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AMERICAN LAW

A TREATISE

ON THE

JURISPRUDENCE, CONSTITUTION AND LAWS

OF THE

UNITED STATES

BY

JAMES DeWITT ANDREWS

EDITOR OF "WILSON'S WORKS," "ANDREWS' STEPHEN'S PLEADING," "COOLEY'S BLACKSTONE" (fourth edition), ETC.

An institute ought to have two properties: the one a perspicuous and clear order or method; and the other, a universal latitude or comprehension, that the students may have a little pre-notion of everything, like a model towards a great building.—BACON.

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TO

PETER STENGER GROSSCUP

IN TESTIMONY OF THE

AUTHOR'S ESTEEM FOR HIM AS A JURIST, A PUBLICIST,

AND A MAN.

PREFACE.

"It is of much importance in practice that the whole law be digested in order, into divisions and titles to which every one may recur suddenly as occasion shall be given, as a storehouse furnished for present use." — BACON.

An elementary treatise on law must be written with one idea always present, namely, that it shall exhibit the origin and growth of the fundamental principles of the subject and of the *corpus juris* itself with such clearness and simplicity that it may be comprehended by one not previously instructed to any degree in that branch of learning. An elementary treatise must also possess two other features, namely, a plain method, which is essential to a clear view of the whole and the relation of the parts, and a comprehensive scope.

Such a work may, without in any manner detracting from its elementary character, possess additional qualities. It is not merely how far the treatment is carried which determines the character of the book, but where the treatment begins. If the author always presents the rudiments and collects the elementary principles with the reasons for them, the treatise is elementary. If he stops with these, it is *merely* elementary. If he carries the treatment further and explains the subjects more fully, it is none the less elementary, but it becomes thereby just so far the more practical as the treatment is complete and exhaustive.

Measured by a close standard, I think it may be safely affirmed that we have had heretofore no elementary treatise on American law. Perhaps the reason is that the study of jurisprudence, properly so called, though well begun in the forma-

tive days of the republic, was neglected near the beginning of the century, and not revived until after the late Civil War. Perhaps also the developing and unsettled condition of our law, state and national, prevented a thorough, comprehensive treatment of our *corpus juris* as a complete, homogeneous system, definite in its objects, symmetrical in its framework, and harmonious in its operation. I am inclined to this view of the matter, and after the most careful study of the treatises which one might term elementary, it is my belief that the respective authors do not attempt the preparation of an institutional elementary treatise or commentary. Indeed, Professor Walker, whose work most closely approximates such a treatise, seems studiously careful to negative such an impression. He says: "*Our great desideratum* is a work which would be (to us precisely what the work of Blackstone is to England) *an accurate outline of American law.*"

Such an outline must precede a logical arrangement of the laws of the Union or of a single state. It is an observation which will apply equally to all logical sciences, that they do not become sciences until analysis is introduced. There have been works published under the title of Analysis of American Law, but it is not going too far to assert of them that they have not so much applied the principles of analysis used by Gaius, Hale, and Blackstone, as that they have adopted the form of arrangement of the law of England, as presented by the latter. My investigations in that direction have failed to discover in any institutional work designed for the use of American students, a declaration and application of the true principles of legal analysis. To this observation there is one notable exception, but that is found in the writings of James Wilson, which for many years passed unnoticed except by a few scholars of this and other lands. The plan he proposed is that of the civilians, and the results worked out agree singularly with those of John Austin.

The true principle is to divide the body of rules which constitutes the *corpus juris* into classes of rules relating to some great subject, and to subdivide these into genus and species, as explained in chapter 2, page 65 *et seq.*, a careful examination of which is made the subject of chapter 3. Legal analysis, as there explained (page 79 *et seq.*), applied to the actual preparation of a discourse or an elementary treatise on law, combines two processes — analysis and synthesis.

Legal analysis in the United States has attained only to the first process of analysis. That it has made so little progress is not due to the lack of acumen or learning on the part of the legal profession, nor of a lack of that peculiar ability usually termed analytical, for it is safe to assert that this quality has been exhibited in the utterances of Hamilton and Judge Wilson, Webster and Chief Justice Marshall, in the very highest degree, though not strikingly prominent in the writings of Story or Kent. Nor is the reason to be found in the complexity of our dual system of state and national jurisdiction, though doubtless that adds to the difficulty of the work. The reason lies deeper, and may be said to result principally from two causes, the first a natural one, the second an artificial one.

As definition cannot precede a settled form and clear conception of the subject to be defined, so a logical arrangement of a nation's laws cannot precede a settled and well understood development of it. The first century of our national existence was a century of growth and development. The relation of the states to the national whole was not settled by the decisions of *Chisholm v. Georgia*, *Cohen v. Virginia*, or intermediate cases, nor until after the reconstruction period. The principles upon which the federal and state jurisdictions were based, as understood and announced in the Federal Convention, are not hard to grasp, but their application in the establishment of a fixed line of demarkation between state and

federal jurisdiction has been a matter of slow and gradual growth, and often has received reluctant acknowledgment. The nation has but recently attained its growth and taken on the settled development of maturity. Its development will continue, but its form is fixed.

That which may be termed an artificial cause for the lack of method in our treatises is not that our system of laws is any the less subject to arrangement than the laws of Rome or England, though doubtless our system is more complex than either. The principles upon which the system of government is founded render it more simple than at first glance one would suppose. The real reason lies deeper, and may be ascribed very largely to the habits of thought engendered by the universal use of Blackstone's Commentaries as an institutional work for students. This not because of any demerits of the Commentaries as an analytical outline, presenting a methodical synopsis of the English law, nor that it is not adapted as an institutional work for students. By the use of the Commentaries as a first book, the minds of students have been filled with ideas and principles not at all adapted to, and indeed in direct conflict with, the fundamental principles of American law; as there has been no corrective, these impressions cling to them after they have become lawyers. Burke says, "Studies become habits of thought."

The second process in legal analysis, which has been termed the synthetical, consists in arranging the elements of the law in logical order under heads and sub-heads, not alphabetically, but according to the natural relation of subjects. Thus each head or title exhibits a progressive exposition of the subject, each division and subdivision follows another in natural order until the subject is exhausted. In this manner a result is attained such as we see in Hale's or Blackstone's analysis of the English law, which may more properly be called

a synopsis or visible outline of the law. Blackstone, who follows Hale very closely, says that his method was to mark out a plan of the law of England so comprehensive that every title might be reduced under some or other of its general heads. There are certain subjects in our law which have been taken bodily, in form and substance, from the English law. As to these, very naturally the outline and arrangement found in the Commentaries of Blackstone may properly be adopted; but it seems quite obvious that we only perplex ourselves by attempting to arrange our whole body of law upon an outline prepared for a system essentially different from our own; and he who supposes that the American system of jurisprudence in principle or form is based upon the English system *as explained by Blackstone*, has not examined deeply into the underlying principles of each.

The accompanying treatise on the jurisprudence, constitution, and laws of the United States is constructed in accordance with the institutional or analytical method, with the object of producing an elementary treatise possessing as much of the practical as is possible within the space devoted to the work. To that end the origin and growth of principles are presented, and the treatment is followed up to show the present state of the law, and is fortified by citations selected with special reference to their historical value to the student and practical value to the jurist.

The selection of the citations is governed so far as possible by the following method: Fundamental principles are generally first promulgated by the judiciary, and are always so expounded.

A leading case is one where a principle is first applied, or a rule first promulgated, or a case where such are finally established.

A ruling case is one settling a rule in accordance with or in opposition to former decisions.

My practice is to cite the leading and ruling cases, and in addition the best considered and most prominent late case or cases applying the principles involved, giving preference to such cases as are re-reported and annotated in standard reports, such as Smith's Leading Cases, The American Reports, American Decisions, American State Reports, The Lawyers' Reports Annotated, etc. In this manner access is given to a volume of law far in excess of that given where no method governs the citation. I believe that this citation does not detract from the usefulness of the book to the student of law or to the political scientist, and adds greatly to its value to the practical lawyer.

As to the treatment of the subjects of Things Real, or real property, and the Law of Actions, or procedure, perhaps a word of explanation is due, because of the brevity thereof. The subjects are of so complicated a character that it is really easier to treat them at length than to summarize them accurately. Brief treatment is more sure to show any imperfections on the surface. It is my belief that the introductions to these subjects, with outlines, will prove more useful to the beginner than would a more elaborate treatise. The American law of real property has never been presented with the proper elementary expositions; nor has it ever been so clearly presented as to enable the student to grasp the most important distinctions between the character and dignity of estates. The old classification of freehold, and less than freehold, conveys no idea based upon existing conditions as it did in its origin; and while these terms are fastened to our law, another classification bringing out the great practical differences between interests in land can be introduced, without in any manner ignoring or disturbing the ancient treatment and classification. This I have done; and if the classification is justified by the facts, our law of real property appears in a natural and simple language, easily comprehended by American readers of the twentieth century. If this treatment is mastered, the detail of the sub-

ject may be easily acquired from any one of several works on real estate.

The law of procedure treated in detail requires at least two volumes, one for the equitable jurisdiction and procedure of our courts, and another for legal actions; and it is my present intention to publish such volumes as soon as possible hereafter. But I deem it extremely desirable that the law of procedure as constituting a part of one grand system of American law, both national and state, be presented with the other parts of the whole in such a manner as to show its relation to them.

The mere outline here given is brief, but it is clear; and whoever masters it will find that the details of the law of procedure, local and general, may be acquired and comprehended without difficulty.

It is my belief that if the present attempt to present our jurisprudence and laws in a simple and natural order is not successful in meeting the approval of the profession, the failure will be due not to an imperfect conception or design, but to my misjudgments and shortcomings in the performance of the work.

J. D. A.

CHICAGO, *May 1, 1900.*

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- ACTIONS (ch. XXXI).
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- CRIMES AND CRIMINAL PROCEDURE (ch. XXXII).

INTERNATIONAL LAW (not treated). { PUBLIC. PRIVATE.

*The explanation of this classification is made the subject of chapter IV. Every endeavor is there made to make this fundamental branch of jurisprudence clear and intelligible.

†It is to be regretted that a technical word must be employed, which does not in its popular sense express the exact idea, but which, like many other words, must be read in the technical sense. *Personæ* denotes the condition arising artificially out of the social state, which attaches to the natural individual (*homo*), and constitutes what we term *status*. See p. 93.

COMMENTARY ON AMERICAN LAW.

CHAPTER I.

INTRODUCTION.

Development of the Science of Law and Government.

First Period.

Sec. 1. *Representative Government in Greece.*— In tracing briefly the development of jurisprudence, it is not to our purpose to trace the evolution of society from the natural state of the semi-savage man. Such a quest is entirely beyond the scope and purpose of the work, and the necessity for such a task is dispensed with by the labors of such writers as Sir Henry Maine and others of his school. Nor is it intended to enter upon a metaphysical speculation upon the origin of law and jurisprudence. This subject has likewise been treated in such a variety of forms as to leave little to be desired. The published lectures of James Wilson discuss this topic in a manner acceptable to the publicists of the day.[1] It will, however, be the endeavor in the course of this treatise to trace principles of government and rules of law to their foundations, and show their growth and change sufficiently to enable the student to understand, and the lawyer to apply, the principle or rule in the practical affairs of political or professional life. To that end it is proposed in this chapter to trace as briefly as practicable the development of the basic principles of political systems, and notice slightly the evolution of applied jurisprudence, *i. e.*, the results of attempts to systematize the law.

Professor Dicey very truly remarks[2] that "a lawyer lecturing on the constitution of the United States would necessarily start from the constitution itself. But he would soon see that the articles of the constitution required a knowledge of the Articles

[1] 1 Wilson's Works, 270.

[2] "Law of the Constitution," 4th ed., p. 15.

of Confederation; that the opinions of Washington, of Hamilton, and generally of the Fathers, as one sometimes hears them called in America, threw light on the meanings of various constitutional articles; and further that the meaning of the constitution could not be adequately understood by any one who did not take into account the situation of the colonies before the separation from England, and the rules of common law, as well as the general conceptions of law and justice inherited by English colonists from their English forefathers."

These observations point out but a part of the obligation of one undertaking to give an adequate treatment of American law; for, as will be apparent, the field of English law, wide as it is and rich in the essential principles surviving in our law, defines by no means the extent of necessary investigation. Indeed, it may be safely asserted that many of the fundamental principles of government have their sources elsewhere, and that several most important principles of constitutional law are diametrically opposed to the view of the same subject which prevailed in England at the time of the American Revolution.

The most important of all these divergences of thought is the differing conception of the nature of law and the province of legislation, resulting in an essentially different expression of the *corpus juris* from that adopted by Sir William Blackstone.

It will be unnecessary to here resort to arguments which were formerly deemed necessary in order to disprove what is now admitted by all American lawyers to be erroneous, viz.: the exploded theory relating to natural law, and the dogma that a law to be binding must emanate from a superior.[1] This subject will be treated further on.

An examination of the subject is not, however, of historical interest merely; it is essential to a clear understanding of the prevailing view to make clearly the contrast between the old idea as expressed by Puffendorf and quoted by Blackstone and the accepted doctrine advocated by Locke and Montesquieu, and maintained by our forefathers and explained in the writings of our jurists.

[1] Chisholm v. Georgia, 2 Dall. 419–458. Dr. Hammond says: "It is in the lectures of Judge Wilson that we find the most explicit and thorough discussion of the question." 1 Hammond's Blk., p. 112, note. See 1 Wilson, pp. 59–160 et seq.

It will be useful to trace the development of the science of jurisprudence, which now properly includes the science of government or the political or public relations of men, as well as the science of law, in the narrow sense embracing only the law of private relations.

Sec. 2. *Conflicting Views on the Basis of Government.*—There have been two schools of thought, as it were, the one in which the only rule of government was based upon the natural law of force, within which the science of private law was developed, based upon reason and a spirit of justice.

Another school, with broader conceptions of the nature of society, bases the right of government upon the consent of the governed,— a popular government but not necessarily a democratic one,[1]— and finding its practical application and most perfect development in the principles of representation, which principles are the foundations upon which the United States government is based. These principles are gradually but surely wearing away the ancient features of monarchial government.

Concerning the development of law, an able writer on jurisprudence says: "At first only rights arising between subjects are determined and protected by the law, whilst the sovereignty remains above the law. Under barbaric despotism, the sovereign acknowledges no legal rule binding upon him in his conduct toward his subjects, . . but in time the relations between the government and the people become subject to certain positive laws."[2]

Sec. 3. *Consent and Representation.*— The development of philosophy caused the Greeks to seek for a reason for all things, and to apply to all things the test of logical examination. This spirit of reasoning pervaded all subjects, and naturally spread to the problem of government and law as well as other subjects; questioned old notions; shook from its foundations the notion of ancestral right to rule;[3] planted the germs of political thought, which bore the first fruit of popular government, taking actual form in a constitution and a government based upon the consent of the people, and whose sheet-anchor was the intelligence

[1] Public good of the whole body of the people the supreme object of the government. Federalist, No. 45.

[2] Heron on Jurisprudence, p. 70.

[3] Curtius' Hist. Greece, vol. 1, pp. 355, 356, 424, 425, vol. 2, p. 473; Gibbon's Decline and Fall, etc. 44.

and morality of the people,[1] for in the assemblage of the citizens (of Athens) vested the real political supremacy.[2]

The principle of civic liberty — *equality before the law* — had been asserted. To the whole people had been confided the safety of the state and the supreme exercise of its laws."[3] "The Athenian state was a community of citizens among whom no *single family* or class could assert particular rights or power. All the citizens were equal before the law; each possessed his civic franchise: . . . free speech before the court and in the assembled council of the people." Public courts protected citizens against officers. Personal liberty was guarantied by right to give bail. "No law might be promulgated relating to a single individual without applying equally to all."[4] These laws were put in writing to be read by all. They stood on pillars, and this was the Athenian popular government with a written constitution.[5] "The good fortune of the Athenians consisted in this: that instead of their possessing an uncertain and formless idea of liberty, the liberty they desired was contained in their ancient and legally-established constitution."[6] "The admirable bearing of the Athenians is solely to be accounted for by the laws of Solon, which, through all the troubles of the times, had with invisible force educated the Athenians to a free citizenship resting on the foundation of morality.[7]

The Senate and Areopagus were representative of the people — changing bodies, checks upon each other, and also against popular passion.[8]

In the sixty-third number of the Federalist, Hamilton, commenting upon the arguments *pro* and *con* in reference to the principle of representation being the pivot around which the

[1] Demosthenes' Third Phillipic; Curtius' Hist., vol. 1, p. 424. See Washington's first Message to the Senate.

[2] Curtius' Hist. Greece, vol. 1, pp. 355, 356.

[3] Id.

[4] Curtius, vol. 1, pp. 423, 424.

[5] B. C. 594.

[6] Curtius, vol. 2, p. 424.

[7] Id., pp. 423, 424.

[8] 1 Curtius, pp. 356, 357. Compare 1 Kent, Com. *232, and notes. The view of Professor Curtius is an extreme one and must be confined to the brightest period of Athenian law. The analogy presented by the ancient examples of representative government was of dangerous utility in argument favoring the formation and adoption of the present constitution. The authors of the Federalist were correspondingly careful in reference to the subject. The conclusion is however just that the principle of representation was first applied by the Grecians.

American commonwealth was moving, which was supposed by some to have been unknown to the ancients, says: "I feel the less restraint, therefore, in observing that the position concerning the ignorance of the ancient governments on the subject of representation is by no means precisely true in the latitude commonly given to it. Without entering into a disquisition, which would be here misplaced, I will refer to a few facts in support of what I advance. . . . Prior to the reform of Solon, Athens was governed by nine archons, annually elected by the people at large. The degree of power delegated to them seems to be left in great obscurity. Subsequent to that period they formed an assembly, first of four and afterwards of six hundred members, annually elected by the people and partially representing them in their legislative capacity, since they were not only associated with the people in the function of making laws, but had the exclusive right of originating legislative propositions to the people." He then refers to the Senate of Carthage, the Ephori of Sparta, and the Tribunes of Rome, and draws the following conclusions: "From these facts, to which many others might be added, it is clear that the principle of representation was neither unknown to the ancients nor wholly overlooked in their political constitutions. The true distinction between these (the ancient governments) and the American governments (the Confederacy) lies in the total exclusion of the people from administration in the former. The distinction, however, thus qualified, must be admitted to leave a most advantageous superiority in favor of the United States" (the proposed constitution).

This passage from the Federalist is one of the very few passages likely to confuse. It becomes plain enough, however, if the reader considers the fact that the author was writing about the old Confederacy and before the adoption of the present constitution, and the point made by Hamilton is that, in the Confederacy, the people collectively had no voice whatever in the government.

Sec. 4. *Divine Right of Sovereigns.*— Greek philosophy in other hands arrived at very different results. The advocate of kingly power could point back to the very dawn of Grecian life, and from their poet hero quote the words of Nestor, rebuking the plebian who had raised his voice in opposition to the king:

"Be still, thou slave, and to thy betters yield; be silent, wretch, and think not here allowed that worst of tyrants, an usurping crowd. To one sole monarch Jove commits the sway. His are the laws, and let him all obey."[1] Or, as put by another translator: "Ill for the common weal is the sway of many; let one man rule and be king alone; from Zeus he holds his office."

Through the mists of tradition, we perceive there, on the sea-washed shore of ancient Ilium, begun the struggle between these contending principles, and there to suit the tyrant's ear is set the song of the immortal bard of Hellas. So has it ever been with power. Alexander had an Aristotle; James the First a Bacon; and George the Third did not lack for advocates in Parliament and in the great university of Oxford.[2]

Sec. 5. *Slavery Accords with Natural Law.*—Aristotle, the Greek tutor of Philip's son, Alexander the Great, said: "If the shuttle could weave by itself alone, one would not know what to do with slaves. The slave is the man of another. Do there exist men as inferior to other men as the brutes are? If they exist they are destined to be slaves. There are men who have hardly

[1] Iliad, book 1.

[2] Speaking of the Commentaries, the learned writer on the Constitution of England, A. V. Dicey, Q. C. B., LL., etc., says: "The arrangement (of the Commentaries) is curious, and certainly does not bring into view the true scope or character of constitutional law. This, however, is a trifle. The book contains much real learning about our system of government; its true defect is the hopeless confusion, both of language and of thought, introduced into the whole subject of constitutional law by Blackstone's habit, common to all lawyers of his time, of applying old and applicable terms to new institutions, and especially of ascribing in words to a modern and constitutional king, the whole, and perhaps more than the whole, of the powers actually possessed and exercised by William the Conqueror." He quotes 1 Commentaries, page 249, and says: "The language of this passage is impressive; it has but one fault: the statements it contains are the direct opposite of the truth. . . . Nor can it be urged that Blackstone's description of the royal authority was a true account of the powers of the king at the time when Blackstone wrote. George the Third enjoyed far more real authority than has fallen to the share of any of his descendants. But it would be absurd to maintain that the language I have stated (1 Blackstone, 249) painted his true position. The terms used by the commentator were, when he used them, unreal and known to be so. They have become only a little more unreal during the century and more which has since elapsed." He cites Paley's assertion of the wide difference between the actual state of the government and the theory. The "Law of the Constitution." Dicey. London: MacMillan & Co., 1893, pp. 7–9.

enough reason to understand the reason of others, and the corporeal labor is all they can produce; they are slaves by nature."[1] The right of the powerful to rule needed no further argument.

Thus, we see in the Grecian land two streams of law whose sources are each asserted to be in the fountains of nature; and, to take a simile from Bacon, "Like as waters do take tincture and taste from the soil through which they run, so do civil laws vary according to the region and governments where they are planted, though they proceed from the same fountains."[2] The one, flowing through a soil impregnated with Wisdom and Morality, continuing to be a pure stream of Liberty and Justice; the other, passing through a soil rich in Knowledge and Power, changing into a stream of Tyranny and Oppression.

These two streams could not mingle; as well might it be expected that the clear water of a pure stream could join with the water of a muddy river and remain pure, as that the Macedonian *Monarchy* could enter the *Amphyctionic League* and its nature not change; and as the sweet sweeteneth not the bitter, but is itself made bitter, or the pure cleanseth not the impure, but is defiled by contact, so the free states of Greece, notwithstanding the struggle of Demosthenes, yielded up their integrity, became corrupted by the gold of Macedon, and fell a prey to the arms of the Barbarian; and thus passed into total eclipse, almost oblivion, the first experiment of self-government.[3]

Very aptly may a parallel be drawn between the cause of the downfall of Athens and the vulnerable point in our own scheme of self-government; if it fails, it must be through the degenerating influence of a blunted morality. In the third Phillippic, Demosthenes said: "But what is the cause of the mischief? There must be some *cause*, some good *reason*, why Greeks were so eager for liberty then, and now eager for servitude. There was something, *men of Athens*,[4] something in the *hearts* of the multitude then, which there is not now, which overcame the wealth of Persia and maintained the freedom of Greece, and quailed not under any battle by land or sea, the

[1] D'Lioy's Philosophy of Right, vol. 2, pp. 83, 84.

[2] 1 Bacon's Works, 238.

[3] See Federalist, No. 18.

[4] This expression, "Men of Athens," cited 2 Dall. 472.

loss whereof has ruined all and has thrown the affairs of Greece into confusion. What is this? Nothing subtle or clever; simply that whoever took money from aspirants for power, or the corruptors of Greece, were universally detested; it was dreadful to be convicted of bribery." . . . "But now all such principles have been sold in open market, and those imported in exchange, by which Greece is ruined and diseased, what are they? Envy when a man gets a bribe, laughter if he confesses it; mercy to the convicted; hatred to those that denounce the crime,— all usual attendants upon *corruption*."

The senate replied to the first inaugural of Washington: "We feel the force and acknowledge the justness of the observation (of Washington) that the foundation of our National policy should be laid in private morality."

And still more to the point is the warning of that grand old patriot who, amid the storm of public strife and private threat which characterized the period of the Revolution, maintained the principles of Liberty.

The second president, in his inaugural address, after reviewing the first years of the republic and the pleasing spectacle presented by the nation, thus reads the signs of the times: "In the midst of these pleasing ideas, we should be unfaithful to ourselves if we should ever lose sight of the danger to our liberties if anything partial or extraneous should infect the purity of our free, fair, virtuous and independent elections. If an election is to be determined by a majority of a single vote, and that can be procured by a party through artifice or corruption, the government may be the choice of a party, for its own ends — not of the nation, for the national good. If that solitary suffrage can be obtained by foreign nations by flattery or menaces; by fraud or violence; by terror, intrigue or venality, the government may not be the choice of the American people, but of foreign nations. It may be foreign nations who govern us, and not we, the people, who govern ourselves. And candid men will acknowledge that, in such cases, the choice would have little advantage to boast of, over lot or chance."

In a recent opinion of the supreme court of the United States Justice Miller thus expresses the same thought: "In a republican government like ours, where political power is reposed in the

representatives of the entire body of the people, chosen at short intervals by popular elections, the temptations to control these elections by violence and by corruption is a constant source of danger. Such has been the history of all republics; and though ours has been comparatively free from both these evils in the past, no lover of his country can shut his eyes to the fear of future danger from both sources."[1]

Here then in ancient Greece, before the empire of Rome was established, and centuries before the age of Cicero, Gaius or Justinian, the Grecian lawyers and politicians established a system of government, based upon natural equality of men as viewed by the aid of reason and philosophy, and in which is applied the same principles which modern political science accepts as correct. Here then (unless there be some older claimant), so far as the science of government is concerned, is the genesis of jurisprudence; *i. e.*, a system designed in accordance with logical principles and in conformity to the dictates of right and justice as those who established it were given to see right and justice. However deserving of praise is the civil law of Rome, and however much it has moulded the ideas of men, it has been frequently overlooked that the excellence of the Roman law is confined entirely in its operation to the regulation of the private affairs of individuals.[2]

On the other hand, as Grecian philosophy and Grecian art by its reflex action moulded the manners and thought of Roman law, so to-day the principles of Grecian policy hold sway in this republic, and the reflex influence is felt in the remotest parts of the world.[3]

[1] Ex parte Yarbrough, 110 U. S. 652–666.

[2] "The value of the civil law is not to be found in questions which relate to the connection between the government and the people, or in provisions for personal security in criminal cases. In everything which concerns civil and political liberty, it cannot be compared with the free spirit of the English and American common law. But upon subjects relating to private rights and personal contracts and the duties which flow from them, there is no system of law in which principles are investigated with more good sense, or declared and enforced with more accurate and impartial justice. I prefer the regulations of the common law upon the subject of the paternal and conjugal relations, but there are many subjects in which the civil law greatly excels." 1 Kent, Com. *547.

[3] In all the great lines of private and public jurisprudence the legislators of Rome and Athens appear to be strangers or adverse to each other. Gibbon's Roman, ch. 44.

Second Period.

Sec. 6. *The Roman System of Private Law — Gaius and Justinian.* — As the Roman empire soon swallowed up the Grecian state, we naturally turn our attention to the Roman law.

Bacon[1] says that "the Decumvirs laws (the XII Tables) were laws upon laws not the original, for they grafted the laws of Graecia upon the Roman stock of laws and customs; but such was their success that the twelve tables which they compiled were the main body of the law which framed and wielded the great body of that estate." Whether this is true or not[2] is only interesting as it suggests to us that, if the Grecian branch of private law was thus grafted upon the Roman tree, it simply shows the plain distinction between the domain of public and private law, and that a people may have an excellent code of private law and no provision whatever or constitution securing their political rights, saving only that elastic rule, ever changing according to the mind and heart of the administration — Natural law, — a thin disguise for the will of the monarch.

The student will remember that, while the laws of the twelve tables were developing in Rome, the whole tree was perishing in Greece, and the other branch of the law, viz., the political constitution of Athens, based upon popular *consent* and morality, and embodying the idea of representation, all pillars in the American government, was not grafted upon any other stock, but perished under the arms of Macedon. This Macedonian empire in time became a part of the empire of Rome, and was at the time of Justinian the seat of the Eastern empire; and all that remained of Grecian laws, if indeed any there was, is found in the Roman law of private right.

Practically a thousand years separates the Grecian period from the age of Justinian.

Sec. 7. *The Law of Nature.* — Half a century before the Christian era, Cicero, the exponent of advanced thought in philosophy and law at Rome, declares that "Reason prescribes the law of nature and of nations; and all positive institutions, however modified by accident[3] or custom, are drawn from

[1] Bacon's Works, vol. 2, p. 234; 1 Kent, Com. 52.

[2] Compare Gibbon, Decline and Fall, ch. 44, and Professor Hammond's introduction to Sanders' Justinian.

[3] Divine Right of Kings and Slavery.

the rule of right, which Deity has inscribed on every virtuous mind."[1]

The translator of D'Lioy's Philosophy of Law says: "The extension of the original *jus civile* by the *jus gentium* did not change its character, and the *jus naturale* was only an *alien* philosophical infusion introduced by Cicero and the jurists . . . from the schools of Greece."[2]

Mackeldy says: "The scientific treatment of the law in the period (from Cicero to Alexander Servius, 50 B. C. to 250 A. D., p. 24) attained its *highest excellence*, which was particularly owing to the connection of law with philosophy and Greek literature."[3]

Sandars says: "By far the most important addition to the system of Roman law which the jurists[4] introduced from Greek philosophy was the conception of *lex naturæ*. We learn from Cicero whence this conception came, and what was understood by it."[5]

Sec. 8. *The Beginning of Legal Analysis — Gaius.*— Gaius was a lecturer and writer upon law of this period and adopts the prevailing theory — that of natural law having a binding force. In respect to the principles of law, he being a faithful commentator, makes no changes or additions.

The renown of Gaius rests mainly upon his announcing the principles upon which all legal analysis has subsequently proceeded. He recognizes as sources of law the law of nature and the law of nations and the *jus civile* of the Roman.[6] He agreed with the other Roman jurists of the second century in the assumption, "on the authority of Greek philosophy, that there was a *lex naturæ* binding upon them because it was a *lex*," and they endeavored to work up the dictates of this law and the *jus gentium*, together with the provisions of the old *jus civile*, into a whole.[7] It was his discerning mind that saw, whatever the source of the law might be, the whole body of the law was subject to an arrangement upon another principle, viz., the object operated upon by the rule: that to which the law "relates" was the touchstone of analysis. This was show-

[1] Gibbon, Decline and Fall, ch. 44, p. 322.

[2] Translator's Preface, p. 11.

[3] Introduction to Roman Law, p. 32.

[4] Jurisprudence, Introduction to Sanders' Justinian, p. 14.

[5] Introduction to Sanders' Justinian, p. 15.

[6] Sanders' Justinian, Int., 25.

[7] Id.

ing that this body of rules as a whole was capable of a separation into classes between which there was a natural relation, and was a great step in the progress of the law as a science. This is the splendid period in the development of scientific jurisprudence. Says Mackeldy: "The scientific treatment of the law at this period[1] attained its highest excellence."[2] Again he says: "Jurisprudence, which had attained its meridian under Hadrian, the Antonines and their immediate successors, soon ceased to progress or to have life after the internal destruction of the empire subsequent to the death of Alexander Severus. All the science decayed, and the old Roman spirit expired beneath the oppression of despotism and the corruptions of morals."[3]

It may be truly said that the science of *government* never under the Romans attained to the Greek model. There is still one more period in the development of the science *of law* or jurisprudence under the Romans, viz., the age of Justinian.

Sec. 9. *Justinian and the Institutes.*— Justinian's merit, however, is not in the destruction of the old and invention of new principles. In the Code and the Digest his agents or commissioners compiled and collected, not all of the applications of the principles of the preceding ages, but, as they supposed, all the living principles of the Roman law. The compilation of the Code and Pandects was, however, not his chief contribution to the science of law, for in these there is little regard to system and arrangement. An institutional word was needed in order to facilitate the study of the law. He therefore caused Tribonian, with the assistance of Theophilus and Dorotheus, to prepare a brief system of law under the title of Institute, which should contain the rudiments of jurisprudence.[4] This work was professedly founded on the Institutes of Gaius, so that Justinian's Institutes are in fact no more than a new edition of that work, which up to that time had been used as a first book for the study of Roman law, much of which, however, was obsolete at Justinian's time. In this new edition of Gaius' Institutes the wholly obsolete matter was omitted."[5]

[1] Of Cicero, Hadrian, and the Antonines. Mackeldy, Roman Law, Int., § 40, p. 60.

[2] Mackeldy, Roman Law, Int., sec. 51.

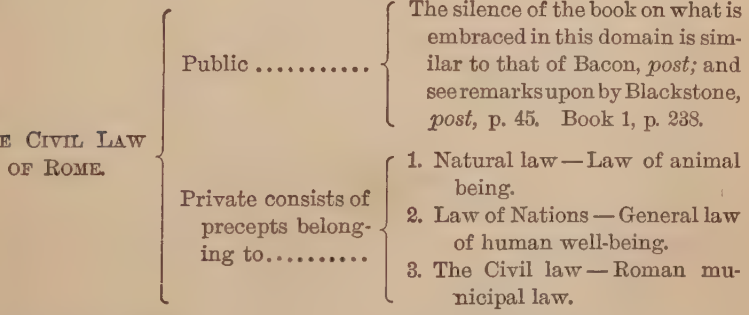
[3] Mackeldy, Roman Law, Int., sec. 60.

[4] See Sanders' Justinian, pp. 63–65.

[5] Mackeldy, Roman Law, Int., 60; Sanders' Justinian, Int., sec. 34, p. 2.

The Institutes of Gaius and Justinian include in their treatment of law only the domain of private law, though they recognize that there is another branch of the law.[1] The Institutes[2] begin thus: Lib. 1, Tit. 1. A definition of justice. Section 1 defines jurisprudence. Sec. 2 speaks of the necessity and objects of the Institutes.[3] Sec. 3, the maxim of the law. Sec. 4 proceeds: "The study of law is divided into two branches, that of public and that of private law. Public law regards the government of the Roman empire. Private law, the interest of individuals;"[4] and continues: "We are to treat now of the latter, which is composed of three elements, and consists of precepts belonging to natural law, to the law of nations, and to the civil law."

The analysis of the Institutes as to the kinds of law is this:[5]


The Civil Law of Rome.
Public .....
The silence of the book on what is embraced in this domain is similar to that of Bacon, post; and see remarks upon by Blackstone, post, p. 45. Book 1, p. 238.
Private consists of precepts belonging to.....
1. Natural law — Law of animal being.
2. Law of Nations — General law of human well-being.
3. The Civil law — Roman municipal law.

[1] Austin's Jurisprudence, 778.

[2] When this expression is used by writers it is understood to refer to those of Justinian unless expressed otherwise.

[3] "Having explained these general terms, we believe we shall commence our exposition of the law of the Roman people most advantageously, if we pursue at first a plain and easy path, and then proceed to explain particular details with the utmost care and exactness. For if at the outset we overload the mind of the student, while yet new to the subject and unable to bear much, with a multitude and variety of topics, one of two things will happen — we shall either cause him wholly to abandon his studies, or after great toil and often after great distrust of himself (the most frequent stumbling-block in the way of youth), we shall at last conduct him to the point to which, if he had been led by an easier road, he might, without great labor and without distrust of his own powers, have been sooner conducted." 1-1-2.

[4] Mark the language.

[5] Institute, 1-1-4. This must not be confounded with the *principles* of analysis put in Gaius' expression, "All our laws relate to persons, to things, and to actions." Gaius, 1-8; Inst., 1-3-1, which will be explained further on, nor with the arrangement based thereon.

The civil law had various sources or modes of promulgation.

1. A Lex. Strictly speaking, *i. e.*, the decrees of the people *en masse*.[1]

2. By the Plebs. A plebiscitum.[2]

3. By the Senate.[3]

4. By the Emperor. A constitution.[4]

5. By the Praetor. The praetor's edict.[5]

6. By the Jurisprudens. Answer to questions.[6]

7. Ancient Customs.[7]

Sec. 10. *The Origin of the Compact Theory.*— The source of power of the emperor is worthy of remark. "That which seems good to the emperor has also the force of law; for the *people*, by the *lex regia*, which was passed to confer on him his power, make over to him their whole power and authority."[8] Gaius puts it thus: "A constitution of the emperor is, etc.; . . . nor has there ever been a doubt as to this having the force of a *lex*, since it is by a *lex* that the emperor himself receives his authority."[9]

This expression of Gaius differs from the idea of the divine right of kings; but the doctrine promulgated by Justinian that the people had surrendered, or made over to the emperor, all the power of the Roman people, the *suumi imperium*, is very similar to what is called the original-compact theory of sovereignty;[10] yet it recognizes consent as the true source of positive law,[11] — consent by submission, it is true.

[1] Mackeldy's Roman Law (Dropsié), 17; Austin's Jur. 530.

[2] Inst. 1-2-4; Gaius, 1-3.

[3] Id. 1-2-5; Id. 1-4.

[4] Id. 1-2-6; Id. 1-5.

[5] Id. 1-2-7; Id. 1-6.

[6] Id. 1-2-8; Id. 1-7. These responses were first called the unwritten law, and subsequently the civil law. They are the commencement of Roman jurisprudence. 1 Wilson's Works, 433, 434.

[7] Inst. 1-2-9. Gaius omits mention of customs.

[8] Inst. 1-2-6.

[9] Gaius, 1-4.

[10] Inst. 1-2-6, Sanders' note. Spence, in his Equitable Jurisdiction, speaks of the origin of the theory of sovereignty as follows: "The reverence for the Roman law, which had been traditionally handed down through the clergy, independently of express adoption, must have operated to facilitate its being so largely resorted to when its stores were opened. The most remarkable feature is that it was taken as of imposing, if not of governing, *authority, even on constitutional points.* Glanville in his preface, which is in part taken almost literally from that prefixed by Justinian to his Institutes, notices and explains the principle "*Quod*

[11] Inst. 1-2-11. See also 1 Black. Com., p. 237.

There is a difference in the arrangement of Gaius and Justinian: the former divides the law into the *jus gentium* and the *jus civile;* the latter divides the *jus gentium*, in accordance with the idea of Ulpian, into the *jus naturale*, the *jus gentium*, and *jus civile* — the *jus gentium* being appealed to as equity. Little real use is made of the latter classification.[1]

Lorimer, in his Institute, points out the distinction between Gaius and the Institutes in accordance with the analysis given above, Justinian simply adding the title *Jus Naturale.*

Sec. 11. *Slavery Contrary to Law of Nature.*— The Institutes mark an important change of thought in regard to the origin of slavery. Lib. 1, tit. 2, sec. 2, says: "Wars arose, and in their train captivity and slavery, which is *contrary to the law of nature*, for by that law all men are originally born free."[2] This doctrine is the direct opposite of the doctrine of Aristotle. The only explanation for this change is the influence of Christianity and a consequently modified conception of the law of nature. Here then, in Rome, at the time of Justinian, the doctrine of the divine right of kings has given place to the principle that the people have, by a compact of submission, *made over* irrevocably to the emperor their whole power and authority, and the institution of slavery is ranked as a misfortune of war instead of the result of natural differences of capacity in human beings.

principi placet legis habét vigorem," as if he were commenting on the terms of an act of the English legislature. Bracton follows exactly the same course, fortifying the qualifications he introduces, not from national sources, but chiefly by references to other passages from the imperial laws. To this, namely, a reference to the *Rex Legia* and other imperial doctrines, says Mr. Allen (on Prerogative, p. 166), we may trace the old doctrines of absolute sovereignty and transcendant dominion which still disfigure our law books." 1 Spence, Eq. Jur., *123.

[1] Inst. 1–2–11, Sanders' notes; Mackeldy's Roman Law, p. 118, § 125.

[2] In August, 1774, James Wilson published his celebrated address to the colonists, wherein he denies the doctrine of an omnipotent parliament. In the course of his argument he says: "All men are by nature equal and free; no one has a right to any authority over another without his consent; all lawful government is founded on the consent of those who are subject to it. Such consent was given with a view to ensure and to increase the happiness of the governed above what they could enjoy in an independent and unconnected state of nature. The consequence is that the happiness of the society is the *first law* of every government." 2 Wilson's Works, 507. Compare this with the second clause of the Declaration of Independence.

Professor Austin gives a just estimate of the Institutes as follows: "It is merely a treatise upon private law. By consequence criminal law with the law of *political status* is not comprised by it; the classical jurists from whose elementary works the Institutes were copied having thought that public law was not a fit subject for an institutional or elementary treatise. I know not why: for a knowledge of the constitution of the state is as necessary to a knowledge of private law as the latter is to a knowledge of the constitution of the state. All parts of the *corpus juris* are in truth so implicated with one another that they cannot be separated."[1]

Third Period.

Sec. 12. *The Rise of Feudalism and the Roman Hierarchy — Allegiance and Sovereignty.*— The civil law as it appears in outline in the Institutes of Justinian, or as it was presented in the books of the *Corpus Juris Civilis*, had force and efficacy for only a short period, and, notwithstanding the pompous flourish of the introduction, the dominion of the emperor extended over but a small portion of what had once been the magnificent empire of Rome. The ancient capital was no longer his capital; the ancient scepter had passed into "unlenial hands;" and in place of "Imperial Rome, the mistress of the world," is seen the Holy Roman Empire, and the kingdoms of Gaul, Italy and France, while in the North is the Saxon, who never bowed the neck to any man.

At the beginning of the seventh century Alaric, king of the Visagoths in Gaul, promulgated the Gothic Roman Code, "in which the Roman and Gothic laws and usages should be formed into one body of law for the general use of all his subjects. This was accordingly done in the twenty-second year of his reign, and from Anianus, his referendary or chancellor, by whom it was either compiled or published, it was called the Breviarium Aniani. It is an extract from the Gregorian, Hermogenian and Theodosian codes, the novells of the subsequent emperors, the sentences of Paullus, the Institutes of Gaius, and the works of Papinian. It superseded the use of the former laws so far that in a short time they ceased to be cited in the courts or by writers on subjects of law, and Anianius' collec-

[1] Austin's Juris., vol. II, pp. 778–79.

tion, under the name of the Roman or Theodosian law, became the only legal work of authority."[1]

In Italy during the time it was held by Odoacre and his successors, and until recovered by Justinian, the study of the Roman law was never abandoned. The ancient laws were in a large measure kept in force, and schools wherein the Roman law was studied were supported by the Gothic rulers.[2]

Clovis, the founder of the French empire, who accepted his crown at the hands of the Pope, naturally fell under the influence of the religion and law of Rome.

The ecclesiastical supremacy acquired over the people of Western Europe involves one of the most important elements in the study of the progress of the science of government.

The establishment of the canon law, and an ecclesiastical jurisdiction over marriage, divorce, administration, and other matters deemed spiritual, have had a material influence upon English law and procedure. The establishment of the Christian hierarchy, with the seat of government at Rome, and asserting its authority over distinct kingdoms or empires, was a phenomenon new to history.

The ancient codes recognized a distinction between things sacred or spiritual and things temporal; but until the establishment of the Christian church no claim had been made of spiritual power separate and distinct from the civil authorities of the state, and insisting upon the right to interfere in civil affairs.[3]

[1] Butler's Horæ Juridicæ, 55.

[2] Holland, Institutes of Gaius, Int., XXX.

[3] Guizot, in the History of Civilization, says: In short, with the church originated a great fact — the separation of spiritual and temporal power. This separation is the source of liberty of conscience; it is the foundation of the most perfect and extended freedom of conscience. The separation of temporal and spiritual power is based upon the idea that physical force has neither right nor influence over souls, over conviction, over truth. It flows from the distinction established between the world of thought and the world of action, between the world of internal and that of external facts. Thus, this principle of liberty of conscience for which Europe has struggled so much and suffered so much, this principle which prevailed so late and often in its progress against the inclination of the clergy, was enunciated, under the name of the separation of temporal and spiritual power, in the very cradle of European civilization, and it was the Christian church which, from the necessity imposed by its situation of defending itself against barbarism, introduced and maintained it. Page 45.

The distinction must be made between Christianity as a religion and the Christian church as an organization.

The greatest political principle involved in this position of the church was the distinction between things secular and temporal, the logical sequence of which, worked out by slow degrees, is the separation of church and state.

Sec. 13. *The Four Different Relations of Religion with Society.*— In the Hebrew society, patriarch and priest are united in one man, and the religious tenets and legal rules are one and the same. The Romanistic idea distinguished between the church and the state, and claimed that the church was superior to the civil authority. The converse of this position finally became the rule in England, and the sovereign claimed that the head of the state was the head of the church. The doctrine, for the first time acted upon in the United States, that religion and civil government should be independent of each other, is the crowning achievement of individual liberty.

Professor Baldwin, in an address before the American Bar Association,[1] in speaking of the epoch when church and state first became separate, shows the contrasts suggested above in the following language:

"Nowhere, until the last part of the eighteenth century, had the state been kept totally separate from the institutions of religion. The original beginning of human society, in the family, the clan, the tribe, made the patriarch also the priest. The household gods were peculiar to the household; the national gods to the nation. Religion was a part of patriotism. Rulers might change; kings might give place to republican magistrates; but the national deities, the national worship, would remain the same. *Pro aris et pro focis* was the watchword of war. "Christianity came, and found the world subject to this law. But the spirit of Christianity was universal, catholic, not national. Its kingdom was not of this world. As, however, its doctrines spread, and as some of them began to be but half understood by those who taught them, government turned to it for aid. It became a part of the imperial system; when that fell, it conquered the conquerors, and for fourteen hundred years was the stay of every civilized government in Europe and America.

[1] Am. Bar Ass'n Rep. 1889, p. 242.

"The religious liberty for which the Puritans crossed the sea was simply liberty to make *their form* of religion the law of a new community. Rhode Island, with her utmost toleration, allowed no Roman Catholic in public office until long after the Declaration of Independence. In Protestant Europe, as in Catholic Europe, the union of church and state remained unbroken. Men had risen up against the tyranny of ecclesiastical power; men had pulled kings from their thrones and set up others, or set up none. The same struggle against unjust government had sometimes been shared by those who attacked the church and those who attacked the state. The same leaders might indeed attack both, but they seldon attacked or questioned the union of both. In England the Puritans fought against Episcopal, the republicans against royal, tyranny, but both were ready to bind the commonwealth to another form of national religion.

"A state church had, no doubt, been long the scorn of atheists and indifferentists, but it endured until religion itself rose to the level of rejecting it; until Christianity came to see and teach that there are two worlds about us — the world we live in knowingly, the world of time, the world of the body and the mind; and the world we live in unknowingly, the world of eternity, the world of the spirit; that governments belong only to the world of the present, with no larger life than it can give; that they are less than the men they govern, and, when they have sought to give laws to the human spirit, have opposed themselves to the order of the universe.

"Modern government began when the state withdrew from its long alliance with Christianity."

Sec. 14. *The Feudal System.*— Side by side with, sometimes hand in hand with, the church, sometimes under its dominion, and sometimes defying its decrees, existed the institution or theory of government known as the Feudal System. Out of this system, and as essential features of it, arose the doctrines of sovereignty and allegiance, with which we of the United States contrast citizenship and patriotism;[1] the peculiar mode of

[1] The idea of allegiance, strictly speaking, is foreign to our constitution, involving as it does the binding of one man to another man. The contrast between feudal allegiance and federal citizenship is very well made in the argument in the case of Talbot v. Janson, 3 Dall. 133, thus:

holding land, termed tenure, or feudal tenure; the English notion of jurisdiction, which was based upon the idea that the sovereign was the fountain of justice, and that no jurisdiction could be exercised except by delegation from him,—all of which must be understood by any one who desires to master our jurisprudence, and each of which must hereafter be fully treated.

The feudal system of government, with its essential incidents, is the political institution generally regarded as the most important product of this period. Inasmuch as the incidents of feudalism must be examined more minutely in connection with the nature of law and government, as well as contrasted with our theory of property in land, it will suffice here to state the manner of its origin and note the peculiar features of the institution which bear upon the subject of this introduction. Remote as we are from the period when feudalism flourished, the inquiry has a practical value and utility in investigating existing constitutions.[1]

Sec. 15. *Rise and Extent of Feudalism.*— "In order to understand the classes into which the two millions of human beings who dwelt here at the time of the grant of the Great Charter were divided, and the system of government which then existed, a right comprehension of the principles of the feudal system is

"It is to be remembered that, whether in its real origin or in its artificial state, allegiance as well as fealty rests upon land, and it is due to persons. Not so with respect to citizenship, which has arisen from the dissolution of the feudal system, and is a substitute for allegiance corresponding with the new order of things. Allegiance and citizenship differ, indeed, in almost every characteristic. Citizenship is the compact; allegiance is the offspring of power and necessity. Citizenship is a political tie; allegiance is a territorial tenure. Citizenship is the charter of equality; allegiance is the badge of inferiority. Citizenship is constitutional; allegiance is personal. Citizenship is freedom; allegiance is servitude. Citizenship is communicable; allegiance is repulsive. Citizenship may be relinquished; allegiance is perpetual." The distinction between national and feudal allegiance, and in fact the whole philosophy of allegiance is ably discussed and applied in the celebrated Allegiance Cases in South Carolina. State v. Hunt, and Ib. v. M'Meekin, 2 Hill (S. C.), 1. See 1 Wilson, Works, 279.

[1] Having found in Creasy's English Constitution a very brief sketch suited to the purpose, I have transferred it bodily, with such changes and additions as seemed best, acting in this instance in conformity with the words with which he closes his preface: "Wherever I have found truths well stated by others, I have preferred useful compilation to worthless novelty." See Creasy, chs. VII, VIII.

indispensable. Even the state of the enslaved peasantry of England at the commencement of the thirteenth century cannot be thoroughly discerned unless we view the peasants in relation to their feudal lords. And when we proceed to the great events of the century, it would be utterly impossible to give any intelligible account of the greatest of all,the acquisition of Magna Carta, without continually pausing to explain feudal terms and usages, if we should not have taken a preliminary survey of that strange body of social and political institutions, so long and so generally prevalent over Europe, to which historians and jurists have given the title of Feudal. The inquiry is indeed far from being one of mere antiquarian interest. The forms of our constitution cannot be understood without it; and the student of our law, especially of the law of real property, must still resort to the feudal system for the principles, and even for the practice, of his art. We will not, however, discuss here either the etymology, or the date of the birth, or the exact pedigree of feuds. Suffice it for the present occasion to say generally that the feudal system was gradually matured during the six or seven centuries of confusion which followed the eruption of the Germanic nations into the Western Roman Empire, and that at the epoch which we treat as the dawn of complete English history (about A. D. 1215), the feudal system was established, though with different modifications, in every European country that had been a Roman province and had been overrun by German conquerors. The feudal system was also then established in Germany itself.

Sec. 16. *Meaning of Feudal Tenure.*[1]—"There are many things which are the more easily understood by first obtaining an understanding of their opposites. This is the case with the word 'feudal.' The term used in contradistinction to it, by European jurists, is 'allodial.' Allodial land was land in which a man had the full and entire property, which he held (as the saying is) out and out. But feudal land (and the land itself so held was called a feud or fief) was land which a man held of

[1] It is not intended here to explain feudal tenure, but merely to refer to is as explanatory of the political institution known as the feudal system, of which the mode of holding land was an incident. Every acre of land in America, says Chief Justice Jay, was held mediately or immediately by grants from the crown. Chisholm v. Georgia, 2 Dall., at p. 470. See 2 Wilson, Works, 496.

some other man, from whom or whose ancestors the holder (or his ancestors) had received permission to possess and enjoy the fruits of the land; but the property and ultimate dominion of it remained in the giver, or, as he was technically called, the lord. The idea of the sovereign owner of the land allowing individuals to have the possession of portions of it, and even to transmit such possessory interest to their heirs, on condition of rendering certain services, usually military, may be found in the institution of almost every ancient European nation, and in those of many Asiatic states at the present time. But it was only in mediæval Europe that this simple idea and natural custom were elaborated into a complete system of government and of social organization, to which everything else was made subordinate, and by reference to which every public office and every private right were determined.

"In order the more clearly to picture to ourselves the chief causes of the establishment of feudalism, we may sketch in our minds the progress and watch the position of some one of those numerous bands of Teutonic conquerors that had won their way into a Roman province at the fall of the ancient Western empire. The sketch there presented is applicable to Romanized Europe generally, not especially to England.

"My object at present is to give the leading ideas of feudalism. When by degrees the band of Germanic warriors who had broken in upon Gaul and other Roman provinces began to lose their spirit of fierce restlessness, and to wish for some permanent settlement in the territories which they had conquered from the provincials and had long fought for with each other, the ownership of land acquired a value in their eyes, not merely of a higher degree, but of a wholly different nature, to that which it had in the eyes of their ancestors, who dwelt amid their primitive forests and wildernesses; and also to that which it had had in their own, so long as they were a mere troop of adventurers, roving in quest of plunder, or seeking fresh enterprises for the sheer sake of excitement. Let us imagine an army of Germanic conquerors in this mood for becoming inhabitants of the land which they had conquered, and let us remark what would be the natural result. Some part of the territory might probably be left in the hands of the conquered population, but the conquerors would share the rest. The

points to attend to are to see first how they would share it, and, secondly, what other system of parceling out domains would soon ensue. It is to be remembered that each barbaric king was not the sovereign of an army of subjects in the sense in which we employ the term 'sovereign' and 'subject,' but of free and independent warriors, each of whom would claim his share of the spoil as a right; as something to hold at his own free will, not as a boon revocable at a despot's caprice. The portion of land which the German soldier thus took, he took as his property, and his estate in it was termed, by the Franks, allodial. As the conquerors dwelt among a numerically superior population, their safety must have required them to keep up their military organization, and the subordination which is the essence of all military discipline must have greatly facilitated the change of tenure, which, as we shall next see, generally occurred.

"I have described the distribution of land that took place among the *free warriors* who composed a Germanic army, and the terms on which that land was usually assigned; but all the confiscated territories was not thus portioned out. Large demesnes were reserved for the king, called fiscal lands. Out of these royal demesnes the sovereigns granted lands to their most favored or distinguished personal followers, under the title of fiefs or benefices. Whether any definite service were at first affixed to a beneficiary grant is uncertain, but in the nature of things some return would be expected from the favored follower — an expectation which would soon ripen into a demand; and military services against foreign or domestic foes would, in such a state of society, be the return most desirable to the grantor, and most easily and willingly accorded by the receiver. But the ownership of the fief did not pass out of the grantor. The favored individual (the feudatory, in the technical phrase) received not a right of property,[1] but a mere license of possession and enjoyment, an usufructuary right, which some authors suppose to have been at first precarious and arbitrarily revocable, though the feudatory's interest soon became more certain and permanent, enduring for his life unless forfeited by some act of misconduct towards the giver, or, as we will term him, assuming the feudal phraseology, the lord; and gradually fiefs

[1] Note this word "property."

became hereditary, though throughout the development of the system the ultimate property was and is held to be in the lord, as evidenced both by legal forms and symbols, and by the liabilities of the fief to revert to the hand that gave it — liabilities which long afforded sharp and practical symptoms of its original character. As the privileges of the feudatory thus became certain, so were his duties systematized, and the consequence of his breach of them defined. Military service, fidelity in counsel, respect for the person and honor of his lord, attendance at his lord's tribunal, pecuniary contribution in certain cases, formed the essence of these duties, varying, however, in detail at different times and in different countries. Corresponding duties of protection from the lord to the feudatory existed, and the general character of the relation between the lord and vassal may be defined, in Mr. Hallam's words, as a mutual contract of support and fidelity.

Sec. 17. *Subinfeudation.*—"We have been describing a case of feudalism in its simplest form, where the feudatory, to whom the sovereign lord of the land granted it, continued to hold the land himself. But the process of 'subinfeudation' was common, and then a far more complex state of things arose. The feudatory, who received large grants of land from his sovereign, frequently had dependents of his own to whom he carved out portions of his fief, to be held of himself on terms similar to those by which he held it of his lord. His sub-grantees thus became vassals under him, and he was a feudal lord to them. They again might divide their sub-fief and grant them to others. And the process might be indefinitely renewed as often as each subdivided piece of feudal land was capable of still further subdivision, so that many links in the feudal chain might intervene between the original grantor, or lord paramount, and the actual occupant of the soil, who was termed the tenant paravail. Thus, there arose a seignioral hierarchy, specious in appearance, and which Blackstone has eulogized, but in reality productive of very great confusion. For, as it was in respect of the land that the feudal relation arose, and not in respect of any personal *status* of the individual, the same two men might be, and often were, lords and vassals of each other in respect of different lands, and an endless conflict of obligations and rights was created. Still some protection was

gained from the system; and as times grew more and more troubled after the dissolution of the empire of Charlemagne, the oppressed and isolated allodialist was glad to seek even temporary shelter, by becoming one of the liegemen of some powerful baron in his neighborhood. Frequently, also, the feudal barons possessed themselves with strong hand of the little properties of their feebler neighbors. 'During the tenth and eleventh centuries,' says Mr. Hallam, 'it appears that allodial lands in France had chiefly become feudal; that is, they had been surrendered by their proprietors, and received back again upon the feudal conditions, or, more frequently perhaps, the owner had been compelled to acknowledge himself the man or vassal of the suzerain, and thus to confess an original grant which had never existed. Changes of the same nature, though not perhaps so extensive or so distinctly to be traced, took place in Italy and Germany; yet it would be inaccurate to assert that the prevalence of the feudal system has been unlimited. In a great part of France allodial tenures always subsisted, and many estates in the empire were of the same description.'

"The influence of the feudal system was not limited to the lay part of the population or to the rural districts of the state. 'The prelates and abbots were completely "feudal nobles;" they swore fealty for their lands to the king or other superiors; received the homage of their vassals; enjoyed the same immunities, exercised the same jurisdiction, maintained the same authority, as the lay lords among whom they dwelt.' Very frequently the bishops and abbots gave fiefs to knights on condition of defending the cathedral or the abbey, and of supplying and leading the contingent of troops which the lord paramount demanded. The towns and cities also had their feudal lords. Sometimes the rights of war and conquest gave to the sovereign or some powerful noble the feudal seigniory over a civic community. Sometimes burghers voluntarily placed their city under the feudal seigniory of some celebrated chieftain or neighboring baron for the sake of military protection. The extent of the jurisdiction of the feudal lord over a borough varied according to the terms of the original compact, where it had been voluntarily created, and according to the terms which the burgesses were able to purchase where the lord's right over

them was the sweeping right of conquest. The modes by which the boroughs obtained their charters of liberties, their municipal organization and their own leagues with one another for self-protection form one of the most interesting portions of mediæval history, but can only be glanced at here.

Sec. 18. "*The Spirit of the Feudal System* was essentially aristocratic. It required, indeed, the existence of a single lord paramount, whether termed emperor or king, who was theoretically the supreme fountain of honor and justice, and the motive center of authority, both in peace and war. But in practice the feudal aristocracy was an aggressive power that ever sought to aggrandize itself at the expense of monarchy. The process of subinfeudation was the great cause of this. Each baron who girt himself with martial vassals sworn to serve him, and who made the revenues of provinces and cities his own, became the founder of an '*imperium in imperio*.' He did not, indeed, often throw off the semblance of allegiance to his sovereign, but he claimed and exercised *the right of resisting his sovereign* by open force if the sovereign carried his feudal prerogative too far, and of making formal war on him as on a stranger, if his sovereign did him wrong on any matter unconnected with their feudal relationship. He claimed and freely exercised *the right of making war on any of his fellow-subjects*, on the neighboring barons, or others who offended him. This right of private warfare was the greatest affliction to feudal Europe.

Sec. 19. *The Right of Jurisdiction.*—"Another point on which the feudal lords strove to assert their independence of the crown was the right of administering justice in their own territories. Each feudal lord had his baronial court, at which his military tenants attended, and where the judicial combat was the favorite mode of determining controversies between the litigants, whether of a civil or a criminal nature.

Sec. 20. *Natural Conflict Between Sovereign and Feudal Baron.*—"While the feudal aristocracy was thus encroaching upon the natural powers of the monarchy, it was no less aggressive upon the commonalty of the land. The feudal barons and their retainers gradually formed an aristocracy of birth as well as of tenure.

"In applying to English history the description of the principles of feudalism given above, we must remember several im-

portant points of distinction between that island and the continent respecting the adoption and the development of the feudal system. But the distinction between feudalism in England and feudalism in France, Germany, Italy or Spain is even more due to the sagacious mind and resolute will of one great man — of William the Conqueror himself. Before we examine this, there are two topics which must be considered. These are: first, the question how far feudalism existed among the Saxons in England before the Conquest, and secondly, how far did it exist among the Normans in Normandy before the Conquest?

Sec. 21. *Saxon Feudalism.*[1] — "On the first of these questions many volumes have been written, and many more will probably appear. I am not going to discuss the conflicting theories that have been put forward, and will only observe that, so far as the *forms* of feudalism are concerned, there are few, if any, of which we cannot trace occasional precedents or analogies among the Anglo-Saxons, but that no general elaborate system of feudal forms and ceremonies existed in Saxon England like that which we find here afterwards. So far as regards the *spirit* of feudalism, there was certainly little here before the Conquest. The Saxon ceorl and his thane were in a far different position relatively to each other from that in which the Anglo-Norman villein stood relatively to his lord. On the whole, I would affirm that there were many institutions among the Anglo-Saxons of a partially feudal nature, which much facilitated the subsequent introduction of feudalism; but that the feudal system, *as a system*, cannot be said to have existed here before the overthrow of Saxon independence at Hastings.

Sec. 22. *Norman Feudalism.*—"A perusal of Dudon de St. Quentin, of William of Jumiege, and Wace, abundantly proves that feudalism, in all its essential principles, either had been es-

[1] Sullivan asserts this jurisdiction to exist among the Saxons. "It is a very curious fact that even some of the Anglo-Saxon nobles had all the prerogatives of earls-palatine. Alfred, we are told, put to death one of *his* judges for having passed sentence on a malefactor for an offense which had been committed where the *king's writ* did not pass. Mirroire de Justices, ch. V. And in Selden we meet with earls who had entirely the civil and criminal jurisdiction in their own territories. Tit. Hon., part 2, ch. V. If there were no other proofs than these, they would have been sufficient to evince the reality of fiefs among the Anglo-Saxons." Sullivan's Lect., Int., p. xviii.

tablished or had grown up in Normandy before William the Bastard became duke; and one great point, namely, that the Norman peasantry were tyrannized over as villein, in the fullest intensity of feudalism, is shown by the narrative of the insurrection of those unhappy men against Duke Richard the Second, which I have quoted in a preceding chapter. The clear evidence also, which we possess, of how William dealt with land holders in England, is cogent proof that he was familiar with the feudal tenures in his own duchy. I believe, on the whole, that it is substantially correct to say that William introduced the feudal system in this country, though some portions of it were not fully developed till after his time, and though Henry the Second and his justiciars, when they reorganized the kingdom, after the 'shipwreck' which it underwent in Stephen's time, probably made several innovations. He established as a universal rule throughout the country that he himself was the supreme lord of all the land. Such continues to be the theory of our law to the present hour. 'All the lands and tenements in England in the hands of subjects,' says Coke, 'are holden mediately or immediately of the king; for in the law of England we have not properly allodium.'

"The feudal supremacy of the crown was solemnly acknowledged at the great assembly which William convened at Salisbury in 1086. Every man of the least note who held land in England attended there, and they all took the oath of fealty to William as their liege lord, and each of the vast multitude performed the ceremony of homage to him. Each land-owner, whatever his rank or wealth, knelt openly and humbly before William as he sat on his throne. Each placed his clasped hands within the king's hands and pronounced the formal words: 'I become your man from this day forth, of life, of limb and of earthly worship, and unto you will be true and faithful, and bear you faith for the land I hold of you; so help me God.'[1]

Sec. 23. *New Form of Allegiance Introduced by William.*— "But while William thus made feudalism universal in England, he at the same time made an important alteration in its system, by which he strengthened the authority of the crown, and pro-

[1] There was another and more elaborate oath of allegiance, the text of which is given in full, with comments, in 1 Sullivan's Lectures, 83. See also McGrimke's arg. in Allegiance Cases, 2 Hill (S. C.), *39.

vided against his great vassals acquiring the insubordinate powers which the feudal nobility on the continent enjoyed. He did not indeed prohibit subinfeudation. That was not done till two centuries later. But William at the Salisbury convention made all the sub-tenants of his tenants in capiti (*i. e.*, of those who held land immediately from himself) take the oath of fealty to him the king as the lord paramount of all; whereas, on the continent, the vassal who held lands took oath of fealty to his own immediate lord — to the sovereign if he held directly from him, but to the mesne lord if (as in the great majority of cases) some peer or baron, or perchance several of them, intervened between the crown and the occupant of the soil.

Sec. 24. *Other Restrictions on the Aristocracy.*—"Besides this 'breaking in upon feudal compact in its most essential attributes the exclusive dependence of a vassal upon his immediate lord,' William took other effective measures to keep down the influence of the aristocracy and exalt that of the crown. While lavishly generous in his grants of land to those who had served him, he took care to reward each leading Norman noble by estates scattered over different parts of the kingdom, and not by compact little principalities which might serve as bases of rebellion, and form independent states.

Sec. 25. *Restrictions on Jurisdiction — The Courts Baron.*—"He maintained also, in effective force, the supreme authority of his own royal tribunal, and kept within as narrow limits as possible the territorial jurisdiction which each lord of a manor exercised in his court baron.

Sec. 26. *Local Courts.*—"He had the wisdom, also, to *retain* the Saxon popular tribunal of the county court and the *court of the hundred*, although he diminished the dignity of the county court by withdrawing ecclesiastical matters from its cognizance. For all purposes of temporal jurisdiction it was preserved. It may, indeed, be said to have acquired vigor, and to have become more democratic in character, under the Anglo-Norman kings than it had before the Conquest. Under the Anglo-Saxon system only the thanes — that is, the gentry — could act and vote as members of the county court. Under the Anglo-Norman rule, all persons who held any land by a free tenure had a right to attend the county court and to take part, both as suitors and voters, in its proceedings. While these democratic courts of

the shire and the hundred flourished, and while also the power of the king's courts was gradually extended (as was done by the Conqueror's wisest successors), it was impossible for any feudal lord in England to raise his baronial court into the judicial importance which was arrogated by each count and seignior on the continent."

New Theory of Jurisdiction.— Norman feudalism, and the notion of sovereignty necessarily incident thereto, introduced the theory of jurisdiction altogether unknown under the Saxon laws. The jurisdiction of the Saxon tribunals was original, and by law not derivative by delegation of the king, for the Saxon king did not have civil jurisdiction as king;[1] but when the Norman earl assumed the exercise of all jurisdiction, all courts necessarily acted by delegation, and no court in a civil case ever acted without the warrant of the king's writs.[2]

Of a court of equity, or of equity in modern sense, there was at this time no thought.[3]

Fourth Period.

Sec. 27. *Revival of the Science of Law —Rise of the Science of Government — Influence of Roman Occupation of Britain.*— The temptation to digress from the theme adopted, and to indulge in the study of the progress of civilization and the growth of civil and religious liberty, must be resisted, and the limits of the subject severely regarded.[4] This observation sufficiently ac-

[1] Maine's Anglo-Saxon Law, 24; White's Outlines, 24.

[2] 1 Spence's Eq. Jur. 62; Chisholm v. Georgia, 2 Dall. *458; Andrews' Stephen's Pl., § 38; 1 Pollock & Maitland, Hist. 175.

[3] "Of equity as of a set of rules which can be put beside the rules of law, or of courts whose proper function is the administration, not of law, but of equity, we shall hear nothing for a long time to come," say Pollock and Maitland, writing of the age of Bracton in their history of English law before the time of Edward the First (vol. 1, 168). But that a contrast between æquitas and rigor juris was then recognized, and the king's court by tradition empowered to do whatever equity might be required, was asserted by the Frankish kings, and since the Conquest, say these historians. So of equitable jurisdiction exercised in the chancery nothing was heard, the king's justices still believing that they could do what equity requires. (176.)

[4] The intimate relations of these subjects to the development of jurisprudence is apparent on slight reflection. The progress which a people has made toward civilization may be quite closely measured by considering the state of the laws which regulate the government established among them. The four hypotheses of Guizot, as tests, indicate quite clearly his view of civilization.

The first — A people among whom

counts for passing by the Saxon period of English law and here taking but slight notice of Saxon institutions.

To properly understand English law, the Roman occupation of Britain as well as Saxon institutions must be taken into account. As early as Caracalla's reign the free Britons were Roman citizens,[1] and for nearly five centuries, including the most brilliant period of the development of Roman law, the days of Cicero, Hadrian, the Antonies, Gaius, Ulpian, Papinian, and till after the Theodosian Code, the laws of Rome held sway in ancient England. The illustrious Papinian was prefect at York under the Emperor Severus,[2] who it is claimed visited that place himself, and it is claimed that Paulus and Ulpian were also in Briton.

It is important to note that the customs of the people of a province were recognized as law at Rome, and that King Canute visited Rome very shortly after the withdrawal of the Romans, and from that time the constant cry of the English people was for their ancient customs: it may throw some light upon the origin of the idea of the binding force of custom.[3]

The Roman Wall has been almost obliterated by the ravages of time, but no enlightened jurist any longer doubts the influence of ancient Roman law and civilization upon the institutions of Saxon England and the permanency of their effect.[4] There was mingling of blood, of religion, of law.

In the same way and to a greater degree have Saxon institutions influenced English law. The Saxon period, with the leaven

private justice well administered, but the people at large have no share in the government.

The second — There is the same degree of comfort, considerable mental and moral activity, but liberty stifled. The condition of Asia.

The third — Great show of liberty, but great actual inequality. The strong opposes the weak.

The fourth — Great individual equality and liberty, few general interests, so that society gets little from the individual. It is apparent that to Guizot the manner in which the reciprocal rights and duties of society and individuals were balanced plays an important part in the scheme of civilization. Hist. of Civ., p. 8.

[1] Reeves' Hist. Eng. Law, Int., XXI.

[2] 1 Kent, Com. *545.

[3] 1 Reeves' Hist. Eng. Law (Finlason ed.), p. 225, note; 1 Spence's Eq. Jur. 1. The real point of controversy upon the subject of the influence of the civil law upon English law relates to whether the influence was exerted directly by reason of the Roman occupation, or indirectly by the influence of the later study of the civil law.

[4] 1 Kent, Com. *546; Reeves' Hist. Eng. Law, Int., and vol. 1, p. 225.

of the old Roman law working in it, and the light of Christianity and literature breaking upon it, of which much will be seen when American law is fairly entered up, may be passed by.

Sec. 28. *Feudal England — The English System Out of which Our American Ancestors Emerged.*— We may ask, what progress has government and law made since we left it in Grecian Athens or Roman Greece? The question is answered by asking: What are the people, the great body of the yeomanry, which in later centuries became the commons? They are slaves, though called serfs and villeins. The Saxons were more honest; they called slaves, slaves.[1] That state of the political atmosphere had not been reached that "the air of England is too pure for a slave to breathe,"[2] which expression Lord Mansfield used of the slave of an American colonist.

Sec. 29. *Early Limitations on Absolute Sovereignty — Magna Charta.*— A few observations upon the Great Charter will bring out the relation of the people to those in whose hands were the government. Of this charter Hoffman says: "Whatever obstructions the royal power found to its tyrannical exercise were opposed by its turbulent aristocracy. For this (the aristocracy) all the privileges, all the charters, all the limitations of prerogative were created; and during all these struggles the people, properly so called, were effectually out of view, because they formed no part of the political state. Even when provision was made against the tyrannical oppression of the king, the very phrase shows the contemptibleness of the commons. '*Nullus liber homo*,' says Magna Charta — a phrase so far from applying to the commons of England, or exhibiting any care for their rights, that it in fact concerned that class only which stood in contradistinction to the commonalty; *liber homo* meaning anything but those indigent and inconsiderable individuals from whom the English commons were afterwards to arise. It is true, indeed, that every subject of England at this day appropriates to himself the benign enactments of the charters and limitations of prerogative alluded to, and that Magna Charta is now a panoply to all; but we must look for the origin of this in times and causes much nearer our own day."[3]

[1] Reeves' Hist. Eng. Law, pp. 172, 174.

[2] Somerset's Case, 1772; S. C., Great Opinions by Great Judges. With this opinion compare the cases of Smith v. Brown, Salk. 666; Buttz v. Penny, 2 Lev. 210; Pearce v. Lisle, Amb. 76.

[3] Hoffman's Legal Outlines, p. 585.

This opinion, while not defensible to its full extent,[1] contains a very salutary admonition, for the reason that a student is often misled to believe that by Magna Charta at a single stroke the people of England emerged from darkness into light, which is untrue, as at the time there were no commons.[2] The people less in rank than the barons had only such representation as allegiance to their lords gave them. It was a great limitation upon the powers of the crown, and did profess to secure, for every individual, protection of life and liberty, unless forfeited by due process of law, and, though obtained by the barons, expressly named the freemen and villeins. From that day the law of the land became a birth-right (the charter really restored the people to ancient rights), and in that sense Magna Charta was, and is, properly called the bulwark of English liberty. But what of the law itself, and what of the people?

The government was based upon the feudal system, with its idea of fealty; that is, the allegiance of one *person* to the *person* of another, or, stated simply, one man became the man of another. Its fiefs, subinfeudations, aids, escheats, wardships, marriage dues, cumbersome feudal tenures, obliterated almost entirely socage tenures.[3] There was scarce a notion of the law merchant or equity. The people were the king's liegemen. Earls, barons, freemen and villeins were all the king's,— the lords bound to the king, the so-called vassals liegemen to the lords,[4] and the villeins beneath the heel of all. It is not until after the establishment of the representation of the people through their especial representatives in a House of Commons that the people are confirmed in their ancient liberties, both in

[1] The Magna Charta brought back in some measure the golden time of the Confessor. It appeared to the barons that they could not expect the assistance of the people if, in treating with John, they should only act for their own emolument. They were therefore careful that stipulation should be made in favor of general liberty. The people were considered as parties to transactions which most intimately concerned them. The feudal rigors were abated, and the privileges claimed by the more dignified possessors of fiefs were communicated to inferior vassals. The cities and boroughs received a confirmation of their *ancient* immunities and customs. Provisions were made for a proper execution of justice, and in the restraints affixed to the power of the king and the nobility the people found protection and security. 1 Sullivan's Lectures, XX.

[2] Hale's Hist. Com. Law (Runnington ed.), p. 181, note.

[3] Reeves' Hist. Eng. Law, p. 225, note.

[4] Reeves' Hist. Eng. Law, vol. 1, p. 469, note.

person and *property*, by written limitation upon the prerogatives of the king.

Sec. 30. *Confirmatio Cartarum.*— This took place by the act of the twenty-fifth year of Edward the First, and commonly called "Confirmatio cartarum," being the year 1297. This statute gave the same security to private property which had been given by Magna Charta to personal security; for while Norman kings had always renounced any right to raise a revenue by taxation, the matter did not become a constitutional limitation upon the king until after the Confirmatio cartarum, which expressly put that right in the hands of the Commons, or at least in the hands of Parliament.[1]

The Commons, it must be recollected, are the only representative body in the English constitution,[2] the King being the supreme executive, the Lords representing no one — simply acting for themselves,— and the Commons, who were formerly knights of the shire and representatives of the boroughs, represented the people of their vicinity or territory.[3]

Sec. 31. *Rise of the House of Commons.*— The establishment of the representative principle by the admission of this representative body into the great council of the nation is not to be taken as the consummation of liberty; much less is it the attainment of the true principle upon which the science of politics is supposed to rest, viz.: Equality before the law. It is but a step

[1] The first parliament in which people had representatives was in 1265. 2 Reeves' Hist. Eng. L. (Finlason ed.) 350, note. There is said to be earlier traces of the Commons, but the form is quite obscure. Freeman's William the Conqueror, p. 157; Argument of Cliffin in Burdett v. Abbott, 4 Taunt. 403; 1 Coke, I, 62, note. The forty-ninth year of Henry III, and the twenty-third year of Edward I, which so many writers consider as the dates of the establishment of the Commons, were of consequence nothing more than memorable epochs in their history. The first summons of knights on record is supposed to be in the twenty-ninth year of Henry III. But this, though it were true, does not prove that knights were not known until that time. The writ does not say so; nor can it be gathered from it that *knights of the shire* were then *newly* established. If there remained, indeed, an uniform series of records from the earliest times in which there was no mention of *knights* till the age of Henry III, there might thence arise a strong argument against their antiquity. But this is not the case; and it happens that in the fifteenth year of King John there is a writ to the sheriff to summon FOUR *knights of the county.* 1 Sullivan's Lectures, XXII.

[2] 1 Wilson's Works, 389.

[3] See Webster's arg. in Luther v. Borden, 7 How. 1.

of ground gained in the struggle;[1] the liberation of a force which had before been guided by one or other of the contending powers; the creation of a new estate which was destined ere long to curb the power of both. No more than the establishment of Protestantism established religious freedom did the Commons establish civil or political liberty, the rational principle of which was then unknown, or at least disregarded.[2]

Sec. 32. *Influence of the Study of the Civil Law.*—It is the natural course of development of all sciences that later systems, in any considerable degree dependent upon or modeled after any preceding system, shall proceed upon the same or similar lines. Jurisprudence forms no exception, and the common law of England is subject to the same principle. The common law is no new invention evolved by Englishmen out of the fertility of their own invention. There is very little in it which is peculiar to England. Lord Bacon, in his offer to make a digest[3] of the laws of England, says: "Now, for the laws of England, if I shall speak my opinion of them without partiality either to my profession or country, for the matter and nature of them, wise, just and moderate laws. They give to God; they give to Cæsar; they give to the subject what appertaineth. It is true they are as mixed as our language, composed of British,

[1] See Stubbs' Hist. Eng., ch. XIV. "The Confirmatio cartarum did not need the executory provisions of the charter of John. It rested not only on the word of a king, who might be trusted to keep his oath, but on a full resolve of a nation awake to its own determination. The king has taught in the plainest terms the principle by which the nation binds him — 'that which touches all shall be allowed of all;' the law that binds all, the tax that is paid by all, the policy that affects the interests of all, shall be authorized by the consent of all. From the date of that great pacification, party politics take new forms." 2 Stubbs' Con. Hist. of England, p. 5.

[2] As an example of their idea of liberty note the following: "By a very hard statute in the 12th of Richard II, no servant or laborer could depart, even at the expiration of his services, from the hundred in which he lived, without permission under the king's seal. Nor might any who had been bred to husbandry till twelve years old exercise any other calling. A few years afterwards the Commons petitioned "*that villeins might not put their children to school in order to advance them by the church, and this for the honor of all the freemen of the church.*" These petitions against emancipation and progress are followed by others equally drastic in their terms and scope. Hallam, Middle Ages, ch. VIII, part III.

[3] The term "digest" is here used, not as an index, but as an orderly treatment.

Roman, Saxon, Danish, Norman customs; and surely as our language is thereby so much the richer, so our laws are likewise by that mixture the more complete. Neither does this attribute less to them than those that would have them to have stood out the same in all mutations. For no tree is so good first set, as by transplanting and grafting."[1]

Bracton.— The influence of jurisprudence, properly so called, begins with Bracton, who wrote during the reign of Henry III. Bracton simply copied a large portion of his work from the Roman law. The arrangement of the book is taken from the Institutes, and it is not until that portion of the work which deals with legal actions and estates in land is reached that the book is based on the English law. It does not treat of public law.

During the reign of Edward the First great impetus was given to the science of law. So marked is the progress made under this distinguished monarch that he is called the English Justinian. The influences which combined to qualify Edward for this work, and the sources from which he drew his inspiration, are thus stated by Stubbs: "Edward was by instinct a law giver, and he lived in a legal age; the age that had seen Frederick II legislating for Sicily; Louis IX for France, and Alfonso the Wise for Castille; the age that witnessed the greatest inroad of written law upon custom and tradition that had occurred since the date of the Capitularies; that saw the growth of great legal schools in the universities, and found in the revived Roman jurisprudence a treasury of principles, rules and definitions applicable to systems of law which had grown up independently of the Imperial codes. Bracton had read English jurisprudence by the light of the Code and the Digest, and the results of his labor were adapted to practical use by Fleta and Britton. Edward had by his side Francesco Accursi, the son of the great Accursi of Bologna, the writer of the Glossus on the Civil Law, a professional legist and diplomatist; but he found probably in his chancellor, Burnell, and in judges like Hengham and Britton, practical advisers, to whose propositions, based on their knowledge of national custom and experience of national wants, the scientific civilian could add only technical consistency."[2]

[1] Bacon's Works, vol. I, p. 335.

[2] Stubbs' Con. Hist., vol. II, p. 110.

Sec. 33. *Misleading Views of Blackstone.*—The students of our law who are directed to read the first book of Blackstone's Commentaries[1] as an introduction to the study of law, as probably the majority of students still are allowed to do, encounters false notions of the principles of law and erroneous conceptions of the sources of the common law, which are almost sure to confuse the ordinary youth, who has, by merely living in the atmosphere of our legal institutions, imbibed views of our legal system entirely at war with these notions of the learned commentator. Fortunately, one attempting to present a treatise upon American law has at the present time abundant authority to justify a radical departure from the habitual blind following of Blackstone. There is no place in jurisprudence where disciples of Blackstone can apply his doctrines on the theory of law and government. His fundamental political dogmas had very transient influence in England, although his treatment of the subject generally classed as private law is a model of method and perspicuity. That he completely throws off the track the student endeavoring to discover the sources of English and American jurisprudence is nowhere better stated than in Pollock and Maitland's History of the Common Law. As a distinguished jurist of the United States has adopted the views referred to, it will serve a double purpose to quote his observations in that connection.

Professor Howe, in his Studies on the Civil Law, speaking of Blackstone's views of the civil law, says: "And therefore, as against the utterances of Blackstone as quoted above, we may set the following from the work of Pollock and Maitland already alluded to. Referring to the time of Henry II and to Mr. Blackstone's singular theories in regard to its spirit, and pointing out the fact that the twelfth century was one remarkable for its devotion to jurisprudence, they say: 'The keenest minds of the age had set to work on the classical Roman texts, and they were inspired by a genuine love of knowledge. . . . The Roman law was for them living law. Its claim to live and to rule was intimately connected with the continuity of the empire. . . . But such theories, apart from the Roman law, demanded reverence, if not obedience, as the due of its own intrinsic merits. It was divinely reasonable; it was a law

[1] These observations are confined strictly to the first book.

that rejoiced the heart, and gave wisdom unto the simple. . . . Henry's greatest, his most lasting, triumph in the legal field was this: that he made the prelates of the church his justices. English law was thus administered by the ablest, the best, the best-educated men in the realm; . . . men who were bound to be, in some measure at least, learned in the canon law. At one moment Henry has three bishops for his archjusticiars. The climax is reached in Richard's reign. We can there see the king's court as it sits day by day. Often enough it was composed of the Archbishop of Canterbury, two other bishops, two or three archdeacons, two or three ordained clerks who were going to be bishops, and but two or three laymen. The majority of its members might at any time be called upon to hear ecclesiastical causes and learn the lessons in law that were addressed to them in papal rescripts. Blackstone's picture of a nation divided into two parties — the bishops and clergy on the one side contending for their foreign jurisprudence; the nobility and the laity on the other side adhering with equal pertinacity to the old common law — *is not a true one.* It is by "popish clergymen" that our English common law is converted from a rude mass of customs into an articulate system, and when the "popish clergymen," yielding at length to the pope's commands, no longer sit as the principal justices of the king's court, the golden age of the common law is over.' . . . If, as we understand, the custom of the king's court was the custom of England, and became the common law, and if the king's court was thus composed, during these golden and formative days, of men whose chief culture was romano-canonical, the syllogism seems complete and the conclusion inevitable. Another source of influence may be briefly noticed. It was about the middle of the twelfth century that Vacarius, imported from Italy by Theobald of Canterbury, began to teach the Roman law at Oxford, and that university soon had a flourishing school of both the civil and the canon law. In the thirteenth century Francisco d'Accorso was invited from Bologna to Oxford by Edward II,[1] 'the English Justinian,' to lecture on Roman law. In the fourteenth century Bishop Bateman of Norwich founded Trinity Hall, Cambridge, for the study of the civil and the

[1] This is an error (typographical doubtless). Accorso, or Accursi, as it is given by Stubbs (*ante*, p. 36), was invited by Edward the First. Edward I is the English Justinian.

canon law. The enthusiasm of young Englishmen of the time of Edward for such studies was intense, and many went to Bologna and Paris for the purpose, where the use of Latin, as the universal language of scholars, made such studies most charming and fruitful. To this should be added the publications of text-books of that period. In the time of Henry II came the treatise of Glanville, of which Professor Maitland has recently said, 'in a sense the whole book is Roman.' In the middle of the thirteenth century came Bracton, an ecclesiastic, an archdeacon, a student of the Roman law, as taught by Azo. Sir Henry Maine says that 'the entire form and one-third of the contents' of Bracton's treatise were taken from the Corpus Juris."[1]

Sec. 34. *Method of English Institutional Writers.*— The position may now be taken as established that the development of English jurisprudence, so far as it took tangible form in the arrangement of treatises by the earlier writers, proceeded upon the lines of the civil law, and was influenced by the study of that system.[2]

Inasmuch as the method of English legal authors is to be examined quite critically in the next chapter, it will be sufficient here to notice merely the development of ideas in relation to legal methods.

Sir Henry Finch.— The first important treatise subsequent to those mentioned above is Sir Henry Finch's discourse on the law, the order of which is as follows: Book 1. An introductory chapter on the Nature and the Sources of the Law, treating of

[1] Howe's Studies on the Civil Law, 45.

[2] The statement of the text must not be taken as an assertion that the Roman law was regarded as having authority in England. A caution may perhaps be given against the impression, which otherwise might obtain, that the books mentioned as having been moulded after the civil law were at the same time the great oracle of the common law. Such was the prejudice at times against the civil law that those citing the works mentioned found it advisable to expressly repudiate any claim of their being authority; *e. g.*, Sanders, arguing the case of Stowel v. Zouch, 1 Plowden, 357, tried about 1563, said that "he cited Bracton not as an author in the law, for he said that Bracton and Glanville were not authors in our law." Dyer, Justice, in the same case, however, quoted Glanville without any such reservation. These expressions show the prejudice of the period, and, instead of sustaining the position that Bracton had no weight and the civil law no standing, demonstrate that, in cases where the common law was silent, the civil law was referred to as to furnishing a safe analogy.

the Law of Nature, devoting a chapter to the Law of Reason, which he says "is of such singular and incomparable use that it rules as lord paramount over the law, and even overrules the positive law; and rather than any of these established rules should fail, the very maxims and principles of the positive law will yield as a higher and more perfect law." In the next chapter he states that these rules are of two sorts, some taken from foreign learning, divine and human, the last proper to law itself.

He then states a view which has exerted great influence in the development of the common law of England. "Of the first sort are the principles and sound conclusions from foreign learnings; out of the best and very bowels of divinity, grammar, logic; also from philosophy natural, political, economics, moral, though in our reports and year books they come not under the same terms, yet the things which there you find are the same; for the sparks of all sciences in the world are raked up in the ashes of the law; and well doth one say, *Non ex prætoris edictis, neq; a 12 tabulis, sed penetus ex intima philosophia haurienda juris disciplina est.* He that will take the whole body of the law before him, and go really and judicially to work, must not lay the foundation of his building in estates, tenures, the gift of writs, and such like, but at those current and sound principles of which our books are so full."[1]

The orderly arrangement of the book begins at chapter two. For it the author claims that, "*as concerning the method, this only of all books of law is without precedent.*" Whether he means without precedent in the English law or not is uncertain, but the method consists in stating the territorial divisions of the realm, followed by the Law of Persons and the Law of Property (or Things), Criminal Law, and Civil Procedure.

The important position of Finch's performance of the science of law is stated by Blackstone, whose views will be given after speaking of the method of Lord Bacon.[2]

[1] Chancellor Kent states that this work was published in 1613 (1 Kent, Com. *509), but Justice Iredell states that the first edition appeared in 1579. Chisholm v. Georgia, 2 Dall. *437.

[2] Bacon's position in the domain of jurisprudence is well stated by Hastie in his Outlines of Jurisprudence, p. xii. "The fertile genius of Bacon was at home in the sphere of law, but his very familiarity with its details, and his official subordination to its authority, made his handling of the methods of jurisprudence in his en-

Lord Bacon.—That Lord Bacon contemplated an elaborate treatise on the law, based upon an orderly method, is stated in his proposal to furnish such a work if he could secure the patronage of the king. The details and the outline of the work were never made public. This much of the order, however, may be surmised from his own statement. He says: "I consider, therefore, that it is a true and received division of the law into '*jus publicum*' and '*privatum*,' the one being the sinews of property and the other of government. '*Jus publicum*' I will divide, as I hold it fittest for the present purpose, into four parts. *The first*, concerning criminal causes, which, with us, are truly accounted '*publici juris*,' because both prejudice and the prosecution principally pertain to the crown and public estate. *The second*, concerning the causes of the church. *The third*, concerning magistrates, officers and courts; wherein falleth the consideration of your majesty's regal prerogative, whereof the rest are but streams. And *the fourth*, concerning certain special and political laws, usages and constitutions, that do import the public peace, strength and the wealth of the kingdom. In which part I do comprehend not only constant ordinances of law, but likewise forms of administration of law, such as are the commissions of the peace, the visitations of the provinces by the judges of the circuits, and the like."

Of the method of Lord Bacon, and the other writers which should be noticed here, Blackstone, in the preface to his Analysis, makes the following very just remarks:[1]

"*Fitzherbert and Brooks*, and the subsequent authors of abridgments, have chosen a method the least adapted of any

cyclopædic survey of human science less novel and incisive than in the case of other forms of knowledge. He indeed recognized the science of universal jurisprudence as the crown of all human philosophy, emphasized its essential connection with the art of government, and pointed to the cardinal importance of an investigation of the sources of law; and, faithful to the practical spirit of the jurisconsult and his own orderliness of thought, he has given many suggestive hints regarding the treatment of the concrete details of law, and anticipated not a few of the later conceptions of legal reform. But he inaugurated no important new method in this sphere, nor did he point the way to any permanent universal discovery as to the nature of right."

[1] This Analysis is scarce and inaccessible to most members of the profession. It was published in 1756. The preface quoted from is to the edition of 1858.

to convey the rudiments of a science; namely, that of the alphabet. *Lord Bacon*, in his Elements, hath purposely avoided any regular order,[1] selecting only some distinct and disjoined aphorisms, according to his own account of them; which, however, he hath expounded in so excellent a manner that the narrowness of his plan is therefore the more to be regretted.

Lord Coke.— "The Institutes of Sir Edward Coke are unfortunately as deficient in method as they are rich in matter; at least the two first parts of them, wherein, acting only the part of a commentator, he hath thrown together an infinite treasure of learning in a loose, desultory order.

"*Dr. Cowel* hath indeed endeavored to reduce the law of England, in his Latin Institutions, to the model of those of Justinian. And we cannot be surprised that so forced and unnatural a contrivance should be lame and defective in its execution.[2]

[1] The author has searched in vain for any indication of the outline which Lord Bacon would have adopted, and it seems plain that he chose rather to let his plan remain unknown than to give it freely to the world. He states in his proposal that the completion of his design would demonstrate whether he or Lord Coke were the greater lawyer. It is a plausible conjecture that his triumphant rival may have had success in supressing a performance which might have left Bacon the bright particular star in the law as he was in other departments of learning. No one familiar with the character of Lord Coke will doubt his readiness to do such an act, and he had the opportunity.

[2] It is not quite clear whether this statement is intended to condemn the arrangement of the Institute, or merely to assert the impossibility of undertaking to arrange the laws of one country on an outline adapted to the statement of another system. If the writer has intended this, the remark is a just one. The statement of Walker in his introduction to American law expresses the same idea concerning the use of Blackstone's outline. He says: "This work, admirable as it is, was written for English students, and of course contains much that is inapplicable to this country. The American student, who reads it without a guide, obtains many erroneous impressions, and much useless learning. We have innovated upon the institutions of our English ancestors with an unsparing hand; and not merely in minute details, but also in fundamental principles. We cannot, therefore, find in Blackstone an accurate outline for American law. Our great desideratum is, a work which would be to us precisely what that work is to the English. And that man should be a great public benefactor who should Americanize Blackstone's Commentaries; that is, who should give this work with just such additions, omissions and corrections as would make it an accurate exposition of American law; or, what were still better, who should equal the style and manner of Blackstone in an original work upon the laws of his own country."

"*Sir Henry Finch's* Discourse of Law is a treatise of a very different character. His method is greatly superior to all that were before extant; his text is weighty, concise, and nervous; his illustrations are apposite, clear and authentic. But, with all these advantages, it is not sufficiently adapted to modern use; since the subsequent alterations of the law, by the abolition of military tenures, and the disuse of real actions, have rendered near half of his book obsolete.

Wood's Institute.[1] — "Dr. Wood has effectually removed this objection, but has fallen into the contrary extreme; his Institute being little more than Finch's Discourse enlarged, and so thoroughly modernized as to leave us frequently in the dark with regard to the reason and origin of many still subsisting laws which are founded in remote antiquity. And as in some titles his plan is too contracted, in others, also, it seems to be too diffuse. Upon the whole, however, his work is undoubtedly a valuable performance;[2] and great are the obligations of the student to him, and his predecessor, Finch, for their happy progress in reducing the elements of law from their former chaos to a regular methodical science. Yet, as neither could be followed entirely in the proposed course of academical lectures, it was judged the most eligible way not to adopt them in part, especially as there were extant the outlines of a still superior method, sketched by a very masterly hand.

Lord Hale's Analysis.— "For, of all schemes hitherto made public for digesting the laws of England, the most natural and scientific of any, as well as the most comprehensive, appeared to be that of Sir Matthew Hale, in his posthumous Analysis of the Law. This distribution, therefore, hath been principally followed, with what variations the learned reader will easily perceive from the ensuing abstract; and it may be no unprofitable employment for the student to learn by comparing them. For these the compiler thinks it unnecessary to give his reasons. For, since those who have gone before him have successively deviated from each other's plan, he hopes to be excused if, in order to adapt some things the better to his own capacity, he frequently departs from them all, having in gen-

[1] Published in 1722.

[2] Chief Justice McKean said: "Wood is a writer of great authority, and frequently cited in Westminster Hall." Stanet's Case, 1 Dall. 357.

eral rather chosen, by compounding their several schemes, to extract a new method of his own, than implicitly to copy after any."

Sec. 35. *The Divine Right of Sovereignty Revived in England.*— The next step in the orderly progress of the investigation brings us again to an examination of the system of government administered in Great Britain, and it will suffice our purpose to deal with the period intervening between the time of Elizabeth and the separation of the American colonies from England. Attention should be directed to the fact that an investigation of the science of government differs from the study of constitutional law in nothing excepting possibly in so far as it partakes of a scientific character. Constitutional law, as a topic of legal study intended to indicate and mark out a definite field of study, is a term of modern invention. Professor Dicey affirms that the term is not employed by Blackstone.[1] The term "Constitutional Law" originated doubtless from the fact of the existence of a written constitution and a habit of testing the validity of laws by the constitution.[2]

On the basis of the regal authority exercised by the crown of Great Britain, Lord Bacon says, speaking of the time of James I:[3] "But I demand, Do these officers or operations of law evacuate or frustrate the original *submission, which was natural?* or shall it be said that all allegiance is by law? No more than it can be said that '*potestas patris*,' the power of the father over the child, is by law; . . . yet no man will

[1] Law of Const., 6.

[2] Professor Dicey says of Blackstone's Commentaries: "Of constitutional law as such there is not a word to be found in his Commentaries. The matters which appear to belong to it are dealt with by him in the main under the head 'Rights of Persons.' The book which is thus entitled treats, *inter alia*, of the parliament, of the king and his title, of master and servant, of husband and wife, of parent and child. The arrangement is curious, and certainly does not bring into view the true scope or character of constitutional law. This, however, is a trifle. The book contains much real learning about our system of government. Its true defect is the hopeless confusion, both of language and of thought, introduced into the whole subject of constitutional law by Blackstone's habit — common to all the lawyers of his time — of applying old and inapplicable terms to new institutions, and especially of ascribing in words to a modern and constitutional king the whole, and perhaps more than the whole, of the powers actually possessed and exercised by William the Conqueror." Law of Const., 7.

[3] Argument on Post Nati of Scotland. Works, vol. II, p. 169.

affirm that the obedience of the child is by law, though laws in some points do make it more positive; and even so it is of allegiance of subjects to hereditary monarchs, which is corroborated and confirmed by law, but is the work of the law of nature, and therefore you find the observation true . . . that law-givers were long after their first kings, who governed for a *time by natural equity without law.*" He concludes: "I shall hardly consent that the king shall be called *only* our *rightful* sovereign or our *lawful* sovereign, but our *natural* liege sovereign, as the acts of parliament speak; for, as the common law is more worthy than the statute law, so the law of nature is more worthy than them both."

His treatment of the subject of government is equally characteristic. He says: "*Concerning government*, it is a part of knowledge, secret and retired in both these respects in which things are deemed secret; for some things are secret because they are hard to know, and some because they are not fit to utter."[1]

We are told by Blackstone that the glorious Queen Elizabeth herself made no scruple to direct her parliaments to abstain from discoursing of matters of state; and it was the constant language of this favorite princess and her ministers that even that august assembly ought not to deal, to judge or to meddle with her majesty's prerogative royal; and her successor, James I, who had imbibed high notions of the divinity of sovereignty, more than once laid it down in his speeches that it is assumption and blasphemy in a creature to dispute what Deity may do; so it is presumption and sedition in a subject to dispute what a king may do in the height of his power. "Good Christians," he adds, "will be content with God's will as revealed in his Word,[2] and good subjects will rest in the king's will as revealed in his law."

Blackstone himself, writing over a century and a half later, of course does not expressly adopt the theory of divine right, but says: "The subject was ranked (in the time of Elizabeth and James) among the *Arcana Imperii*, and, like the mysteries of the *bona dea*, was not ever to be pried into by any but such

[1] 1 Bacon's Works, p. 238, "Advancement of Learning."

[2] Probably as expounded in the Westminster Confession of Faith, prepared under his direction.

as were initiated into its service; because perhaps the exertion of the one, like the solemnities of the other, would not bear the inspection of a rational and sober inquiry."[1] It is quite evident that, notwithstanding Magna Charta, the science of government had not, at the time of Lord Bacon, taken any great strides forward.

Sec. 36. *Puritanism and Religious Liberty.*— As having an important bearing upon events taking place subsequent to the reign of King James, we must note the fact that in 1534 the crown of England, whose king was then Henry VIII, was declared to be the head of the church. Elizabeth and James were both Protestant, and during the times of their reigns the sect known in history as Puritans became prominent.

The Puritans and Their Doctrines.— Besides their religious views Hume says of them: "But there was another set of opinions adopted by these innovators which rendered them in a *peculiar manner* the objects of Elizabeth's aversion. The same bold and daring spirit which accompanied them in their addresses to the Divinity appeared in their political speculations, and the principles of civil liberty which, during some reigns, had been little avowed in the nation, and which were totally incompatible with the present exorbitant prerogative, had been strongly adopted by this new sect. Indeed, so absolute was the authority of the crown, that the precious spark of liberty was kindled and preserved by the Puritans alone, and it is to them that the English owe the whole freedom of their constitution."[2]

It must not be understood that the Puritans or any religious sect advocated in terms what is now understood in the United

[1] 1 Blk. Com. *238. Prof. Hammond, in his edition of the Commentaries, says: "But B. could not, consistently with his political beliefs, accept the doctrine of divine right as the basis of the state's power to command in things morally indifferent. He had to seek some other source of the laws which prohibited things not *mala in se*. Here he seems to be open to criticism for the lack of precision and uncertainty in his views. He falls back on *compact*, without apparently perceiving the inconsistency between this doctrine and his definition, an inconsistency of which his first American critic, Wilson, has made effective use, showing that B.'s definition ranked him, in spite of himself, with the supporters of divine right and absolute power." Hammond's Blackstone, p. 111, note.

[2] Students' Hume, p. 331. References to historical matters of this character can be found in any of the histories of England, and on constitutional questions, Stubbs, May, Hallam or Macintosh may be referred to.

States when we use the term "religious liberty." In fact, the practice of the Puritans and Pilgrims in their new homes in America are devoid of the spirit of religious toleration.

Passing from the time of Elizabeth and James with the remark that the rulers did not expel the Puritans for their religious sentiments alone, but for the more material things of their political dogmas, we reach the time of Charles the First, just prior to the Petition of Rights. And of the Puritans Hume again says: "We may observe that the appellation stood for three parties, which, though commonly united, were yet actuated by very different views and motives. There were the *political* Puritans, who maintained the highest principles of civil liberty; the Puritans in *discipline*, who were averse to to the ceremonies and Episcopal government of the church; and the *doctrinal* Puritans, who rigidly defended the speculative system of the Swiss reformers. In opposition to these stood the Court party."[1] The leaders in the House of Commons, John Hampton, Pym, and Elliot, were political Puritans.

Sec. 37. *Taxation and Representation.*—The struggle between Charles the First and the Commons took definite shape in Hampton's resistance to the ship-money tax and forced loans; and this memorable struggle between the Crown and the Commons in reference to the right of the king to impose taxes or raise a revenue without the consent of the Commons culminated in the *Petition of Rights.* The whole tenor of the petition is simply a reference to the customs of the time of King Edward the First and to the statute commonly called *Statutum De tallagio non concedendo*, that no tallage or aid should be levied by the king without the assent of the bishops, archbishops, earls, knights, barons, burgesses, etc.; then to the statute of King Edward III, the *Confirmatio cartarum*, above referred to, by which it was enacted that no person should be compelled to make any loan to the king, and then reciting violations of the same. It referred to the great charter of liberties, and concluded with the very humble prayer against any taxation, except by consent of parliament.

Being peculiarly involved in the controversy between England and the American colonies, the *Confirmatio cartarum* and the Petition of Rights are of greater interest, because they di-

[1] Students' Hume, p. 396.

rectly referred to the subject of taxation, expressly denying that power to the king, but not touching upon the power of parliament.

Sec. 38. *Extraordinary Jurisdiction of Parliament — Constructive Treason — Ex Post Facto Laws — Bills of Attainder.* Twelve years after the Petition of Rights occurred the impeachment of the Earl of Strafford and his trial in parliament, which contains so instructive a lesson upon the state of constitutional law in England that it is worthy of the time which it will take any student to investigate it. In it will be seen the idea of constructive treason, and the absolute power of the king and the House of Lords over the life and property of any subject, under that powerful weapon, the bill of attainder. Strafford was impeached[1] by the House of Commons for the crime of treason — a crime which should be defined by all governments. High treason in England was an offense against the king, and, to amount to a crime, necessarily involved some overt act; but the hatred of the people, justly excited by the atrocious conduct of Strafford, inflamed them to such a degree that they invoked a doctrine, dangerous to themselves, viz., of constructive treason, and demanded his death. Lord Digby, the prosecutor of Strafford, pointed out to them clearly that *legally* they could pass no judgment of death against him, but with strange inconsistency they yielded up the claim of a judicial sentence and demanded his death by a bill of attainder. The power in parliament in that respect was clearly explained by Lord Digby in his celebrated speech, April 21, 1641. "I know," said he, "Mr. Speaker, there is in parliament a double power of life and death, [the one] by bill a judicial power, and the [other a] legislative power. The measure of one is what is legally just; of the other, what is prudentially and politically fit for the good and preservation of the whole; but these two, under favor, are not to be confounded in judgment."

To the clamor of the Commons, the lords and the king yielded the legal demand and passed a bill of attainder forfeiting his life, his estates, and corrupting his blood. And here let us remark the character of a law under which the people of England, through their representatives, the Commons, took the life of Strafford. "Acts of parliament," says Blackstone, "to attaint

[1] The student must remember that impeachment is but an accusation.

are to all intents and purposes new laws, made *pro re nata*, and by no means execution of such laws as are already in being, but an impeachment proceeding before the Lords by the Commons in parliament is a prosecution of the already known and established law."[1]

These bills of attainder are from their nature *ex post facto* laws; they proceed on the principle that while courts, and the House of Lords while sitting upon a trial of an impeachment is a court, are to be governed by the strict letter of the law as previously known and established, parliament, in exercising the high sovereignty of the state, may on great and crying occasions arrest some enormous offender in the midst of his crime and inflict upon him the punishment he so richly deserves, even in cases where, owing to a defect in the law, it is impossible to arrest him by means of impeachment or through the ordinary tribunals of justice. The Commons themselves insisted upon waiving strict legality and taking advantage of a bill of attainder. It is obvious to the American reader that such a man as John Quincy Adams, who daily persisted for so long a time in presenting petitions to congress amid the storm of abuse from the opposition, might readily be deemed by some an enormous offender; but our forefathers, in the American constitution, wisely prohibited the passage of any bill of attainder or *ex post facto* law.[2] The case stands in history the monument of the danger of leaving unchecked power in any hands. No better argument could be given to maintain Strafford's sentence than that the end justified the means; an argument which comes with bad grace from a people striving for constitutional liberty, even though the act of attainder was strictly within the constitutional and customary powers of the English parliament. England was now in the whirlpool of civil strife, and in less than ten years, Charles, their "liege lord" and natural sovereign, the "fountain of justice and honor," their "hereditary king," against whose person any act of violence was treason, was by the people of England beheaded.

[1] 4 Black. Com., p. *259.

[2] An *ex post facto* bill fixing a penalty less than death was called a bill of pains and penalties. Among the notable cases involving the discussion of the nature of *ex post facto* acts and bills of attainer are: Calder v. Bull, 3 Dall. 386 (1798); Ex parte Garland, 4 Wall. 333; Cummings v. State of Missouri, 4 Wall. 277.

The doctrine of divine right of kings expired with Charles I. It was opposed to all traditions of Saxon or Norman England. It has historical interest now as illustrating the extravagant claims men will make in order to accomplish political designs.

Sec. 39. *Constitutional Conventions in England — Transfer of Allegiance.*— The interruption of the hereditary dynasty of England by the commonwealth illustrates the desirability of providing in a constitution orderly methods for changing it.

Sir John Dalrymple says of the trial of Charles I: "The republican and puritanical Commons, with a democratic spirit, brought their sovereign, under the forms of justice, like a common member of the community, to a public trial and a public execution. With the same leveling hand they laid the peerage, the church, the parliament, and the law itself, in the dust." The orderly course of affairs being interrupted and the crown deposed, it devolved upon the people to determine upon the course to be pursued. The assemblages of the national council of this period are therefore called convention parliaments.

The restoration of Charles II, and the abdication of James II, are simply illustrations of the chaos into which the system of English constitutional law had drifted. The parliament which placed King William on the throne and fixed on the prerogative presents the peculiar spectacle of the English people, in convention assembled, engaging in great and original acts of political legislation without the presence of the sovereign.

By Blackstone and other theoretical writers the commonwealth is not recognized as a lawful government; but that government which exists is the lawful if not the rightful government.[1]

Very naturally, James Wilson, in his speech in vindication of the colonies in 1775, inquires, "Was the convention of the Barons at Runnymede authorized by the forms of constitution? Was the convention of Parliament that recalled Charles the Second and restored the monarchy authorized by the forms of the constitution? Was the convention of Lords and Commons that placed King William on the throne authorized by the forms of the constitution?"

Notwithstanding the arguments of courtiers and partisans,

[1] See Luther v. Borden, 7 How. 1.

who, by sophistry and reasoning, change conquest into succession, or a contract into a submission to a natural lord, the historical fact remains that Charles the Second became king of England by the consent of the English people; likewise William IV. Arguments that a monarchy is stronger to suppress treason, stronger to protect the government, stronger to defend the individual, than a republican form of government, ignore all the eventful incidents in English history recalled by the names of Magna Charta, the Petition of Rights, the commonwealth, the convention parliament that restored the monarchy, the acts of settlement, the execution of Elliot and Stratford, John Hampton and the ship-money tax, and the American Revolution. The whole error of the Tory party in England at the time of the American Revolution consisted in basing the powers of government upon a theory which had no place in their system. The main body of the English people never assented to this view. Citizens of the United States need but refer to the trial of Burr, the attempts of states to secede, the attempts during the civil war to apply the rules of martial or military law to individuals residing in sections of the Union not occupied by either army, the impeachment and trial of President Johnson, and numerous cases arising under the *post-bellum* amendments of the constitution,[1] to assure himself that the framers of our national government established a government of laws and not of men, conceived in wisdom and clothed with power.

Sec. 40. *American Ideas of Government and Allegiance to the King.*— The controversy between the American colonists and Great Britain, and which resulted in their final separation, related entirely to questions of constitutional law.[2]

[1] See Ex parte Milligan, 4 Wall. 2; Johnson v. Jones et al., 44 Ill. 142; Ex parte Yarborough, 110 U. S. 652; Ex parte Virginia, 100 U. S. 340; Ex parte Garland, 4 Wall. 333; Cummings v. State, 4 Wall. 277.

[2] Edward Everett, in an address on the fiftieth anniversary of the Declaration of Independence, said: "The oppressions which aroused them had assumed, in their day, no worse form than that of a pernicious principle. No intolerable acts of oppression had ground them to the dust. They were not slaves, rising in desperation from beneath the agonies of the lash, but free men, snuffing from afar 'the tainted gale of tyranny.' The worst encroachments on which the British ministry had ventured might have been borne consistently with the practical enjoyment of many of the advantages resulting from good government. On the score of calcula-

The questions arose in a threefold aspect: *First.* The nature of the bond between the subject and the crown, involving the extent of the king's prerogative. *Second.* The nature of the modes of acquisition by which the subjects had acquired the territory embraced within the boundary of the several colonies. Upon this depended the question as to whether the colonists were entitled to the privileges and immunities of the common law as colonists, or whether they occupied the servient position of a conquered people. *Third.* Really depending upon and involved in the second, the right of the British parliament to legislate for the colonists, or to bind them by legislation.

These questions, it will be seen, relate to two entirely distinct branches of governmental authority, viz.: the king as king, and the parliament as the great legislative body of the kingdom.

The question of religious toleration dropped entirely out of view[1] in this struggle, to re-appear and reach its final solution at the hands of American statesmen.

tion alone, that generation had much better have paid the duties on glass, painters' colors, stamped paper and tea than have plunged into the expenses of the Revolutionary war. But they thought not of shuffling off upon posterity the burden of resistance. . . . The British ministry, at that time weaker than it had ever been since the infatuated reign of James II, had no knowledge of political science but that which they derived from the text of official records. They drew their maxims, as it was happily said of one of them, that he did his measures, from the file. They heard that a distant province had resisted the execution of an act of parliament. Indeed! and what is the specific in case of resistance? A military force — and two more regiments were ordered to Boston. Again, we hear that the general court of Massachusetts Bay has taken counsels subversive of the allegiance due to the crown — a case of a refractory corporation. What is to be done? First try *mandamus;* and, if that fails, seize the franchises into his majesty's hands. They never asked the great questions, whether nations, like man, have not the principles of growth; whether Providence has assigned no laws to regulate the changes in the condition of that most astonishing of human things, a nation of kindred men. They did not inquire, I will not say whether it was rightful and expedient, but whether it were practicable, to give law across the Atlantic to a people who possessed within themselves every imaginable element of self-government." Am. Oratory, pp. 452, 453.

[1] Mr. Justice Wilson says: "The doctrine of toleration in matters of religion, reasonable though it certainly is, has not been long known or acknowledged. For its reception and establishment, where it has been received and established, the world has been thought to owe much to the inestimable writing of the cele-

The colonists freely subscribed to the doctrine of allegiance to the person of the king. They not only admitted, but insisted, that they were British subjects and entitled to all constitutional rights of Englishmen. They claimed the common law as a birthright, and submitted to certain regulations which had always been classed under the head of the king's prerogative, wherein he was regarded as the arbiter of commerce. As constitutional rights they claimed all of those protected by the great constitutional charters guaranteeing liberty, and in that word was embraced the idea of self-government so far as the same was expressed by the time-honored principle that taxation and representation were inseparable, and the idea that a tax was a grant and a gift by the person taxed.

The Navigation Act of the Cromwellian period, passed in 1651, is of peculiar interest. Blackstone says: "But the most beneficial statute for the trade and commerce of these kingdoms is that Navigation Act, the rudiments of which were framed in 1650, with a narrow, partial view, being intended to mortify our own sugar islands, which were disaffected to the parliament and still held out for Charles the Second, by stopping a gainful trade which they carried on with the Dutch, and at the same time to clip the wings of those, our opulent and aspiring neighbors. This prohibited all ships of foreign nations from trading with any English plantations without license from the counsel of state. In 1651 the prohibition was extended also to the mother country, and no goods were suffered to be imported into England or any of its dependencies in any other than English bottoms. This act, and many acts subsequently passed of the same nature, were, and professed to be, merely *regulations of commerce*,[1] and were not resisted or con-

brated Locke. To the inestimable writings of that justly celebrated man let the tribute of applause be plenteously paid; but while immortal honors are bestowed upon the name and character of Locke, why should an ungracious silence be observed with regard to the name and character of Calvert? Let it be known that, before the doctrine of toleration was published in Europe, the practice of it was established in America. A law in favor of religious freedom was passed in Maryland as early as the year one thousand six hundred and forty-nine" (1649). 1 Wilson's Works, p. 4.

[1] With this in view it is easy to understand that the states did not consider that they were *surrendering* anything when committing this subject to congress.

sidered illegal in their *object*, although sometimes considered oppressive."

Finally, in 1764, an act was passed *by parliament*, avowing in its preamble that it was for the purpose of beginning a system of revenue to be raised from the colonies.[1]

The colonies protested promptly against the act of 1764, with its preamble; resisted the Stamp Act, and resented the declaratory act, which asserted that "the king and parliament could make laws binding colonies in all cases whatsoever," as a direct menace to their liberties.

"It was not easy to draw the line between laws of trade to which they held themselves subject, and the general legislation of parliament, but they considered it clear that their charters from the crown exempted it from the latter giving it to their own legislatures."[2]

The only theory upon which the jurisdiction of parliament to bind the colonists by legislation could be upheld was to class them as occupying conquered territory.[3]

Sec. 41. *Division of Opinion in England.*— The struggle was not confined to the parties on either side of the Atlantic. In parliament Chatham and Burke vigorously defended the rights of the colonies, while Mansfield and Grenville (prime minister) maintained the supremacy of parliament.

The first arguments, led by Chatham on one side and Mansfield on the other, took place in January, 1766. Chatham distinguished between *internal taxation* and *commercial regulations*, and maintained that from immemorial custom, and from the fact of the existence of legislatures in the colonies and the lack of representation in parliament, together with the idea that taxes were grants from the people, it must follow that taxes could constitutionally be levied upon the colonies only by a legislative act of their own.[4]

[1] This act was claimed to be directly in the teeth of the *Confirmatio cartarum*, which lies at the basis of the principle allowing taxation only by representation.

[2] Massachusetts State Papers, 351; Johnson, Lessee, v. M'Intosh, 8 Wheat. 570–597.

[3] The question of the extent of the legislative power of parliament as directly applied to the colonies is discussed more fully than elsewhere by Mr. Justice Wilson. His discourse on that subject, with the observation of the author appended as notes thereto, is found in 2 Wilson's Works (last ed.), 505 et seq.

[4] See also Johnson, Lessee, v. McIntosh, 8 Wheat. 510–597.

Lord Grenville affected to be unable to make the distinction, and relied upon the Navigation Act and subsequent acts of that character.

Lord Mansfield also denied any distinction between external and internal taxation, claimed that the colonies were *virtually* represented in parliament, and classified the colonies into three kinds, viz.: the charter colonies, the proprietary governments, and the king's colonies. These debates resulted in the repeal of the Stamp Act and the passage of the declaratory act just mentioned.

Sec. 42. *Blackstone's Novel Position.*— It must be remembered that volume 1 of the Commentaries, which contains a discussion of the character of the colonies and powers of parliament in reference to them, was published in November, 1765, and also that Lord Mansfield was a patron of Blackstone. The similarity of the doctrines of Mansfield and Blackstone suggests the query as to whether Mansfield was following Blackstone, or Blackstone was quoting the opinion of his influential friend. An examination discloses that Blackstone re-edited volume one in 1766, within a year from its first publication; and while in the first edition there was nothing on this subject which would seriously have incensed an American reader, although he clearly erred in claiming the colonies as occupying conquered territory — the significance of which was that the inhabitants of conquered territory could not claim the rights of constitutional representation as a part of the common law,— the subject was entirely changed in the second edition to conform to the opinion of Mansfield and the predominant ministry in England. To be specific, volume 1, pages 101, 107, 108 and 109 of subsequent editions, show changes at page 101 that subordinate dominions may be bound by parliamentary laws; practically the whole of page 101 being added. Page 107 is changed so as to restrict the colonies to the English constitution as it stood at the time of Elizabeth and James, and holding them subject to the regulation of parliament in matters of property, of police and of revenue, and that parliament might new-model their whole constitution. That the common law of England, as such, had no authority in the colonies, and that they were subject to the control of parliament. He classified the colonies into provincial establishments, proprietary govern-

ments and charter governments. They are denominated as "Our more distant plantations in America."[1]

"Studies," said Mr. Burke, in commenting upon the education of the people of the colonies in his speech advocating conciliation with America in 1775, "studies pass into habits," and as the Commentaries of Blackstone is still frequently the first book placed in the hands of the American student, we are interested in the fact that the first volume of Blackstone, as it now reaches the hand of the student, contains views of the law which were *diametrically opposed to the principles of the constitution of Great Britain* as understood by our ancestors; in fact, as we shall see further on, the Commentaries express views as to the definition and nature of law and government which are not only directly in conflict with the principles accepted in America, but which are now obsolete,[2] or entirely repudiated in England, as either founded in error or maintained for political reasons."[3]

Sec. 43. *Reason for Renouncing Allegiance.*—We have now arrived at a period in our examination as to the nature and progress of law and government when our attention must shortly be directed to a minute analysis of the laws of the United States; but before entering upon that subject we should understand the nature of the government of England as it existed at the period of the American Revolution, for the reason that our ancestors were subjects of that government, rendering cheerful allegiance to the king, and agreed fully with Montesquieu, as quoted by Blackstone, "that the English was the only nation in the world in which political or civil liberty was the direct end of its constitution." They renounced their allegiance to the king (they owed it to no one else) because of many arbitrary acts committed by him, and finally because he "*combined with others* (parliament) to subject us to a jurisdiction foreign to our constitution and unacknowledged by our laws by giving his assent to their (parliament's) acts of pretended

Against this, see Johnson v. McIntosh, 8 Wheat. 574; Martin v. Waddell, 16 Pet. 403; Canal Com. v. People, 5 Wend. 445; Mayor v. Hart, 95 N. Y. 450; Gould on Waters, p. 67.

[2] Broom & Hadley, Com., p. 1; Ham. Black., Int., p. 277.

[3] Stockdale v. Hansard, 1 Ad. & El., p. 1 (36 E. C. L. 1), opinion of Coleridge, J., pp. 119, 121; Denman, C. J., p. 70.

legislation."[1] Parliament and the king were exercising such powers only as Blackstone teaches to be constitutional.

Sec. 44. *The Executive Power as Expounded by Blackstone.* First let us notice the character and prerogatives of the king as pictured by Blackstone. "The prerogative," he says, "is limited by bounds so certain and notorious that it is impossible he should mistake or legally exceed them without the consent of the people,[2] or without a violation of that *original contract* which in all states impliedly, and in ours (England) most expressly, subsists between the prince and the subject.[3] The feudal idea of a personal allegiance remained, with the notion that by that contract the king was in some mysterious way clothed with a peculiar, extraordinary, regal power and dignity.[4] His first attribute was sovereignty or pre-eminence, with certain attributes of a great and transcendent nature, by which the people are led to consider him in the light of a superior being, and pay him that awful respect which may enable him, with greater ease, to carry on the business of government.[5] He had the right of dealing with foreign nations, of making war and peace, and, by his fiat, out of a kitchen scullion he could create a peer of the realm,[6] much as Charles the First ruined Thomas Wentworth, at the same time transforming his nature from a strong supporter of Hampton and Elliott and the Petition of Rights into a fitting prime minister of a despot. He could establish ports,[7] regulate commerce,[8] was the head of the church as well as state,[9] and had many more prerogatives relating to his revenue; but the power of taxation, annual and perpetual, levying customs and duties was in the House of Commons by their gift and grant.[10] The king was also the fountain of honor and justice."

Sec. 45. *The Legislative Power of Parliament.*—Having taken this glance at the *sovereign king*, let us see the parliament, as described by the same hand. "The power and jurisdiction of parliament," says Sir Edward Coke, "is so transcendent and absolute that it cannot be confined for causes or persons

[1] Declaration of Independence.
[2] Vol. 1, p. 141.
[3] Id., p. 237.
[4] Id., p. 239.
[5] Id., p. 241.
[6] 2 Black. Com., p. 240.
[7] Id., p. 264.
[8] Id., p. 273.
[9] Id., p. 280.
[10] Id., pp. 307, 308, 313, 314.

within any bounds."[1] The quotation from Coke omits this important qualification between the words "parliament" and "it:" "for making of laws and proceeding by bill." This is clearly pointed out by Judge Wilson to mean nothing more than as Coke puts it, that parliament is the *supreme legislative* authority.[2] "Parliament hath *sovereign* and uncontrollable power in *making* . . . and *expounding* of laws concerning matters of all possible denominations. This being the place where that absolute despotic power, which must in all governments reside somewhere, is intrusted by the constitutions of these kingdoms."[3] "Sovereignty and legislature," he had said in connection with his definition of law, "are indeed convertible terms.[4] Parliament can remodel the succession, alter the established religion; the king was the head of the church, but parliament could change and create afresh the constitution of the kingdom and of parliament themselves; in short, do anything not naturally impossible. The power of parliament is absolute and without control.[5] As a high *court, parliament* hath its peculiar law, the *lex et consuetudo parliamenti;* a law which is *ab omnibus quaerenda a multis ignoranta a paucis cognito.*[6] The maxims and rules of their proceeding are not defined and ascertained by any particular stated laws.[7] The privileges of parliament are likewise very large and indefinite. The dignity and independence of the houses are, in great measure, preserved by keeping their privileges indefinite."[8]

This is sufficient to denote the two branches of sovereign powers in England: the one, a sovereign whose authority is limited and circumscribed by definite boundaries; the other, absolute and uncontrolled, expressly asserting the possession of a law unto itself. This was the doctrine accepted and acted upon at the time by the war party, although it has finally been shown to have been an error by the decision in the case of *Stockdale v. Hansard*, where the whole doctrine, as laid down by Blackstone, is entirely wiped away.

Lord Chief Justice Denman, in his opinion in that case, said

[1] Id., p. 160.
[2] 1 Wilson's Works, 164.
[3] 1 Black. Com., p. 160. This principle is denied and repudiated by Coleridge, J., Stockdale v. Hansard, 9 A. & E. 1 (36 E. C. L. 119) [1838].
[4] 1 Black. Com., p. 46.
[5] Id., p. 162.
[6] Id., p. 163.
[7] Unfounded. Hansard v. Stockdale, *supra*, Patterson, J.
[8] 1 Black. Com., p. 164.

of an opinion of Blackstone of that time, that "his remarks on the state of public feeling rather evinces the spirit of a political partisan than the calmness and independence which becomes the judicial seat. We know now, as a matter of history, that the House of Commons was at that time engaged in unison with the Crown in assailing the just rights of the people."[1]

Coleridge, J., in the same case, said: "No lawyer, I suppose, now supports the doctrine of Blackstone that the dignity of the Houses and their independence are in a great measure secured by keeping their privileges indefinite."[2]

Sec. 46. *The Science of Government in America.*— We may now turn from the old world to the new, and examine what progress the science of law and government has made in America, for at that time it existed only as a science. The government was still in control of the despotic power so vividly described by Blackstone, and apparently consisted in nothing else than the art of maintaining supremacy. John Adams, in 1755, though scarce twenty years of age, wrote to a friend as follows: "Be not surprised that I am turned politician. This whole town is immersed in politics. The interests of nations and all the dira of war make the subject of every conversation." In 1765 he published a dissertation of Canon and Feudal law, "whose object," says Webster, "was to show that our New England ancestors in coming to America were actuated by the desire to deliver themselves from the power of the hierarchy, and from the monarchial and aristocratical political systems of the other continent, in which he urges earnestly the necessity of diffusing general knowledge, and calls on the people to study and understand their rights and privileges, and makes use of this very advanced sentiment, that they (the people) have a right to that most dreaded and envied kind of knowledge,—I mean of the character and conduct of their rulers. Rulers are no more than attorneys, agents and trustees of the people, and if the cause, interest and trust is betrayed or trifled away, the people have a right to revoke the authority they themselves have deputed."[3]

In January, 1775, Lord Chatham, in a speech favoring the removal of the troops from Boston, said, referring to papers

[1] 36 E. C. L. 70.
[2] 36 E. C. L. 121.
[3] Webster's Speech on Adams and Jefferson.

transmitted from the American congress, "that for solidity of reasoning, force of sagacity and wisdom of conclusion, under such a complication of difficult circumstances, no nation or body of men can stand in preference to the general conference at Philadelphia." A few months later, Mr. Burke, probably the most learned man in the kingdom upon the subject, speaking in favor of conciliation with America, and referring to the education of the people of the colonies, said: "In no country, perhaps, in the world is the law so general a study; the profession itself is numerous and powerful, and in most provinces it takes the lead. The greater number of the deputies sent to congress were lawyers; but all who read, and most do read, endeavor to obtain some smattering in that science. I have been told by a book-seller that in no branch of his business, after tracts of public devotion, were so many books as those on the law exported to the plantations. The colonists have now fallen into the way of printing them for their own use. I hear that they have sold *nearly as many*[1] of Blackstone's Commentaries in America as in England." He quotes from a report of General Gage, "that all the people in his government are lawyers or smatterers in law, and that in Boston they have been enabled, by successful chicane, wholly to evade many parts of one of your capital penal constitutions."

Panegyrics on the constitution are frequent, and often extravagant, but the observations of Professor Bryce, both as to the character of the work accomplished by its framers, and the sources from which they drew, are worthy of repetition. He says: "Yet, after all deductions, it ranks above every other written constitution for the intrinsic excellence of its scheme, its adaptation to the circumstances of the people, the simplicity, brevity and precision of its language, its judicious mixture of definiteness in principle with elasticity in details. One is therefore induced to ask, before proceeding to examine it, to what causes, over and above the capacity of its authors and the patient toil they bestowed upon it, these merits are due; or, in other words, what were the materials at the command of the Philadelphia convention for the achievement of so great an enterprise as the creation of a nation by means of an instrument of government. . . . The men of the convention had

[1] Hammond quotes him as saying *more*.

the experience of the English constitution. That constitution, very different then from what it is now, was even then not quite what they thought it. Their view was tinged not only by recollections of the influence exercised by George the Third, an influence due to *transitory causes*, but which made them overrate its monarchial element, but also by the presentation of it which they found in the work of Mr. Justice Blackstone."[1]

Sec. 47. *United States a Leader in the Science of Government.* Framers of the constitution of the United States had approached the task of framing a national constitution with an equipment for such work which scarcely could have been gained in any other manner than that afforded them by the experiences of the decades which intervened between the time when the natural alliance between the colonies transpired and the time when it became apparent to all that the confederation between the states lacked entirely the national character.

The habit of study which was a peculiar result of the policy of the colonists, their spirit of free and independent investigation of the circumstances upon which for nearly a quarter of a century the very existence of their civil liberties depended, the right solution of the questions of political science, rendered the investigation of political science imperative, practical and thorough.

The builders of the nation were thoroughly alive to the dignity of the position, the magnitude of their undertaking, and the probable effect of their experience upon the nations of the world.[3]

[1] Bryce, Am. Com., vol. 1, pp. 25, 26. It is the false light in which he presents fundamental principles which renders the first book of the Commentaries objectionable as a first book.

[2] Mr. Justice Wilson, in his opening lecture before referred to, said: "The foundations of political truth have been laid but lately; the genuine science of government, to no human science inferior in its importance, is indeed but in its infancy, and the reason of this can be easily assigned. In the whole annals of the Trans-Atlantic world, it will be difficult to point out a single instance of its legitimate institution. I will go further, and say that among all the political writers of the Trans-Atlantic world it will be difficult to point out a single model of its unbiased theory." 1 Wilson's Works (last ed.), 20, quoted by Simeon Baldwin in address to American Bar Association (1889).

[3] Mr. Wilson said in the Pennsylvania convention of 1787: "By adopting this constitution we shall become a nation; we are not now one. We shall form a national character; we are now dependent on others." He proceeded with a remarkable prediction of the influence which American freedom would exert upon the Old World. Elliot's Debates, vol. II, p. 526.

Many of these great reformers were singularly happy in witnessing the successful accomplishment of their designs and partaking of the blessings which they had hoped only to bequeath to their posterity. Succeeding generations have not failed to accord to them the full measure of praise, and foreign nations have felt the reflex influence of American institutions until one may almost say of the American people in regard to political and public questions as was said of Rome in regard to her system of private law, that "America holds dominion over the civilized world by the silent empire of her laws." Of this happy circumstance Judge Cooley says: "In matters of government, America has become the leader and the example for all enlightened nations. England and France alike look across the ocean for lessons which may form and guide their people. Italy and Spain follow more distantly; and the liberty-loving people of every country take courage from American freedom, and find augury of better days for themselves from American prosperity. But America is not so much an example in her liberty as in the covenanted and enduring securities which are intended to prevent liberty degenerating into license, and to establish a feeling of trust and repose under the beneficent government whose excellence, so obvious in its freedom, is still more conspicuous in its careful provision for permanence and stability."

Sec. 48. For over a century America has maintained its isolation from entanglements seemingly necessary to European powers. A decade since, Professor Bryce contrasted her position in this regard with the condition of the European nations, and said of her: "America lives in a world of her own, *ipsa suis pollens opibus, nihil indiga nostri.* Safe from attack, safe even from menace, she hears from afar the warring cries of European races and faiths, as the gods of Epicurus listened to the murmurs of the unhappy earth spread out beneath her golden dwellings. *Sejuncta a rebus nostris semotague longe.*"

PART I.

THE LAW OF PERSONS.

(*Unus homo sustinet plures personas.*)

PERSONAL RELATIONS.

CHAPTER II.

ANALYSIS OF AMERICAN LAW.

Sec. 49. *The Use of Words.*— The student of American law encounters at the outset of his course difficulties which are perhaps more perplexing and less easy for him to solve than any he will encounter during the progress of his studies. These are the selection of what to read, for the most of his knowledge must be gained from books; the method of study, for his education will depend largely upon the methods of study employed; and lastly, but by no means the least perplexing of them all, the nomenclature of the law.

The determination of what to read and the methods to be pursued are generally and properly left to the decision of those who, as preceptor or professor, guide the steps of the beginner; but the mastery of the language of the law must of necessity be the work of the student.

Writing of jurisprudence from the American standpoint, and of American municipal law for the specific purpose of presenting a clear view of its rudiments and elementary principles, it is well to begin the work by directing attention to the importance of acquiring the habit of an accurate comprehension of the words which will be constantly made the medium of expressing ideas.

The first right of every system, says Sir Frederic Pollock, "is to be judged in its own field, by its own methods, and by its own work; it cannot be seen at its best, or even fairly, if its leading conceptions are forced in conformity with an alien method." Again the same learned jurist says: "We now realize that the laws of every nation are determined by their own historical study, not only as to details but as to structure, and if we fail to attend to this, we cannot duly appreciate the system as we find it at a given time."

These expressions suggest clearly enough that every particular system of municipal law will naturally have certain fun-

damental principles peculiar to itself, while at the same time it constitutes in its institutions a part of general jurisprudence.

The student of any particular system of law soon perceives that many of the rules of law, and many of the principles upon which these rules depend and from which they flow, are derived from more ancient systems, and are expressed in the language of another age.[1]

These observations are sufficient to enforce upon the attention of the beginner the importance of a correct conception of words.

Sec. 50. *The Utility of Definition.*— "The use of words is to express ideas;"[2] but how shall ideas be accurately expressed unless apt words be chosen?

Lest the writer seem to assume the *rolé* of critic at the outset, he will, on the subject of the most prevalent fault of writers and speakers, in the careless use of leading terms, quote the language of another:

"Of all the fallacies to which the political writers are addicted, the most common, and at the same time most serious, is the fallacy of *petitio principii*, or of the illegitimate assumption of first principles. The most usual and formidable form of this fallacy is that of using question-begging terms, which consists either in including in the formal definition of a term some improved assumption, as being of the essence of the conception denoted, or — without including such assumption in the formal definition — by using the term as though such assumption were implied. By this method the propositions from which our conclusions are to be deduced, instead of being proved, as they ought to be, are unconsciously imbibed by the mind with the definition, or with our conception of the term, and the conclusions thus in effect assumed."[3]

Upon the same subject Wilson says: "It may, perhaps, be expected that I should begin with a regular definition of law.

[1] See Lyle v. Richards, 9 S. & R. 343–356.

[2] Federalist, No. 37. "Men imagine," says Bacon, "that their reason governs words, whilst in fact words react on the understanding, and this has rendered philosophy and the sciences sophistical and inactive. Hence the great and solemn disputes of learned men, often terminating about words and names, in regard to which it would be better to proceed more advisedly in the first instance, and to bring such disputes to a regular issue by definition." Bacon's Works, vol. III, p. 349.

[3] Smith's The State, 50, 51.

I am not insensible of the use, but at the same time I am not insensible of the abuse, of definitions. In their very nature they are not calculated to extend the acquisition of knowledge, though they may be well fitted to guard the limits of that knowledge which is already acquired. By definitions, if made with accuracy — and consummate accuracy ought to be their indispensable characteristic,— ambiguities in expression, and different meanings of the same term — the plentiful sources of error and of fallacy in the reasoning art — may be prevented; or, if that cannot be done, may be detected. But, on the other hand, they may be carried too far, and, unless restrained by the severest discipline, they may produce much confusion and mischief in the very stations which they are placed to defend. You have heard much of the celebrated distribution of things into *genera* and *species*. On that distribution, Aristotle undertook the arduous task of resolving all reasoning into its primary elements; and he erected, or thought he erected, on a single axiom, a larger system of abstract truths than were before invented or perfected by any other philosopher. The axiom from which he set out, and in which the whole terminates, is, that whatever is predicated of a genus may be predicated of every species contained under that genus, and of every individual contained under every such species. On that distribution, likewise, the very essence of scientific definition depends; for a definition, strictly and logically regular, "must express the genus of the thing defined, and the specific difference by which that thing is distinguished from every other species belonging to that genus."

From this definition of a definition, if I may be pardoned for the apparent play upon the word, it evidently appears that nothing can be defined which does not denote a species, because that only which denotes a species can have a specific difference.[1]

With these suggestions in mind, the least instructed will be able to perceive that he must, from the very outset, be on the alert to detect the present meaning of old words, and to distinguish the difference in the meaning between so-called synonyms. He will soon perceive that there are very few real synonyms in the vocabulary of the lawyer.

[1] 1 Wilson's Works (last ed.), pp. 50, 51.

Until the habit of the exact use of words is acquired, and the faculty of differentiation is cultivated, the student need expect little progress, and the law will seem "the lawless science of our law, that codeless myriad of precedents, that wilderness of single instances," which Lord Tennyson speaks of.

Sec. 51. *Utility of Analysis.*— One of our great teachers wrote that "whoever finds the main outlines of the law left obscure is almost certain to neglect them, and content himself with learning the practical rules that he can commit to memory, without any effort to understand them. He thus increases greatly the amount of labor before him, if he does not preclude himself from ever mastering the law as a system. It is worth any amount of time and trouble . . . to make general principles plain."[1]

Dr. Holland says: "The ever-renewed complexity of human relations calls for an increasing complexity of legal detail, till a merely empirical knowledge of law becomes impossible. The evil has been partially remedied by the formation of codes, by means of which legislators, more or less imbued with legal principles, have grouped the legal chaos under *genera* and *species*. But an uncodified system of law can be mastered only by the student whose scientific equipment enables him to cut a path for himself through the tangled growth of enactment and precedent, and so to codify for his own purposes. In this as in other departments of knowledge, the difficulty of the subject is due less to the multiplicity of its details than to the absence of general principles under which those details may be grouped. In other words, while legal science is capable of being intelligently learned, isolated legal facts are capable only of being committed to memory."[2]

Sir William Jones, in a work which gives a practical application of his theory, says:

"The great system of jurisprudence, like that of the universe, consists of many subordinate systems, all of which are connected by nice links and beautiful dependencies; and each of them, as I have fully persuaded myself, is reducible to a few plain elements, either the wise maxims of *national policy* and *general* convenience, or the *positive* rules of our forefathers,

[1] Hammond's Blackstone, Preface, xix.

[2] Holland's Jurisprudence, p. 1.

which are seldom deficient in wisdom or utility. If law be a science, and really deserve so sublime a name, it must be founded on principle and claim an exalted rank in the empire of reason; but if it be merely an unconnected series of decrees and ordinances, its use may remain, though its dignity be lessened, and he will become the greatest lawyer who has the strongest habitual or artificial memory."[1]

Legal analysis as a practical help to the legal scholar proceeds upon the idea that, wherever reason and logic are allowed to act, the memory is relieved, and that by an orderly system the mind may grasp, retain and reproduce on occasion what would otherwise be impossible to one with an ordinary memory.

Sec. 52. *Practicability and Difficulty of Analyzing Our Law.* "All jurists agree that we are indebted to the Romans for the beginning of the scientific treatment of the law,[2] the development of which we have had under examination somewhat in a former chapter.

Jurisprudence is, in the Institutes, defined to be "the knowledge of things divine and human, the science of the just and the unjust."[3] Since that definition was formulated, the meaning of the word "jurisprudence" has gone through several mutations, until now it has come to signify to us merely the science of human law, and to include within it everything within the domain of law.[4] The remark of Sir William Jones, "That if law is a science it must be founded on principle," is obviously true, or law is simply an art.[5] Being founded upon principle, and being also a science, the rules of law must be susceptible of some logical arrangement, and that arrangement must be the result of analysis. There never was a time when so much pains should be taken to arrange and simplify the statement of the law. A constant recurrence to fundamental principles is the only way to preserve the integrity of the system or to obtain an enlightened knowledge of it.

Lack of Attention to Method in Text-books.— We have many text-books which are methodically arranged, nevertheless it is

[1] Jones on Bailments, p. 144, cited in Heron on Jurisprudence, 57.

[2] See also Holland's Jurisprudence, pp. 2, 3; 1 Stephen's Com., xi.

[3] Institutes, lib. 1, tit. 1.

[4] Heron on Jur., 66; 1 Austin on Jur., 176.

[5] Jones on Bailments.

equally true that, as yet, there has never been accomplished a tolerably fair arrangement of the whole body of American law.[1] As a consequence a confusion has crept into our text writings; for instance, one writer takes for the title of his work "Constitutional Law." We are led at once to inquire what will be the subjects embraced within that volume and what will be excluded. Our constitutions relate to governmental relations and also protect individuals in person and in property; consequently the student may inquire, is constitutional law a distinct branch of the law, and does the prefix "constitutional" indicate what subjects will be discussed? If not, constitutional law is not a significant title-head. We are also aware that the term, as the title of a body of law, is the outgrowth of our written constitution.[2] Another will take the topic-head of "Judgments," and still another of "Estoppel," and a third "Jurisdiction," etc. Now the law of judgments includes one branch of the law of estoppel, and the law of estoppel concerns a portion of the law of judgments. Judgments and estoppel both must relate somewhat to jurisdiction or "due process of law," and due process of law is one of the fundamentals of constitutional law, which is almost equivalent to "the law

[1] See Walker's Am. Law, p. 4. The Institutes of Professor Minor reproduce the outline of English law. There is a reason for this lack of a thoroughly scientific institutional work, and the author conceives it to be this: Until after the Civil War, no analysis which assigned the relative positions of the nation and the state as they are now fixed could have been acceptable, and while so great a question remained a vexed one it was a great impediment to such a treatment.

[2] Dicey, writing of Blackstone's Commentaries, says: "Of constitutional law, as such, there is not a word to be found in his Commentaries. The matters which appear to belong to it are dealt with by him in the main under the head, "Rights of Persons." The book which is thus entitled treats (*inter alia*) of the parliament, of the king and his title, of master and servant, of husband and wife, of parent and child. The arrangement is curious, and certainly does not bring into view the true scope or character of constitutional law. This, however, is a trifle. The book contains much real learning about our system of government. Its true defect is the hopeless confusion, both of language and of thought, introduced into the whole subject of constitutional law by Blackstone's habit — common to all the lawyers of his time — of applying old and inapplicable terms to new institutions, and especially of ascribing in words to a modern and constitutional king the whole, and perhaps more than the whole, of the powers actually possessed and exercised by William the Conqueror." Dicey, Law of the Constitution, p. 7.

of the land." This mode of treatment depends entirely upon the discretion and conception of the individual writer, and is no way controlled by that which is arbitrary and which no discretion can change, viz., the natural relation and dependence of legal subjects.

Methods of Codes.— It has been said that "no code from the Code Theodosian to the Code Civile of Canada has yet been tolerably well arranged. Not one shows any conception of the mutual relations of the great departments of law. Not one is governed by the logical principles of dichotomy,[1] which, though it may not always be visible, yet should underlie and determine the main features of any system of classification."[2] It is not to be understood, however, that Prof. Holland would contend that Gaius' Justinian's Institutes and the analyses of Hale and Blackstone are not controlled by the principles of classification.

Analysis Brings Deformities to the Surface.— Sir James Wilde, in an address before the Social Science Assembly, at

[1] Division of classes into sub-classes.

[2] Holland, Forms of Law, 1870.

Meaning of Codification.— These remarks, applied specifically to a code, apply with equal force to an orderly presentation of the existing law, and to such an orderly presentation, with the legislative sanction added, the term code is applied. So the New York code commissioners, David Dudley Field and others, in their draft of a civil code which never was enacted, say: "All that we now know of the law we know from written records. To make a code of the known law is therefore but to make a complete, analytical and authoritative compilation from these records. The records of the common law are in the reports of the decisions of the tribunals. The records of the statute law are in the volumes of the legislative acts. That these records are susceptible of collation, analysis and arrangement might have been assumed beforehand, even if we had not the proof in our libraries, in digest upon digest, more or less perfect, to which we daily resort for convenience and instruction. The more perfect a digest becomes the more nearly it approaches the code contemplated by the constitution. In other words, a complete digest of our existing law, common and statute, dissected and analyzed, avoiding repetitions and rejecting contradictions, moulded into distinct propositions, and arranged in scientific order, with proper amendments, *and in this form sanctioned by the legislature,* is the code which the organic law commanded to be made for the people of this state. That this was possible was all but proven by what had been already done among ourselves." This conception of the code at the same time and by the same arguments enforces the practicability and utility of analytical treatment of our law. Civil Code, ch. XIV.

York, in 1864, said: "The general principles and broad basis on which our common law reposes, and which tacitly guide the decisions of our courts, should be brought to the surface, grouped together in their relations, and contrasted in their differences. If such a result could be obtained, the vast area covered by the law would present a district set out in order, in place of a tangled thicket; the true bearing of each abstract proposition would stand out plainly, because side by side with others of a similar nature."[1]

Mr. Parsons says:[2] "The grand defect of our law is its inaccessibility; overcome this by giving every barrister the opportunity of knowing the law, and reform becomes feasible. Abuses can then be struck at which are now secure, because no one knows where the aim should be directed; but when the discordant decisions have been harmonized, when unsound principles have been expurgated, and when the various departments of law have been regulated, grouped and subordinated, reform is fairly begun." While we are all perfectly agreed upon these propositions, we are also aware that a vast amount of painstaking study is involved in the accomplishment of the design.

Sec. 53. *The Method to be Pursued.*—It is conceived, also, that in a scientific arrangement of the law, a rule arbitrarily belongs in a certain place in the analysis, and in but one place, and, when completed, a glance at the analysis inevitably leads the inquirer to the location of the principle. The subject may be demonstrated thus, taking Blackstone's Analysis as the illustration: He says he made it his first endeavor to mark out a plan of the laws of England, so comprehensive as that every title might be reduced to some or other of its general heads.[3] In his Commentaries he fills up that analysis by stating a rule of law, and commenting upon its origin, growth and change, and giving illustrations of its application in decisions. In pursuing this plan he states under a particular head the rules applicable to a subject, without any regard to whether the source of the rule was a statute of parliament, a custom of the country,

[1] Essays on Legal Topics (Parsons, 1875).

[2] Lecture before University of Pennsylvania, published in 1875, title "Essays on Legal Topics."

[3] Preface to Analysis, p. 4.

a constitutional document like Magna Carta, or was simply evidenced by some legal decision[1] which was itself based upon reason and supposed policy.[2]

The Principal Heading for the Outline.— It is obviously necessary that some term be selected which is the basis of the analysis, so comprehensive that every subordinate subject may be embraced within this general head; and here it is proper to remark that in the discussion of a legal subject, as well as any other, each word used should be selected with a natural appropriateness of the term used to convey the desired idea. We must also bear in mind that there is a mutation in language, as there is a development of thought and language, as the vehicle of thought must, to keep pace with the progress of thought, either invent new words or ascribe a new meaning to the old ones.

New Meaning of Old Words.— Throughout the nomenclature of the law will be found words which have come down to us from the Roman or Saxon period, or some intervening time, but the meaning which now attaches to that word may, and quite frequently does not, correspond to the meaning which was given to it originally.[3] The body of the law which we are to analyze was framed by men of bold conceptions and upon new lines. The statement of Madison is quite true, "that had no important step been taken by the leaders of the Revolution for which a precedent could not be discovered, no government established of which an exact model did not present itself, the people of the United States would, at this moment, have been numbered among the melancholy victims of misguided counsels; must at best have been laboring under the weight of some of those *forms* which have crushed the liberties of the rest of mankind. Happily for America, happily, we trust, for the whole human race, they pursued a new and more noble course. They accomplished a revolution which has no parallel in the annals

[1] Black., p. 68; Analysis, ch. 2, sec. 3.

[2] Such, for example, as Coggs v. Bernard (1704), Lord Raymond, 909; s. c., 1 Sm. L. C. 369; s. c., Great Opinions by Great Judges, 40; s. c., Laws L. C. Simp. 194; s. c., Shir. L. C. 41 — the great case in which Lord Holt elucidates the law of Bailments. This is a case which the student must read; in which the practicing lawyer will find the learning on the degrees of negligence, which has opened up such a field of law.

[3] See Holland, Jur., 3, 4.

of human society. They reared the fabrics of governments which have no model on the face of the globe."[1]

The matter is more plainly put and more directly applied to the subject in hand in the opinion to which we have before referred.[2] "It is hardly possible to make any innovation in our philosophy concerning the mind and its operations without using new words and phrases, or giving a different meaning to those that are received. With equal propriety may this solid remark be applied to the great subject, on the principles of which the decision of this court is to be founded. The perverted use of *genus* and *species* in logic, and of *impressions* and *ideas* in metaphysics, have never done mischief so extensive or so practically pernicious as has been done by '*states*' and '*sovereigns*' in *politics* and *jurisprudence;*[3] in the politics and jurisprudence even of those who wished and meant to be free. In the place of those expressions I intend not to substitute new ones; but the expressions themselves I shall certainly use for purposes different from those for which they have hitherto been frequently used."[4]

Sec. 54. *Jurisprudence Defined.*—We have seen the definition of jurisprudence as given by the Romans. The word "jurisprudence" has been in constant use since then, but it has now a meaning quite different from the idea originally expressed by the word.[5] It has been frequently defined, "Jurisprudence is the science of positive law, the art of legislation, and the practice of law."[6]

"The science of compulsory law with their reasons and sources combined with their philosophy and history. The simple knowledge of laws without these lacks the scientific requisite of jurisprudence."[7]

"As a science, jurisprudence is analytical; that is to say, it deals with the various relations which are regulated by legal rules, rather than with the rules themselves, abstractly speaking."[8]

[1] Federalist, No. 14.
[2] Chisholm v. Georgia, 2 Dall. *419.
[3] Wilson, J., Chisholm v. Georgia, 2 Dall. *454.
[4] See Tennessee v. Davis, 100 U. S. 263; 1 Ham. Black. 137–141
[5] Holland on Jurisprudence, p. 4.
[6] Heron on Jurisprudence, p. 66; Austin's Jurisprudence, vol. 1, p. 176.
[7] Mackeldy's Roman Law, p. 3.
[8] Holland's Jurisprudence, p. 5.

We regard jurisprudence as a science which embraces not only a view of positive law and government as they exist in any particular system, but embraces the theories upon which private rights depend, and upon which governments and nations are builded. It bears "very intimate relation to the progress of civilization, and the study of one must embrace the other."[1] It is not the same as moral philosophy, although moral philosophy is one of the basic principles of jurisprudence. It is a broader term than political science in this: that jurisprudence must descend to and treat specific rules of private right.

Inasmuch as some definite limits must be set to this limitless subject, for our purposes, jurisprudence may be regarded as a practical rather than a metaphysical science, and as bounded by the terms the science of law and government, and confined in application to human laws. It is, however, a historical science, and consequently not confined to an investigation merely of what is the law, but what its development has been, and why and how existing things came to be. Law cannot be treated intelligently apart from jurisprudence. Jurisprudence is not a practical science apart from law. Jurisprudence may not be apparent on the surface of a legal treatise, but should pervade and control the arrangement and treatment of legal subjects.

There being no authoritative tribunal to fix the meaning of this word, it must be left to each author to state his conception of the subject, and in this treatise it is not proposed to treat jurisprudence abstractly, but to use the science in connection with the system of municipal law which obtains in the United States. The jurisprudence with which we deal is jurisprudence applied, the practical science of law which gives order and homogenousness to the *corpus juris* of the United States.

Sec. 55. *The Principle of Legal Analysis.*— It is necessary at the outset to discover the principle lying at the basis of all legal analysis. That principle, so far as it has been applied to any feasible attempt at classification or arrangement, is that the rules of law are to be classified according to the subject-

[1] For example, see Gibbon's Decline and Fall, ch. 44, and the four hypothetical conditions of the people as marking the progress of civilization.

matter of the rule of law, or, as we may otherwise put the same idea, laws are to be arranged according to the objects to which they relate. This principle is noticed by several men of note.[1] Upon a matter of such importance as the fundamental principle upon which to build the whole structure, we cannot take the opinion of any one as authority, but must discover the principle by an investigation for ourselves, which will enable us the better to appreciate and understand it; and in this instance it will be no unprofitable employment to examine such analyses as have been made of other systems, for the underlying principles of arrangement will be the same. And this is true, not so much because any of them have had any influence upon the form of our own institutions as that the influence of the arrangement of Blackstone's Commentaries upon the minds of most of those who have entered the profession, by reason of their very general use among American students, has clung to them, and may be said to have formed an obstacle in the way of a perfect understanding of our system; and it may not be going too far to say the universal use and deference which has been paid to the Commentaries upon the Law of England has formed an obstacle in the way of an arrangement of our system, better adapted to the real form of American institutions; for no matter how well it was adapted in its day, and to the laws of England as maintained by the Court party at St. James in 1766, it was never fitted to inculcate the principles of American law, or of the English constitution as understood by our ancestors.

Sec. 56. *Classification of the Roman Law.*— Gaius, the most celebrated jurist of Rome, said: "That all laws relate to persons,[2] to things, or to actions." No great use was made of these principles in the Roman *code* or *pandects*, and it is apparent to any one who gives that body of laws close examination that those books have not been arranged in conformity with these principles.[3] While the divisions pointed out by Gaius are observed, the external arrangement of the law of Rome was never made to conform to this internal arrangement.[4]

[1] Bowyer, Com. on Civil Law, ch. 8; Mackeldy's Roman Law, p. 117, sec. 124; Austin's Jurisprudence, 761.

[2] *Persona*, i. e., condition or status.

[3] 1 Stephen's Com., p. xi.

[4] Sanders' Justinian, Introduction, p. 24.

Sec. 57. *Method of the Institutes.*— The greatest application of the principles and the nearest approach to system is found in the arrangement of the Institutes,[1] which was a work designed for the use of students, and meant to give an outline or introduction to the laws of Rome as found in the Code and the Digest. Judge Tucker truly remarked that in arbitrary governments questions concerning the constitution rarely occur, and are still more rarely discussed, and hence in such governments the study of the law merely as a profession does not seem necessarily to require the study of the constitution; the former being limited to such controversies between individuals as do not involve in them any question of the authority of the government itself, and the latter being supposed to be a theme too exalted for the comprehension of the private individual, and as such discouraged and neglected.[2] This is undoubtedly the reason why the arrangement and discussion of the Institutes does not embrace the relation of magistrate and people.

The following, taken from Spence's "Equitable Jurisdiction," shows sufficiently the arrangement of the Institutes: "The laws of the Romans may be classed under five general divisions: *First.* Those which concern the distinctions of persons and the relations which existed between individuals. *Second.* Those which related to property or things. *Third.* Those which related to the rights of individuals in respect to their transactions with others, and to the claims arising from the conduct of individuals one to another, or the laws relating to obligations. *Fourth.* Those which related to the enforcing by legal means the rights and claims of individuals, or the laws which concerned the machinery of actions. *Fifth.* The laws relating to public offenses."

Sec. 58. *Blackstone's Disposition of these Subjects.*— A comparison of this analysis of Roman law with Blackstone's analysis of English law shows that Blackstone has reproduced, in his Commentaries, all excepting the third division. The first division, under "Rights of Persons" (book 1); the second division, under "Rights of Things" (book 2); the fourth division,

[1] The Institutes of Gaius are referred to as such; those of Justinian are universally cited as the Institutes.

[2] Preface to Tucker's Black., xvi.

"Of Actions and Defenses of Actions" (book 3), under the head of "Private Wrongs;" and the fifth division, in book 4, under the title "Of Public Wrongs." What, then, becomes of the third head, namely, "Obligations?"

Obligations were those which related to the rights of individuals in regard to their *transactions* with each other, and the claims arising from the *conduct* of individuals one to another.

In the Roman law these obligations arose by reason of, first, *contracts*, express or implied, which Spence has designated by the words "transactions with others;" or second, from *torts* or wrongs, as understood in English or American jurisprudence, expressed by Spence as arising from conduct of individuals one to another, which the Roman called *delicts*.

All that part of obligations arising from contracts is logically treated by Blackstone under "The Rights of Things," as all such contracts affected property, and *conduct* imposing an obligation was some wrongful act of one person against another, amounting to a tort.

Sec. 59. *Universality of the Principle of Analysis.*— These principles of Gaius, and their application in the Institutes, lie at the basis of every systematic analysis of modern law, and it is obvious that, if the principles are sound, they are applicable alike to all systems. Blackstone says, in the introduction to his analysis of the laws of England: "The most early and, indeed, most useful of those who have labored in reducing our laws are Glanville, Britton, Bracton and Fleta." (Bracton's system was to book 3, tract 1, substantive and fundamental rules; the balance, legal procedure, and was professedly following the Roman law.) Fitzherbert and Brooks, and the subsequent authors of abridgments, have chosen a method the least adapted of any to convey the rudiments of a science; namely, that of the alphabet. Dr. Cowl follows the Institutes of Justinian. He then says: "Of all the schemes hitherto made public for digesting the laws of England, the most natural and scientific of any, as well as the most comprehensive, appeared to be that of Sir Matthew Hale in his posthumous analysis of the law."

Sec. 60. *Critical Examination of the Principle.*— It is important to ascertain clearly the principles lying at the basis of

each analysis, and also to see how far they are applicable to our law.

We have asserted that the principle lying at the basis of the various analyses is that the laws are to be classified according to the objects of the rules. Austin, speaking of Gaius, says: "That he divided *jus*, or law, into *jus gentium* and *jus civile*, and, having shown the various sources of the assumption of law, or *jus*, proceeds to divide that same subject according to the *objects or subjects* with which it is conversant."[1]

Blackstone says in the opening words of his Commentaries:[2] "The objects of the laws of England are so very numerous and extensive that, in order to consider them with any tolerable ease and perspicuity, it will be necessary to distribute them methodically under proper and distinct heads." In his fourth paragraph he says: "The *objects* of the laws of England falling into this four-fold division, the present Commentaries will, *therefore*, consist of the four following parts." He begins the outline thus: The objects of the laws of England are: 1. Rights of persons. 2. Rights of things. 3. Private wrongs. 4. Public wrongs.[3]

What the law concerns, determines its place in Hale's Analysis. Thus, he says: "The laws of this kingdom do respect either, etc." "The civil part of the law concerns civil rights or interests."[4]

In the United States the jurisdiction is divided between the national and state governments upon this principle.

Mr. Justice Wilson, speaking in the convention called by the state of Pennsylvania to consider the question of ratifying or rejecting the proposed constitution, said: "To be left without guide or precedent was not the only difficulty in which the convention was involved, by proposing to their constituents a plan of a confederate republic. They found themselves embarrassed with another of peculiar delicacy and importance; I mean that of drawing a proper line between the national government and the governments of the several states. It was easy to discover a proper and satisfactory principle on the subject. Whatever object of government is confined in its opera-

[1] Austin's Jurisprudence, 761.
[2] 1 Blk. Com. *121.
[3] See outline in any edition of the Commentaries.
[4] Hale's Analysis, sec. 1.

tion and effects within the bounds of a particular state should be considered as belonging to the government of that state; whatever object of government extends in its operation or effects beyond the bounds of a particular state should be considered as belonging to the government of the United States. But though this principle be sound and satisfactory, its application to particular cases would be accompanied with much difficulty; because, in its application, room must be allowed for great discretionary latitude of construction of the principle."[1]

A little reflection will show that it is the subject-matter of the rule that determines its location in any particular chapter in Blackstone's Commentaries, and not whether the rule is found in the statutes of the kingdom or in Magna Carta, the Customs of Merchants as evidenced by the reported decisions, the Bill of Rights, etc. These simply determine by virtue of what the alleged rule of conduct has the authority of law, while the object affected by the rule, *i. e.*, whether it relates to a man's right to locomotion, his right to a particular chattel or real property, etc., is the controlling element in arrangement.

The plan of Blackstone's Analysis, which is the outline of his Commentaries, published some years afterwards, is the outline upon which many subsequent treatises have based their arrangement. We will speak of Blackstone's arrangement sufficiently to explain such departure from it as the difference between the American and English systems of law compels. It is intended in this analysis to observe the arrangement of Blackstone, Hale and Gaius, so far as the same are applicable to American jurisprudence, because they have all been attempts to proceed in accordance with the principle of analysis mentioned. The familiarity of the profession with the method of Blackstone renders reference and comparison of still more utility. We shall, however, be compelled to depart from the form or plan of arrangement of Blackstone where a slavish adherence to the language used by him will not convey the desired idea, or when, as will frequently be found to be the case, it will convey an erroneous one.

[1] 1 Wilson's Works, p. 533.

CHAPTER III.

PRIMARY CLASSIFICATION OF SUBJECTS.

"All the matters of the Civil Law have among themselves a simple and natural order which forms them into one body, in which it is easy to see them all, and to perceive with *one* view in what part every one hath its rank." Domat, Civ. L., ch. xiv, p. 96.

Sec. 61. *Nature and Uses of Classification.*— In the process of separating the *corpus juris* of the United States into different subjects, each of which may in turn be examined minutely, we necessarily avail ourselves of what is called legal analysis.

Legal Analysis Explained.— Analysis, applied to law and used in reference to a tangible result attained, has a meaning peculiar to itself; *e. g.*, when we speak of Hale's analysis or Blackstone's analysis, the phrase calls to mind the synoptical outline of English law, rather than the processes by which these results have been attained.

Analysis, used abstractly or applied to chemistry, naturally suggests the process of separation, or the resolution of some substance into its elements.

Legal analysis, however, involves two processes. *First.* Analysis in its narrower sense, *i. e.*, the resolution of the body of the law into its separate parts according to the principles of didotomy,[1] *i. e.*, separation according to *species* and *genera*.[2]

[1] See Webst. Dic., titles Method, Analysis, Synthesis, Synopsis. This is the plan of Lord Comyn's celebrated Digest of English Law, which is to-day unexcelled by any subsequent work. It may be remarked that the arrangement of a digest, to be perfectly logical, should be identical with the arrangement of a commentary. That this is practicable is clear, if one but remembers that every judicial decision involving questions of law is but the application of some rule which must find a place in a commentary. The editor of Comyn's Digest says: "The general plan of this Digest is that the author lays principles or positions of law, and illustrates them by instances, which he supports by authorities; and these are branched out and divided into consequential positions, or points of doctrine, illustrated and supported in the same manner. By this means, each head or title exhibits a progressive argument upon the subject, and one paragraph (and in like manner one division or subdivision, etc.) follows another in natural and successive order, till the subject is exhausted."

[2] "You have heard much of the celebrated distribution of things into

The second process may be termed *synthetical*, and consists in arranging the matter thus differentiated by the first process in such a manner that each subhead will be again divided, and so on until all of the subjects and the mutual relation and dependence of each appears upon the surface.[1]

Sec. 62. *Classification of Legal Treatises.*— *The result* of such a process is the production of a synoptical outline, and in the production of legal treatises the extent to which comment, explanation and illustration is indulged in by the writer is the test to determine whether the book is an analysis, an institute, or a commentary. As an example of books of the character above mentioned, of the first class are the outlines of Hale and Blackstone, in which the writers indulge in no comment at all, or but occasionally, a mere reference; as, for example, Lord Hale speaks of the classes of Men, *sub-class* Aliens, and adds: "Here comes in the learning of (concerning) aliens, as naturalization, denization, etc."[2] As examples of institutes

genera and *species*. On that distribution Aristotle undertook the arduous task of resolving all reasoning into its primary elements; and he erected, or thought he erected, on a single axiom, a larger system of abstract truths than were before invented or perfected by any other philosopher. The axiom from which he sets out, and in which the whole terminates, is that whatever is predicated of a genus may be predicated of every species contained under that genus, and of every individual contained under every such species. On that distribution, likewise, the very essence of scientific definition depends; for a definition, strictly and logically regular, 'must express the genus of the thing defined, and the specific difference by which that thing is distinguished from every other species belonging to that genus.'" 1 Wilson's Works, 51.

[1] This work must be done either mentally or visibly by an actual outline. Before any subject can be thoroughly mastered the mind must see the outline. Henry St. George Tucker, in his Commentaries, says: "It is with the law as with everything else that is to be learned. It is sooner learned, and better learned, by being studied systematically. The *rudis indigestaque moles* must be reduced to order by the student himself, or by somebody for him. That every person who comes to acquire a knowledge of this complicated subject should have to arrange for himself would exhibit a state of infancy in the science unworthy of our times. It would be as if the innumerable papers in a clerk's office were thrown in a common heap without order, and each suitor was compelled to hunt in the confused mass for whatever he might want, to arrange them for his own use, and then throw them back again into the same undistinguished chaos, to try the ingenuity and patience of the next adventurer. These evils were early discovered, without doubt, but they have been only recently remedied to any considerable extent." See Minor's Institutes, Preface.

[2] Hale's Analysis, p. 3.

we have Gaius, Justinian, Wood's Institutes of English Law, Minor's Institutes, and that of Bouvier, unless it be said that the last two indulge in more comment than is allowable in a mere institute, and thereby become commentaries.

The best known examples of commentaries are Blackstone's and Kent's Commentaries, and the writings of Judge Story. Every extended treatise which now passes under the title of "text-books" is in reality a commentary on the particular subject, unless its order is so deficient as to make it partake more of the character of a digest.

"Institutes," says Lord Bacon,[1] "ought to have two properties,—the one a perspicuous and clear order of method, and the other a universal latitude or comprehension, that the students may have a little pre-notion of everything, like a model towards a great building."

A commentary must of necessity be as orderly in its treatment as either an analysis or an institute, and should the title a *commentary* on English law or American law be taken, then every subject should be noticed. The order should not be changed because of the bulk of the work. For example, Kent's Commentaries are said by Professor Dwight to be imperfect as commentaries on American law because they do not include within the treatment the subject of torts, criminal law and procedure.[2]

Sec. 63. *Legal Analysis in American Treatises.*— Authors, especially in recent years, have not been noted for their lucidity of arrangement, although the legal profession has exhibited a high degree and skill in the first branch of legal analysis. This is undoubtedly the natural result of regarding constitutional law, which is properly a part of the law of persons, as a distinct field of law. Kent's Commentaries is a striking illustration of this influence.[3]

[1] Works, vol. II, p. 232.

[2] 1 Green Bag, 143. Professor Dwight did not mean that the treatment was imperfect, but that the scope was narrower than the title. To the author, the arrangement of Kent's Commentaries is its principal defect. The classification of the matter contained in Part Two, by itself, under the title, "The Constitutional Jurisprudence of the United States," leads one to view the subject as a body of law isolated from the matter of the next part, which is "Municipal Law;" whereas, the whole of the book, as well as Part One, is within the title "Municipal Law."

[3] I do not mean to say that this has

Sec. 64. *Subjects Are How Classified.*— It is obvious that the arrangement and classification of a system of law depend upon the nature and peculiarities of the system to be treated, and that it is illogical to undertake to arrange one system of law in accordance with the synopsis designed to present another system, unless the two systems are entirely similar in structure, and the synopsis which presents itself is strictly correct in all its parts, and especially in its leading divisions. Most authors who have attempted to treat the whole body of American law have undertaken to cast it in the mould of the outline of English law found in Blackstone's Commentaries, without taking the pains to investigate the soundness of the reasons for his method, and without questioning whether the two systems were identical in outline. Not one American writer has stated the principle of arrangement which dominated his classification; not one has arranged his material in accordance with the logical principles which were used by Hale, and which Blackstone professed to follow in his Commentaries.

Sec. 65. *Importance of Primary Classification.*— The importance of a logical and correct primary classification cannot be overestimated.[1]

had a bad effect upon the character of the text produced. It is an acknowledged fact that American text writers are the equals of any in the field of law, but the opinion is ventured that this has been the principal reason why no complete outline of our law, distinctively American, has appeared. The difficulty is to look through the formal mode of expression and artificial legislative classification and formulate a system in compliance with the natural order of the subjects. Now the law of England used to be classed as common law or *lex non scripta*, and statute or written laws, and this outward form was a hindrance to its treatment. Lord Hale perceived that the source of the law had nothing to do with the method of arrangement, as he says in the preface to the analysis: "And although the laws of England are generally distributed into the common law and statute law, I shall not distribute my analysis according to this method, but shall take in and include them both together, as constituting one common bulk or matter of the laws of England." He applied the true touchstone. Our jurisprudence presents an additional obstacle, the one mentioned, our system of written constitutions. We have the common law, the constitutions, and judicial decisions. But these are not the sources of the law, although often erroneously so called. They are the *media* of communication — the means of expression; but there is only *one* source — the people. There being but one source, there is no room for classifying according to the source, in such a way as to be the basis of a treatise on the law.

[1] "By some philosophers, definition and division are considered as the two great nerves of science. But

Sec. 66. *The Reason for and Fallacy of Blackstone's Primary Classification.*— In seeking for the most appropriate classification, we must of necessity examine those methods which have been heretofore used, and ascertain, if we can, the reasons which underlie them, test the accuracy of their application, and determine their applicability to our system of laws.

Blackstone's first great division of the law of England is into Rights and Wrongs. Municipal law he defines to be a rule of civil conduct, prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong.[1]

In book 1, on page 122, he says: "Now, as (*i. e.*, because) municipal law is a rule of civil conduct commanding what is right and prohibiting what is wrong, it follows that the principal and primary *objects* of law are rights and wrongs." He then indicates that "rights" are divided into rights of persons and rights of things, and "wrongs" into private wrongs and public wrongs, and then continues: "The *objects* of the law of England falling into this fourfold division, the present commentaries will therefore consist of the four following parts, viz.," etc.

In book 3, page 1, after reciting his definition, he says: "From hence, therefore, it follows that the primary objects of law are the establishment of rights and the prohibition of wrongs, and this occasioned the distribution of these collections into two general heads."

By this recital two things are made perfectly obvious. *First*, that the principle of analysis recognized by Blackstone is that rules are to be classified according to the *objects* to which the rules relate; *second*, that he determined what these objects were by what he supposed to be a definition of municipal law.

Blackstone's Definition of Municipal Law Examined.—Blackstone's definition of municipal law has received criticism of great weight on each of its essential points,[2] viz.: *First.* It is

unless they are marked by the purest precision, the fullest comprehension, and the most chastised justness of thought, they will perplex, instead of unfolding—they will darken, instead of illustrating, what is meant to be divided or defined. A defect or inaccuracy, much more an impropriety, in a definition or division, more especially of the first principle, will spread confusion, distraction, and contradictions over the remotest parts of the most extended system." 1 Wilson's Works, 52.

[1] 1 Blk. Com. 44.

[2] 1 Cooley's Blackstone (2d and 3d eds.), 44, note; 1 Sharswood's Blackstone, 44, note, 122, note; Heron on

denied that it is a rule *prescribed*,[1] as distinguished from consented to, or agreed upon. *Second.* It is denied that it is prescribed by the supreme power in a state.[2] *Third.* It is denied that it necessarily commands what is *right* and prohibits what is *wrong*. The definition lying as it does at the threshold, and constituting in fact the basis, of his primary division of the body of law into the two general heads just mentioned, the question as to whether the definition is correct, and the division follows, is of vital importance. But at this point of our inquiry we are only interested in that last clause of the definition, viz., whether a law is a rule commanding "what is right and prohibiting what is wrong," and whether, as a consequence thereof, the body of the law must be divided into the two general heads, Rights and Wrongs. The other branch, locating the supreme authority in the legislative branch, will be discussed when we explain the relation of Magistrate and People.

The point of criticism applied to this branch of the definition is, that it is superfluous and conveys an erroneous idea of municipal law. Many of the criticisms will be found in notes to pages 44 and 122 of volume 1 of different editions of the Commentaries, cited above.[3] Blackstone's handling of the question is in nowise clear. He seems to connect the moral obligation of natural law with the law of nations,[4] binding upon nations, and being their only bond, for the reason that there is no superior.

In accordance with his idea that, to have a law binding, there must be a superior in the law of nations, he finds a superior to nations in the Deity, or the law of God; but he immediately

Jurisprudence, 65; Hoffman's Legal Outline, 268; 1 Bouvier's Institute, p. 6; Walker's American Law, p. 47; Austin's Jurisprudence, vol. 1, p. 220.

[1] 1 Cooley, Blk. (3d ed.), *45, note; Dartmouth College Case, 4 Wheat. 518; Binghamton Bridge, 3 Wall. 57; 1 Wilson's Works, 75, 159 et seq.

[2] 1 Wilson's Works, 55, 65; 1 Hammond's Blk. 112.

[3] I know of but two modern writers who approve of this definition. The first is Prof. Bliss, in his work on Sovereignty, and the other is Prof. Hammond, in the notes to his edition of Blackstone; but the opinion of Mr. Bliss is based upon the proposition that an act of the legislature which is contrary to natural right is invalid, he quoting from Blackstone's Commentaries, pp. 39, 44. In this position Mr. Bliss is not supported by any one, and the authorities he cites go to another proposition; neither does he address himself to the question as being one of classification.

[4] 1 Blk. Com. 43.

contrasts with this, municipal law or the rule of civil conduct;[1] for he says: "Municipal law is a rule of civil conduct. This distinguishes municipal law from the natural or revealed. The former (natural) is a rule of moral conduct, and the latter (revealed) a rule of faith; . . . but municipal or civil law regards him (man) as a citizen and bound to other duties than those of mere nature or religion."[2] Then follows an inquiry into the nature of civil government, the object of which is to locate *a supreme power*, which, to be consistent with his definition, must be found somewhere. "There is," he says, "and must be in all of them (states), a supreme, irresistible, absolute and *uncontrollable* authority in which the *jura summi imperii* or right of sovereignty resides."[3] This he finds to be in England the legislative body, which is the parliament.[4] In the United States the idea is entirely different, and will be discussed with Magistrate and People.

Sec. 67. *The Right-and-Wrong Clause Condemned.*— After establishing and locating in this manner the supreme authority, he proceeds to the latter clause of the definition, commanding what is right and prohibiting what is wrong,[5] and proceeds: "Now, in order to do this completely, it is, first of all, necessary that the boundaries of right and wrong be established and ascertained by law." What law does he mean? Obviously the civil law, of which he is speaking, for he proceeds: It remains to consider in what manner the law is said to ascertain the boundaries of right and wrong. For this purpose laws are said to consist of two parts, declaratory and directory.[6] "The

[1] Book I, p. 44.

[2] Id., p. 45.

[3] Id., p. 49. Bentham says: "The vehemence of this passage is remarkable. He ransacks the language; he piles up, one upon another, four of the most tremendous epithets he can find; he heaps Ossa upon Pelion; and, as if the English tongue did not furnish expressions strong or imposing enough, he tops the whole with a piece of formidable Latinity. From all this agitation it is plain, I think, there is something which he has very much at heart; which he wishes, but fears, perhaps, to bring out undisguised; which in several places, notwithstanding, bursts out involuntarily, as it were, before he is well ready for it; and which, a certain discretion, getting at last the upper hand of propensity, forces, as we have seen, to dribble away in a string of obscure sophisms. Thus, oddly enough, it happens that that passage of them all which, if I mistake not, is the only one that was meant to be dedicated expressly to the subject, is the least explicit on it." Fragment on Gov., ch. 4, sec. 13.

[4] Page 49.

[5] Page 51.

[6] Page 53.

first," he says, "depends not so much upon the law of revelation or of nature as upon the will of the legislator." But he at once modifies the view by the statement that the "legislature must not violate rights established by natural law." "The directory part of the law," he says, "stands upon the same footing, being implied from the declaratory."[1] The question, then, whether this clause of the definition is surplusage or conveys an erroneous idea of a law, resolves itself into this: whether or not legislative acts must conform to the moral or natural standard of right and wrong as taught by the law of nature or religion? For Blackstone says: "No human laws are of any validity if contrary to this (law of nature), and such of them as are valid derive all their force, mediately or immediately, from this origin." The United States supreme court has declared this idea impracticable as a rule of action to be administered in courts.[2]

Judge Cooley, in his notes to this proposition in the Commentaries, with his usual directness and practical good sense, the result of lifelong contact with practical jurisprudence, says: "Under no circumstances do mankind differ more widely than when they undertake to apply their fallible judgment to the determination of what the law of God commands or of what it forbids. . . . Now, when it is said that no human laws which are opposed to the law of God can be of any validity, we may accept the declaration as theoretically true, but in government it is fallacy."[3]

Christian says that the "latter branch, commanding what is right and prohibiting what is wrong, must be either superfluous or convey a defective idea of municipal law; for if right and wrong refer to the municipal law, then whatever it commands is right and whatever it prohibits is wrong, and the clause would be insignificant tautology; but if right and wrong be referred to the law of nature, then the definition will become deficient or erroneous."[4] And Judge Sharswood says: "But mere law (the command of a superior) cannot *per se* annex the moral qualities of right or wrong to the action, in itself considered, commanded or prohibited. Right and wrong are ab-

[1] Book I, p. 55.
[2] Allen v. Ferguson, 18 Wall. 1.
[3] 1 Cooley's Blk. (3d ed.) 50, note; Peel Splint Coal Co. v. West Virginia, 36 W. Va. 802; 17 L. R. A. 387.
[4] 1 Sharswood's Blk. 44, note.

stract moral qualities, resulting necessarily from the relations of persons or things. No law can make that right which is itself wrong. The definition of Cicero certainly avoids this objectionable feature of Blackstone's language."[1]

In his notes to page 122 of book 1 of the Commentaries (3d edition), Judge Cooley has made a complete and exhaustive examination of the idea of *natural rights*, *moral rights*, and *legal rights*. In respect to natural rights, which Judge Blackstone treats as having their origin in the natural state of society, he says: "By this it is implied that there is a state of nature antedating political organizations, and therefore antedating law, of which every individual has rights given him by the law of nature, which every other individual is under obligation to respect and observe. Now of this it must be said, first, that the conception of such a state of nature is mere fancy; that it never did and never can exist; for the individual is never found outside of society, or of the reach of human law, except, perhaps, in wholly exceptional and anomalous cases, and therefore the supposition of such a state must be useless, even as a matter of theory. It seems clear that any theory, in order to possess any possible value, must recognize whatever condition of things is universal and inevitable."

Judge Cooley quotes approvingly[2] from Mr. Bentham: "The great multitude of the people are continually talking of the law of nature, and then they go on giving you their sentiments as to what is right and what is wrong, and these sentiments you are to understand are so many chapters and sections of the law of nature. Instead of the law of nature, you have sometimes the law of reason, right reason, natural justice, natural equity, good order; and any of them will do equally as well."

The great trouble with the theory is that it is a mere theory, and is not based on any fact. It is defining what law is by the use of a philosophical theory of what it ought to be. There never was, and never could be, any natural society not governed by human laws.[3] The fallacy seems more plain if the doctrine is traced to its source. The Institutes define jurisprudence as

[1] 1 Sharswood's Blk. 44, note.
[2] 1 Cooley's Blk. (3d ed.), p. 39, note.
[3] 2 Wilson's Works, p. 300; 1 Sharswood's Blk., p. 48, n. 11.

the knowledge of things divine and human, the science of the just and the unjust.[1]

Sec. 68. *The Definition no Basis for Classification.*— Sanders, in his notes, says: "*Jurisprudentia* is the knowledge of what is *jus;* and *jus*, according to the theory of the law of nature, laid down what is commanded by right reason, this right reason being common to nature, or, as the Romans more often said, to the Gods and to man. On this ground, and also because public law *has to deal with religious worship*, the knowledge of divine things was therefore necessary, as well as the knowledge of human things, to say what were the elements of *jus*. Both this and the preceding definition, taken at random out of the writings of Ulpian, are *unintelligible* unless taken in connection with a philosophical theory from which they are here dissevered, and are quite out of place at the beginning of an elementary treatise on law."[2] Blackstone did not regard this, and based his whole theory of law and classification upon this obsolete definition.

The Christian religion having been, until quite recently at least, held to be the basis of the law of England,[3] and so rigidly so at the time of Blackstone that it was an indictable blasphemous libel to question, no matter how moderately, the divinity of Christ or the truth of the Christian religion, constitutes a justification for his position stronger than many now suppose who look at matters from the present standpoint. A recent decision in England has materially changed the light in which the matter is regarded, and England now enjoys the liberty of free religious discussion, providing the party questioning the truth of the prevailing Christian religion maintains a perfect control of his temper and couches his argument in dignified and well-chosen language.[4] Americans can appreciate the fourth so-called absolute right.

The Institutes also define the law of nature. The law of nature is that law which nature teaches to all *animals;* for this law does not apply exclusively to the human race, but applies to all animals, whether of the air, the earth or the water.[5]

[1] Inst., 1–1.

[2] Sanders' Justinian, lib. 1, tit. 1, and note. See also Id., Introduction, sec. 34.

[3] 1 Cooley's Blk., p. 59. See Cooley's Const. Lim., p. 572.

[4] Reg. v. Ramsay & Foot, 48 L. T. (N. S.) 733, a case involving the Bradlaugh episode.

[5] Inst., 1–2.

The trouble with this appendage (commanding what is right, etc.) and its basis is that by it you can prove anything. It is the basis of the divine right of kings, sanctioned by Aristotle, Justinian, Bacon, Queen Elizabeth and King James, and as Prof. Hammond himself says, "Blackstone, in falling back on to the original-compact idea, without apparently perceiving the inconsistency between the doctrine and his definition, an inconsistency of which his first American critic, Wilson, has made effective use, showing that this definition ranked him, in spite of himself, with the supporters of divine right and absolute power."[1]

The Institutes lay down the doctrine that the law of nature was the basis of the law of nations, and yet holds that slavery was contrary to the law of nature, but was an incident of war, which, of course, was regulated by the law of nations and humanity. The Roman civil law recognized regulated slavery. The very churches of America have been divided upon the subject.

Blackstone says the only true and natural foundations of society are the wants and fears of individuals; and, if it were not too cynical, one might almost be justified, in the light of history, in saying that man has had no other criterion for determining the law of nature than his own selfishness. The doctrine of the binding force of natural law as a legal doctrine is long since exploded; not but what there are some things in the law of nature recognized and enforced by all municipal codes,

[1] 1 Hammond's Blk. 112; Wilson's Works, vol. 1, pp. 54–75. Men of the same race, religion, ancestry, language and law could justify the institution of slavery, and with the same law illustrate that the air of England could not be breathed by a slave. Best, Judge, in the celebrated case of Forbes v. Cochran, in 1824, goes somewhat into the history of the relation of the slave traffic with England, and asserts that during the reign of Queen Elizabeth she issued patents to encourage the trade, and these were followed up by acts of parliament expressly recognizing it. Acts were also passed during the reigns of William III and George II. Lord Mansfield refers to the opinion of Sir Phillip Yorke and Lord Chief Justice Talbot, whereby they oblige themselves to British planters for all the legal consequences of slaves going over to England. He himself, with the same magic weapon, the law of nature or God's law, wiped out the institution in England once for all. Somerset's Case, State Trials, 201; Great Opinions by Great Judges, 112. The English cases discussing the subject of slavery in the English law are cited in Forbes v. Cochran, 2 B. & C. 448; 9 E. C. L. 138.

but these rules address themselves to the law-makers, while civil laws address the individual.

A False Antithesis the Ground for Classification, Continued. Enough has been said to indicate the foundation upon which Blackstone rests this last clause of his definition, and somewhat of the force of the criticisms against it. But, as the basis of classification, the definition is subjected to still more serious criticism. Close attention and observation to Blackstone's text will suggest to the reader that in the definition Blackstone uses the words "right" and "wrong" as adjectives, but in the classification he uses them as nouns. This manner of using the words is much like "keeping the word of promise to the ear and breaking it to the hope." The transition from the adjective use of the words to their use as nouns is so bold and sudden that it requires an effort of the mind to detect that the same words in the two situations have entirely different meanings. In the definition, the words "right" and "wrong" are used to express the idea of abstract moral qualities as applied to certain acts.

We might substitute that a law commands what is just, good, upright, and in conformity with "natural justice," and prohibits what is unjust, evil, bad, iniquitous, or contrary to "natural justice;" in which case it would, according to Blackstone, naturally follow that the law was divided into just and unjust, good or bad, etc. And Chitty, Christian, Austin, Coleridge, and Judges Wilson and Cooley[1] all agree that this qualifying phrase is surplusage, and not true as a definition of municipal law. Coleridge, Judge, thinks Blackstone misquotes Cicero.[2] It is apparent that, if we reject this phrase in the definition, or substitute other words for rights and wrongs, the primary division of the law, if depending upon a definition at all, falls out of Blackstone's analysis, because he says the division follows the definition. He says: "Because the law is a rule commanding what is *right* and prohibiting what is *wrong*, it follows that the primary and principal objects of the law are "*rights* and *wrongs*." But I cannot assent that the definition of a law necessarily discloses the division of the whole body of law. Much less is there any association of ideas between the words,

[1] Notes to different editions of Blackstone, pp. 39, 44, 122.

[2] 2 Sharswood's Blk. 1, note.

although of the same spelling and sound; "right" and "wrong," when used adjectively, denoting an affirmative or negative quality of morality and synonymous with "good" and "evil," and the same words, when used as nouns, indicating something a man is entitled to. Rights are, by Blackstone, nowhere defined, nor their nature investigated,[1] although they are the principal and primary objects of the law. "Rights" and "wrongs" are nouns. The latter conveys no ideas separable from the former. A wrong must have a right to operate against. Every rule of law in a body of municipal law involves a right, but not necessarily what is right; and under the head "Rights" all of the law might be classed. In fact, we know this is just what Blackstone really does, though he translated "*jus*" and "*jura*," in this connection, "right," while the words mean "law."

Book I consists of the Rights of Persons; Book II, of the Rights of Things or Property, or the rights of persons concerning things, which is Blackstone's meaning; Books III and IV, the Law of Actions, Private and Public, meaning not, however, the rights and wrongs of actions, but, as he himself says, the means of obtaining redress and punishment. By classifying these actions under Wrongs, Blackstone does not intend that persons do not have a right to these actions or remedies. The subjects discussed in Book IV are punishments for violation of public rights. We know that the right to a hearing in court in vindication of any of our other rights is a constitutional right, and in reference to contracts constitutes their obligation, binding force, and indeed their only valuable attribute. Chief Justice Taney says: It is this remedy by an action in court which constitutes "the part of municipal law which protects the right, and the obligation by which it enforces and maintains it.[2] . . . It is this protection which the clause in the constitution (sec. 9, art. 10) now in question mainly intended to secure, and it would be unjust to the memory of the distinguished men who framed it to suppose that it was designed to protect the barren and abstract right without any practical operation upon the business of life."[3]

[1] Prof. Hammond's Introduction to Sanders' Justinian, p. 50.

[2] Actions Subordinate to Rights, 1 Blk. 140.

[3] Bronson v. Kinzie, 1 How. 311, 317. See also Cooley's Const. Lim. (6th ed.) 344, 350, citing dissenting opinions of Judges Washington, Thompson and

Supposed Reason for the Definition.— Prof. Hammond, in his recent edition of Blackstone, undertakes to refute the criticism of Christian, Wilson, Cooley, Sharswood and others, though admitting that they are almost universally followed, on the ground that they do not see, or they disregard, the importance of the clause as connecting this definition with Blackstone's classification, and undertakes to maintain that the definition is necessary for the purpose of the division made by Blackstone. While it is perfectly obvious that this definition gives apparent color to the division, with all due respect to the distinguished editor's manifest learning, it is clear that he signally fails to show, either that this clause of the definition is required from the nature of the word defined, or that it is true in fact, or that the division was a natural or necessary one. The division was original with Hale, while the definition was taken from the civil-law definition of natural law. His note makes it quite plain that Blackstone, following Puffendorf, Hobbs and other authors back to the days of Cicero, attempts to apply the Roman definition of natural law to municipal law, without observing the distinction that a natural law, being of divine origin, must necessarily conform to what is right, while municipal law, emanating from man, may or may not; for the simple reason that a body of men are no more certain to do right than an individual. This, so far from covering the point, is a departure from it. It is saying that, having classified into rights and wrongs, the definition is necessary. Hence law commands what is right and prohibits what is wrong, and from the definition the division follows; while the question is: Does a law always command what is right and prohibit what is wrong? Does it necessarily conform to what is morally right? If not, the definition is untrue. Neither is it true that all other classification is but auxiliary to this primary division, as contended by Prof. Hammond, or, in fact, that any classification is dependent upon the definition.

Sec. 69. *Blackstone's Primary Classification Not Adhered to by Himself.*— Notwithstanding the great pains to which he went to frame and defend his definitions of law and to demon-

Trimbell, in Ogden v. Sanders, 12 Wheat. 213; McCracken v. Hayward, 2 How. 608; McMillan v. McNeal, 4 Wheat. 209; Douglass v. County of Pike, 101 U. S. 677.

strate the material dependence of his classification of the law, as it relates to rights and wrongs, upon the definition, Blackstone does not, in reality, introduce any new arrangement, nor does his arrangement *necessarily* depend upon the closing phrase of the definition.

Professor Hammond, one of the most scientific editors, points out this fact quite clearly.[1] The fact is that Book I of the Commentaries has to do with the various classes of legal entities and their personal relations in society — *i. e.*, the *status* or *personas* of men as we shall see it explained in the next chapter.

This book does not treat of all the rights of persons, but only their personal rights[2] (*i. e.*, Public Relations, Domestic Relations, and Status). In the sense in which he uses the word "person," the subject of the second book constitutes the Property Rights of Persons, and the third book the Right to Remedies Afforded, or the Auxiliary Rights, as he terms them.

This Classification Was Novel.— Blackstone refers to no precedent for the formal arrangement, and none of his editors have pointed out any. The body intended to be treated and actually arranged was *the law* of England. The classification ostensibly made was of rights, but so artificially is it done that rights are apparently accorded to things.[3]

Sec. 70. *The Confusion Results from Inapt Use of Words.*— "Jurisprudence," says Holland, "is specifically concerned only with such rights as are recognized by law and enforced by the

[1] "Notwithstanding the care of Blackstone to connect the general plan of his work and its chief divisions with the definition of law given in the introduction (p. 44, as to which, see note 14, *ante*, p. 121), the observant student will see that there is here a departure from that conception. He would naturally expect to find the body of the work consisting of a statement of the laws or rules which command or forbid the actions of man, and constituting thereby rights and wrongs; he would expect to find the character of these latter absolutely determined by the rule which commands or forbids them. On the contrary, the conception of a law, and especially the highest kind of law, natural or ethical, disappears entirely from this point onward; that is to say, in the main body of the work. We have in its place the rights and wrongs themselves, originating, it is true, in that reason which is the common law, but rarely traceable to any distinct command." Hammond's Blk., p. 316.

[2] We are excluding corporations for the present.

[3] "Rights of Persons and Rights of Things." Hammond asserts that rights are not defined by Blackstone. Int. to Sanders' Juris., p. L.

power of a state. We may, therefore, define a legal right, in what we shall hereafter see is the strictest sense of that term, as a capacity residing in one man of controlling, with the assent and assistance of the state, the actions of others. That which gives validity to a legal right is in every case the force which is lent to it by the state. Anything else may be the occasion, but not the cause, of its obligatory character. . . . This simple meaning of the term 'a right' is, for the purposes of the jurist, entirely adequate.[1] It has, however, been covered with endless confusion, owing to its similarity to 'right,' an abstract term formed from the adjective 'right,' in the same way that 'justice' is formed from the adjective 'just.' Hence it is that Blackstone actually opposes rights in the sense of capacities to wrong — in the sense of unrighteous acts."[2]

Professor Hammond, himself an editor of Blackstone, and the one who has made the ablest attempt to defend him, says in his learned introduction to Sanders' Justinian,[3] speaking of Blackstone's division into rights and wrongs: "As a scientific distribution, this is no doubt open to criticism, since a wrong can no more exist apart from right in law than a shadow without substance in optics, a negative without positive in logic." Again, at page 50 he says: "We confess that seems to us the weak side of Blackstone's entire system." Walker says a wrong always results from the violation of a right, so that by describing the one we indicate the nature of its opposite. A treatise, therefore, upon municipal law is for the most part a treatise upon rights and remedies, as one may chose to express it; and this suggests a remark upon Blackstone's primary division of legal subjects into rights of persons, rights of things, private wrongs and public wrongs. These expressions do not on their face indicate that remedies are to enter into the discussion. Moreover, the phrase "Rights of things," "*Jura rerum*," by itself conveys no definite idea, since all rights are the rights of persons; that is, they belong to persons, though they may have relation to other things.[4]

Indeed, Blackstone is inconsistent with himself, because, to be consistent, he should have divided wrongs into wrongs of

[1] See opinion of Chase, J., in Calder v. Bull, 3 Dall. *394, quoted by Webster, 4 Wheat. 516.

[2] Holland's Jur., 71, 72.

[3] Page 48.

[4] Walker's Am. Law, p. 47.

persons and wrongs of things. He says, in treating of private wrongs:[1] "For, as these (wrongs) are nothing else but an infringement or breach of those rights which we have before laid down and explained, it will follow that this negative system of wrongs must correspond with the former system of rights. As, therefore, we divide all rights into those of persons and those of things, so we must make the general distribution of injuries[2] into such as affect the *rights of persons* and such as affect the rights of property."[3]

Sec. 71. *The Right to Redress in Court is a Right.*— One observation further will make the matter so plain that one can more readily see it.

If laws are to be classified under rights at all, under that head should be classed rights of action,[4] or the right to redress in courts of justice, which Blackstone himself calls a *right auxiliary to absolute rights*, but without which the other rights would be useless and protected only by the *dead letter* of the law.[5] He, however, treats it under the negative head of wrongs.[6] No better illustration could be asked of Bacon's remark, "that men imagine that their reason governs their words," while in truth their words react upon the understanding, and, as a consequence, science becomes sophistical and inactive, and also of the words of Burke, "that studies become habits of thought," than is found in the confusion the definitions and forms of expressions, imbibed from Blackstone by students at the outset of study, has produced on their habits of thought.

A recent author, who has brought to the matter great learning and deep research, in his preface makes this candid statement: "When the author began the study of law, he was, like other students, bewildered by the confusion reigning in Blackstone's and other text-books with regard to the nature and general principles of private right."[7]

Sec. 72. *Municipal Law Defined.*— Blackstone's confusion results from two things: first, an erroneous definition of law;

[1] Book 3, p. 119.

[2] Notice the change from "wrong" to "injuries."

[3] "Property" is now substituted for "things."

[4] See 1 Wilson's Works, pp. 36, 46; Austin's Jurisprudence, p. 764; Bronson v. Kinzie, 1 How. 311, 317; Board of Education v. Blodgett, 155 Ill. 441; Campbell v. Holt, 115 U. S. 620.

[5] 1 Blk. Com. 141.

[6] In Book III.

[7] Smith's Right and Law, Preface, p. 7.

and second, a labored attempt on his part to make it appear that the classification of legal subjects resulted naturally and necessarily from definition. Had he followed more closely his model (Hale), he would have avoided at least the charge of confusion. "By some philosophers," says Justice Wilson, "definition and division are considered as the two great nerves of science. But, unless they are marked by the purest precision, the fullest comprehension, and the most chastised justness of thought, they will perplex, instead of unfolding — they will darken, instead of illustrating, what is meant to be divided or defined. A defect or inaccuracy, much more an impropriety, in a definition or division, more especially of a first principle, will spread confusion, distraction and contradictions over the remotest parts of the most extended system." [1]

It must also be borne in mind that, there being many forms of government, there will be as many different ideas of municipal law. In a despotism the will of the ruler is law; in another form of government, that which is agreed upon by the people is law. It is useless to attempt to make one universal definition which will be suitable alike to Roman, to English, and to American jurisprudence. A definition cannot be given except after the most perfect conception of the subject of the definition. The truth is, no word can be truly defined until the exact idea is understood in *all its relations* which the word is designed to represent.[2] From this it would seem that in an institutional work, such as the one in hand, a definition of law need not necessarily precede the work, and would be useless at the conclusion, for the reason that a perfect idea of the law would then be had. Nevertheless, we will venture to define municipal law in American jurisprudence as a *rule agreed upon by the people regulating the rights and duties of persons.*[3]

From the fate which has attended prior definitions of the law, it would not be surprising if this one was found too narrow in this, or too broad in that, view; but inasmuch as it is apprehended that no definition of the law, or a law, is essential to classification and analysis, we do not deem it wise to here

[1] Wilson's Works, p. 52.

[2] Matthews' "Words, Their Use and Abuse," 23.

[3] Several words in this sentence have a technical meaning, which must be understood before the definition readily defines; especially is this the case with the word "person." See 1 Wilson's Works, 89, 90. "That what is now called the common law of

spend any more time upon a definition, inasmuch as the nature of law has been commented upon in the introductory chapter, and must necessarily be thoroughly investigated in the future prosecution of the work.[1]

Sec. 73. *Primary Classification — The Subjects of Jurisprudence.*— American law or jurisprudence has two primary objects, namely, *municipal law* and *international law.* These will constitute the main heads of the analysis, using the former term in its broadest sense, as used by jurists generally. These two great branches of law are not distinct and separate — they touch and support each other; but their orbit and sanction is different, quite as much so as that of national and state law.

The consideration of this subject may be appropriately closed by adopting, as indicative of the intention of the author, the language of Lord Hale as to his intended treatment of the same subject applied to English law: "Nor shall I confine myself to the *method* or *terms* of the civil law, nor of others who have given general schemes and analyses of law; but shall use that *method* and those *words* and expressions that I shall think most conducible to the thing I aim at."[2]

England was made up of a variety of different laws, enacted by the several Saxon kings reigning over the distinct parts of the kingdom; which several laws, affecting then only parts of the English nation, were reduced into one body and extended equally to the whole nation by King Alfred, appears from Fortescue's Preface; and that it is therefore properly called the common law of England, because it was done '*ut in jus commune totius gentis transiret.*' But it had an ancienter original than Edward the Confessor, and was at first called the folcright or people's right (for it is plain it could not be called the common law in Edward the Confessor's time, for then they spoke Saxon; nor in William the Conqueror's time, for then they spoke French), but it received this name when the language came to be altered. And Lord Coke (1 Inst. 142) says: 'The common law is sometimes called right, common right, common justice.'" Millar v. Taylor, 4 Burr. 2343, 2344.

[1] Mr. George H. Smith, in his learned treatise on the Law of Private Right, where will be found a criticism of the common definitions of law, says: "But while even a perfect definition of the law would do but little to help us at the threshold of our inquiries, an incorrect definition, by giving us a false notion of the law and misleading us as to the method to be pursued in studying it, may do us infinite harm; and hence it will be necessary for us to examine at some length the various definitions that have been offered — so far, at least, as may be necessary to avoid being misled by them." Page xi.

[2] Hale's Preface to Analysis.

CHAPTER IV.

PERSONAL RELATIONS — THINGS — ACTIONS.[1]

"Was it Mirabeau, Mr. President, or what other master of the human passions, who has told us that words are things? They are, indeed, things, and things of mighty influence, not only in addresses to the passions and high-wrought feelings of mankind, but in the discussion of political and legal questions also; because a just conclusion is often avoided, or a false one reached, by the adroit substitution of one phrase or one word for another." — Webster's Reply to Calhoun.

Sec. 74. *The Difficulty of Communicating Ideas.*— In this chapter we shall endeavor to show what we understand to be the main heads to be adopted in the classification of the civil branch of American municipal law. The main obstacle encountered in such a discussion is the difficulty of conveying, in written language, the exact ideas intended. Mr. Madison, in the Federalist,[2] very aptly points out the impediment in the following language:

"Besides the obscurity arising from the complexity of objects and the imperfection of the human faculties, the medium through which the conceptions of men are conveyed to each other adds a fresh embarrassment. *The use of words is to express ideas.* Perspicuity, therefore, requires not only that the ideas should be distinctly formed, but that they should be expressed by words distinctly and exclusively appropriated to them. But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many, equivocally denoting different ideas. Hence it must happen that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be conceived, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered;

[1] The matters considered in this chapter, and examined with such minute care, are really the touchstones of the law. At every turn in practice they are encountered. Master them at the outset and the way is easy. Pass them over lightly, gaining only obscure ideas of their meaning, and the law seems a labyrinth, and the cases applying it a forest without order.

[2] No. 37.

and this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined. When the Almighty himself condescends to address mankind in their own language, his meaning, as luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated."

Sec. 75. *Suggestions on Criticism, Construction and Interpretation.*— This suggests a remark in reference to the spirit of criticism of the productions and writings of others,— a remark equally applicable and useful in connection with the subject of construction and interpretation of laws or documents.[1] Before condemning any one as inaccurate, erroneous or nonsensical, the position of the writer, the age in which he lived, the subject-matter, and indeed the very meaning of the words in the vernacular and idiom of the language of that day, should be comprehended; and with this view the author has taken the greatest pains not to do injustice to any of those whose language, expressions or efforts he is obliged to discuss in this and the preceding chapter.

On first reading, to a person of the present day and surrounded with the institutions and ideas which obtain in the United States, Blackstone's language[2] seems jargon and to convey indefinite ideas; but it must not be forgotten that a century and a quarter has elapsed since the words were penned, and because of the widely different principles of our government from those enunciated by Blackstone, a great change has taken place in the meaning of words.

As ideas change, the meaning of words change. "Nature's live growths crowd out and rive dead matter. Ideas strangle statutes."[3] Lord Coke says: "The principles of natural right are perfect and immutable, but the condition of human law is ever changing, and there is nothing in it which can stand forever. Human laws are born, live and die."[4]

In the present chapter we are obliged to discuss words which have been in constant use for centuries, associated with the same ideas, though ever changing somewhat in meaning to suit the requirements and notions of the age and people using them.

[1] On pp. 122, 123 of Book 1.

[2] See Lyle v. Richard, 9 S. & R. 356.

[3] Wendell Phillips' Speeches and Lectures, 278.

[4] Calvin's Case, 7 Rep. 12, 13.

Sec. 76. *Meaning of Leading Words Obscure.*— Mr. Austin says: "Of all the perplexing questions which the science of jurisprudence presents, the notion of *status* or condition is incomparably the most difficult, and much of the obscurity in which it is involved arises from the way it has been treated by the modern commentators upon the Roman law."[1]

We may substitute for the word "*status*" in the above sentence the word "person;" for, if we do not find them synonymous, we will find the two terms very intimately associated. This word "person," and its scope and bearing in the law, involving, as it does, legal fictions and also apparently natural beings, it is difficult to understand; but it is absolutely necessary to grasp, at whatever cost, a true and proper understanding of the word in all the phases of its proper use.

In the discussion of this question, two methods are admissible: one is to state the meaning of the words used as they obtain to-day without reference to what their meaning has been heretofore; the other is more like the method pursued in comparative jurisprudence, of showing the etymology and prior use of the terms in other systems, directly or remotely connected with our own. The latter course will be adopted; for while it may not have the same appearance of originality, and may detract somewhat from the literary style of the work, it will nevertheless put the reader directly in possession of the materials which prove or refute the argument; and a knowledge of the prior use of words is always of great value in a proper understanding of their present meaning.

Sec. 77. *Public and Private Law.*— There have been various ways suggested of classifying municipal law, *e. g.*, the written or statute law, and unwritten or common law. This classification depends upon the form in which the rules are expressed. Another division may be into substantive law, which amounts to the *directory* and *declaratory* part of the law and *adjective* or *remedial* law.[2]

Still another classification is into *public* and *private* law.[3] This latter division has some advocates and some apparent reason for the division.[4] For example, public law relates largely

[1] Austin's Jur. 362.
[2] Austin's Jur. 797.
[3] Ibid.
[4] Holland's Jur. 109; Pomeroy's Const. Law, §§ 4–12.

to public relations; but upon investigation it will be found that the law cannot be presented in two separate bodies, and that the subjects classed under either of the general heads will be found embraced as subordinate to the general heads which are adopted.[1]

This classification is proper as a theoretical division unaccompanied by an attempt at arrangement under particular heads; but the moment the application is made, the theory will be destroyed by the attempt at application — that crucial test which at last shatters all theories, however beautiful when abstractedly indulged. There is no body of public law which is separate from another body of private law.

The best exposition of the method is that of Pomeroy. He says: "Public law embraces those precepts (rules) which imposed duties and conferred rights upon the political superiors in the state, supreme or subordinate, while the rules which control the subject members of the state in their relation to the whole body ought in strictness to be ranged in private laws; but as

[1] Austin's Jur. 70, 751, 752, 777, 960. Austin says: "In rejecting the division of the law into public and private, and in classing political with other conditions, Hale, I believe, is original and nearly singular. In an encyclopedia by Falck, a professor of law at Kiel, it is said that the authors of the Danish code, with those of the Danish writers who treat law systematically, observe, in this respect, the arrangement observed by Hale. But in all the treatises by continental jurists which have fallen under my inspection, law is divided into public and private, though the province of public law is variously determined and described." Austin's Jurisprudence, vol. 1, p. 71. Again he says: "If, then, the law of political persons be opposed by the name of public law to the rest of the legal system, one of these absurdities inevitably ensues: either a bit of the *corpus juris* is opposed to the bulk or mass; or (to avoid that absurdity) the rest of the legal system must be appended to the public law; and public law, plus the rest of the legal system, must be opposed to that rest of the legal system from which public law is severed. . . . Agreeably to the view which I now have taken of the subject, Sir Matthew Hale, in his Analysis of the Law, and Sir William Blackstone, following Sir Matthew Hale, have placed the law of political persons (sovereign or subordinate) in the law of persons; instead of opposing it, as one great half of the law, to the rest of the legal system. Blackstone divides what he calls law regarding the relative rights of persons into law regarding public relations and law regarding private relations. Under the first of these he places constitutional law and the powers, rights and duties of subordinate magistrates, of the clergy, and of persons employed by land or sea in the military defenses of the state." Austin's Jur., vol. 2, pp. 776, 777.

these relations are public in their nature, the rules themselves are also considered as a part of the public law. Again, the private law includes rules which are definite rights, powers, capacities and incapacities of various classes of persons, private, domestic or professional — the rights of property, etc. Again, public law touches and affects the state in its organic unity." The conception of dividing the law into two parts, public and private, fails to observe what has always been the accepted doctrine, that the body politic itself is a person, that all magistrates are persons, that all corporations are persons, that all individuals are persons, and that all rights cluster around and radiate from persons as they stand in some capacity or incapacity in which they are clothed by law. The recognition of this enables Hale and Blackstone to present a beautiful outline of English law. It is the strong side of their plan. It is sometimes said that constitutional law is not treated by Blackstone, but this is an error. All the recognized rules of constitutional law of England are in some form or other treated by Blackstone under the law of persons, very much of the same being again repeated under the law of wrongs — a defect which swelled the volume of his work and tended to confusion on account of the repetition.

In most treatises upon American law, the lack of an analysis of the subject such as that possessed by Hale and Blackstone prevents the treatment of the constitutional law of America under the law of persons, and this place has been taken by the title-head "Constitutional Law," to the utter confusion, in fact, of all logical method in text writing, for the reason that there is no right, tangible or intangible, personal, or of property, which is not protected by the constitution. There is no authority, legislative, executive or judicial, which is not limited by the constitution. When subjected to examination it will be found that under the public law of these authors will be found the relations of men in regard to public matters, as Magistrate and People, and there will always be found that confusion contained in the statement of Professor Pomeroy that those rules (laws) which control the subject member of the state in the relations with the whole body ought in strictness to be ranged in the private law; but as these relations are public in their nature, the rules themselves are also considered as a

part of the public law. On the contrary, if the capacities or incapacities, powers or duties of the public functionaries are treated directly in relation to their capacity as persons, we obtain exactly the notion we desire, namely: the identity of the alleged person, and the powers, duties, obligations and disabilities appended thereto by law; and I apprehend that upon investigation it will be found that the subjects classed under either the general heads *public* or *private* law will be found to be treated more analytically and specifically as subordinate to the general heads which we shall hereafter adopt.

"Public law," says the Institutes, "relates to the government of Rome." It also included criminal law, which is not treated in the Institutes.[1]

Sec. 78. *Ancient Classifications.*— The attempts to classify systems of law that have been attended with anything like success are those of Gaius, Justinian, Hale, and Blackstone. In the Commentaries of Gaius and the Institutes of Justinian, we have nothing on the subject of political relations excepting something regarding the sources of law. The analysis of Hale did not include the criminal law, as he had treated that subject in his "Pleas of the Crown."

All of these attempts at classification have proceeded upon what we believe to be the true principle of legal analysis, namely: a classification of laws according to the objects to which the rules relate, or, as we might otherwise put the same idea, laws are to be classified according to the subject-matter of the law, each and all being intimately connected with the ideas and nomenclature of the law of the United States; and in many cases we will see terms borrowed from one or the other to express ideas not at all similar to the idea conveyed by the same word as originally used.

Sec. 79. *Persons and Things.*— It is not strictly true that Blackstone makes no use of the classification into Rights and Wrongs in the body of his work, as we shall presently see; for in chapter 1 of the Commentaries proper, he says: "Now, as municipal law is a rule of civil conduct commanding what is right and prohibiting what is wrong, it follows that the principal objects of law are Rights and Wrongs;" and in the prosecution of the Commentaries he professes that he will follow the

[1] Austin's Jur., vol. 2, p. 778.

very obvious division of the law into Rights and Wrongs, and the title of the first book is "The Rights of Persons." He then proceeds: "Rights are liable to another subdivision; either, *first*, "those which concern and are annexed to the persons of men and are then called *jura personarum*, or the rights of persons; or *second*, such as a man may acquire over external objects or things unconnected with his person, which are styled *jura rerum*, or rights of things."

He does not, however, classify wrongs as the wrongs of persons and the wrongs of things. This division of "rights" into rights of persons and rights of things is apparently based upon a supposed adherence to the arrangement of the Roman law, and also a translation of the Latin expression *jura personarum* and *jura rerum* as the rights of persons and the rights of things.

Gaius treats the subject under the title-head, "the divisions of the *law*," not the division of *rights*, his expression in Latin being, "*Omne autem jus quo utimur val ad personas pertinet, vel ad res, vel ad actiones*," and is translated by Sanders, "all our *law* (not rights) relates either to persons, to things, or to actions."[1]

Austin has been criticised as using harsh language because he characterizes the translation by Hale and Blackstone of *jura personarum* and *jura rerum*, with rights of persons or rights of things, as mere jargon;[2] but it must be remembered that it is a very serious defect in an institutional work to make use of any expression, without explanation, which it is necessary to explain before it conveys an intelligent idea, and which, also, when explained to one acquainted with the vernacular in which the book is written, expresses an idea entirely different from the idea suggested by the words used.

There is no difference of opinion as to the meaning of the words *jura personarum* and *jura rerum* when used in these connections; all are agreed that in these situations these words mean law of persons or law relating to persons and law relating to things, and not the rights of persons and the rights of things.[3]

The whole confusion in regard to rights and wrongs, and

[1] Gaius, 1-8; Sanders' Justinian, 1-3; Austin's Jur. 983.

[2] Austin's Jur., p. 294, note.

[3] See also Sanders' Justinian, Hammond's Int.; Holland's Jur.; Austin's Jur. 157, 376, 715, 761, 763, 983.

rights of persons and rights of things, results from Blackstone's transplanting the nomenclature and definitions of natural law, borrowed from Roman law, into England without the use of intelligent translation and apt explanation.

Sec. 80. *Rights of Persons — Blackstone's Meaning.*— It has been claimed that this error in translation, *rights* of persons and *rights* of things, instead of *laws* concerning persons and *laws* concerning things, arises on account of ignorance, so far as Blackstone was concerned.[1] If it is so absurd an error as claimed by Mr. Austin, Blackstone erred in good company, for he merely followed Lord Hale, who was at least the equal of any other lawyer of his day. That *jura personarum* and *jura rerum* could not properly be translated *rights* of persons and *rights* of things, but that the word "*jura*" in that connection meant *law*, is perfectly clear; but that the expression used by Lord Hale, and followed by Blackstone, was ignorantly used, without a clear understanding of the meaning of the words used as qualified by them, is not at all apparent.

Christian, in notes to Blackstone's Commentaries, at this point says: "But the distinction of rights of persons and rights of things in the first two books of the Commentaries seems to have no other difference than the antithesis of the expression, and that, too, resting upon a solecism; for the expression rights of things or the right of a horse is *contrary to the idiom* of the English language. We say invariably a right to a thing. The distinction intended by the learned judge in the first two books appears in a great degree to be that of the rights of persons in *public stations*, and the rights of persons in *private relations*."[2]

Walker, in his treatise on American Law, says in regard to the primary division of legal subjects into rights of persons and rights of things: "Private wrongs and public wrongs. These expressions do not on their face indicate that remedies are to enter into the discussion; moreover the phrase "rights of things" by itself conveys *no definite idea*, since all rights are rights of persons, *i. e.*, they belong to persons, though they may have relation to other things."[3]

Judge Cooley says all individual rights are, or must be, rights of persons. They may be rights which concern their

[1] Austin's Jur. 71, 294, 715.
[2] 1 Sharswood's Blk. 1, 122, note.
[3] Walker's American Law.

personal safety or liberty, or they may be relative rights pertaining to them as members of families or civil or political societies, or they may be rights to possess and enjoy animate and inanimate things. To speak of the right of things, though correct enough in the sense which it is hereafter explained, is likely to convey inexact ideas and therefore misleading. By "rights of persons" we are likely to understand rights which belong to and are possessed by persons, but in that sense there could be no rights of things.[1]

Sec. 81. *Austin's Misstatement of Blackstone's Meaning.*— Austin says: But the distinction, as explained in the cited places, is not only founded upon a misapplication of language, and thereby involves the subject in obscurity; it is also inconsistent with the subsequent exposition which he gives of these same rights. According to the terms of the distinction, the rights of persons are such rights as men have to their own persons or bodies, freedom from bodily harm, etc., so that all such rights as a man may have in, over and to external objects (whether to other persons or things) ought, in pursuance to the same distinction, to have been excluded from the rights of persons and treated of nowhere but under the rights of things.

He instances husband and wife, father and child, as such rights as a man may have over external objects. In consequence of his misapprehension of the term "rights of persons," he has treated (Book I, chapter 1) rights to life, reputation, etc., with the obligation to respect them, under the rights of persons, although, as being common to every *status*, it is manifest that they belong to the rights of things.[2]

It is plain that Austin has not expressed the meaning of Blackstone's qualifying phrases. Blackstone does not say rights of persons are such as men may have to their *own persons*, but "*which concern and are annexed to the persons of men.*"

Sec. 82. *Different Views of Blackstone's Meaning.*— No better illustration of the confusion of ideas conveyed by the words of Blackstone, as contained on pages 122 and 123 of volume I of the Commentaries, can be given than will be found by comparing the notions of the meaning as given by the notes to those pages by Walker, Christian, Cooley and Austin with each other, and then with the explanation given by Prof. Hammond.

[1] 1 Cooley's Blk. (3d ed.), 122, note. [2] Austin's Jur. 762.

The conclusions are quite different from each other, and each is different from the idea expressed by Prof. Hammond; the latter has expressed the meaning intended.

Let us compare briefly these notions.

Mr. Christian takes it that the distinction between rights of persons and rights of things commented upon in the first *two books* is the difference between persons in *public stations* and in *private relations*. This is not correct, as will be seen by turning to the analysis as found in any edition of the Commentaries. It will be seen that the *public* relations are magistrates and people, and the *private* relations are master and servant, husband and wife, parent and child, guardian and ward. These, with the subject of corporations, are all embraced within the expression "rights of persons," and actually treated in Book I; while under the title-head "Rights of Things," in Book II, is treated the subject of "Property."

Mr. Walker understands that the phrase "rights of things" conveys in itself no definite idea.[1]

Mr. Justice Cooley sees matter as explained clearly enough, but he adds: "The language used is likely to convey inexact ideas, and therefore be misleading," adding: "By 'rights of persons' we are likely to understand rights which *belong* to and are *possessed by* persons," and that "in that sense there can be no rights of things." But, as we shall see, of possession, or belonging to, is not quite correct. The idea of Hale and Blackstone in reference to rights of persons is the difference in the conditions of men and rights depending thereon.

Professor Austin understands that "Blackstone's 'rights of persons' are such rights as men may have to their own persons or bodies."

Professor Hammond says Blackstone does not deserve the criticism and ridicule that has been spent on his supposed mis-

[1] Walker says: "A treatise, therefore, upon municipal law, is, for the most part, a treatise upon rights and remedies, or upon wrongs and remedies, as one may choose to express it; and it suggests a remark upon Blackstone's primary division of legal subjects into rights of persons, rights of things, private wrongs, and public wrongs. These expressions do not on their face indicate that remedies are to enter into the discussion. Moreover, the phrase "rights of things," *jura rerum*, by itself conveys no definite idea, since all rights are the rights of persons; that is, they belong to persons, though they may have relation to other things." Walker's Am. Law, p. 47.

takes, and asserts that in this passage he states, *as clearly as any of his critics* have done,[1] that *things* are the objects and *persons* the subjects of rights.[2]

The learned editor then submits eight pages of notes in explanation of Blackstone's meaning of these Latin expressions taken from the Roman law, and the English equivalents given by him, in which he shows clearly:

First. That the idea intended by Blackstone was different from that conveyed by the Latin expressions *jura personarum* and *jura rerum.*

Second. That the idea expressed by "rights of persons" and "rights of things," standing alone, did not convey to the English reader the idea intended by the author.

Third. That Blackstone had a definite idea which he intended to express by these words, and that the explanatory words did express the true meaning; and it is gratifying to find that Professor Hammond has given an explanation of the meaning of the expressions intended by Blackstone which seems reasonable and useful as applied to English jurisprudence.

Blackstone's Explanation.— What is the explanation given by Blackstone? All that there is, is found in the qualifying phrases italicised. "*Rights* of persons," he says, "are those *which concern and are annexed to the persons of men;* secondly, rights of things are *such as a man may acquire over external objects or things unconnected with his person.*"[3]

This explanation may be clear to one who has spent years in the investigation of legal subjects, and who has thereby become possessed of so much learning as to be able to explain not merely the ideas actually conveyed by the words used, but to arrive at the ideas intended to be conveyed by the person using them; but the explanation will be found by the uninitiated only to add to the confusion, for the reason that the rights of persons are said to be those which are annexed to the *persons of men*, and there is no explanation anywhere afforded by him of any distinction between the word "persons" and the word "men;" and the rights of things are confined to those which a *man* may acquire to external things; while he

[1] The critics have not explained at all.

[2] 1 Hammond's Blk. 330.

[3] The use of the two words *objects* and *things* renders the phrase indefinite.

immediately points out that there are *artificial* persons that are not *men*, and yet may and do enjoy the right of things. Indeed, we have seen that three learned men, viz., Walker, Christian and Austin, have failed to get the true meaning as explained by Professor Hammond, which is submitted below.[1]

SEC. 83. *The Law of Persons in English Jurisprudence Differs from the Same in Roman Law.*— It is apparent that a proper explanation lies at the threshold of any analysis, and it is conceived that no progress can be made till the proper conception is had of the leading terms used. We have asserted in effect that the ideas contained in the expression found in Gaius and the Institutes, that "*all* our law relates to *persons*, to *things*, and to *actions*," are applicable to American jurisprudence as well as to the English and Roman.

In what sense does Blackstone use the expression "rights of persons?" In the sense of rights *belonging* to persons? or does he use the word *of* in the sense of *concerning* or *relating to?* That is determined by referring to the text.

The *jura personarum*, or "rights of persons," Blackstone explains to be those which *concern* and are annexed to the *persons* of *men*. The *jura rerum*, or rights of things, are such as a *man* may acquire over *external objects* or *things* unconnected with his *person*. This is an odd expression to use in a definition of the rights of persons, *i. e.*, the rights *of* persons are the rights which *concern* the persons, to which is added the phrase "of men," making it read, "the persons of men," although "persons" seems to be used as equivalent to "man." Why not say, concern the persons of persons, or man of men, or simply men?

It will be seen that, in the first connection, the word *of* is used in the sense of "concern" and "relating to," instead of "belonging to," and the second are defined to be, not the right of things at all, but such rights as a man may acquire over *objects and things not connected with his person*. On another page, however, he says that certain absolute rights of *individuals* (not persons) are such as would *belong to* the persons merely in a state of nature, thus introducing another word, viz., individual.[2]

Some authors assert that Blackstone did not understand what was intended by Gaius and the Institutes;[3] others, that the

[1] *Post*, p. 123.

[2] 1 Blk. Com., p. 123.

[3] Austin's Jur., lec. XL; Holland, 71.

meaning of his expressions, if once thoroughly comprehended, was justifiable.[1]

The commentator should have the benefit of the construction most favorable to him, that in using the expression "rights of things" he used this word "*of*" in the sense we have suggested, namely, "concerning" or "relating to," which will leave his expression less liable to criticism on that ground; and it would then appear that he had distinguished certain rights as relating to *persons*, and certain rights as relating to *things*, though we still have the expression that absolute rights of individuals are such as would belong to (not concern or relate) their *persons* in a state of nature, and it is not made plain to us just what political or civil rights a man would have in a state of nature, and their absolute rights are plainly the civil rights of Hale, and such as we term "civil" rights.[2]

By translating *jura* as "rights" instead of "laws" seemingly puts us in the situation of having persons and things alike the *objects of rights*,[3] instead of having laws relating to persons and things, and we have not been told who is the possessor of the rights of persons or the rights of things. This is left to implication, and by reason thereof confusion and obscurity pervade what should have been the clearest part of the Commentaries.

Jeremy Bentham, in his remarks in reference to the inexact use of language by Blackstone in pages 47 and 49 of the Commentaries, says: "When leading terms are made to chop and change their several significations, sometimes meaning one thing, sometimes another, at the upshot perhaps nothing, and this in the compass of a paragraph, one may judge what will be the complexion of the whole context."[4]

Sec. 84. *The Legal Conception of Leading Words.*— Inasmuch as the words *person*, *man*, *thing*, *property*, *rights*, *wrongs* and *actions* are leading terms constituting the designation of departments of the *corpus juris*, it will be impossible to obtain clear conceptions of subjects connected with these words until an understanding is agreed upon as to the sense in which these terms

[1] Hammond's Blk., note, p. 316.

[2] See next chapter.

[3] This is more in conformity to the Roman law than many who criticise Hale and Blackstone seem to realize. There is a real dominion over persons, *e. g.*, husband and wife, parent and child, etc., but these are not rights *in personam* by the Roman law. They would be according to Blackstone's qualifying phrase. See next chapter.

[4] Fragment on Government, ch. 1, sec. 3.

are used. If we arrive at the meaning of these words intended by Blackstone and make the same clear, we will have a better idea of his method and perhaps a better opinion of it, and at the same time will be able to show the distinction between the same words in the Roman, the English and in American law.

Blackstone apparently uses the Roman word *personarum* as synonymous with the English word "person," and the latter word interchangeably with "individual" and "man," whereas he might have avoided all confusion by a closer adherence to that which he professed to follow.

Sec. 85. *The Word "Person" Defined.*— Gaius says "*De juris devisione*" [the divisions of the law] immediately preceding his division of the law; then follows, "*De conditione hominum*" [meaning the condition or *status* of men].

In the Institutes[1] "*De jura personarum*" precedes the expression "All our law relates either to persons, or to things, or to actions." The words *persona* and *personæ* did not have the meaning in the Roman which attaches to *homo*, the individual, or a man, in the English; it had peculiar reference to artificial beings, and the *condition* or *status* of individuals.[2]

[1] Liber, tit. 3.

[2] Sanders' Justinian, 1–3, notes; Austin's Jur., pp. 41, 157, 362, 363, 376, 715, 730, 762, 983.

Professor John Austin's View.— "Many of the modern civilians have narrowed the import of the term 'person' as meaning a physical or natural person. They define a person thus: '*homo, cum statu suo consideratus;*' a 'human being, invested with the condition of *status*.' And, in this definition, they use the term *status* in a restricted sense, as including only those conditions which comprise *rights*, and as excluding conditions which are purely onerous and burthensome, or which consist of duties merely. According to this definition, human beings who have no rights are not *persons*, but *things*, being classed with other things which have no rights residing in themselves, but are merely the subjects of rights residing in others. Such, in the Roman law, down to the age of the Antonines, was the position of the slave." Austin's Jur., vol. 1, p. 358.

The Signification in Our Jurisprudence.— "The word 'person,' in its primitive and natural sense, signifies the mask with which actors, who played dramatic pieces in Rome and Greece, covered their heads. These pieces were played in public places, and afterwards in such vast amphitheatres that it was impossible for a man to make himself heard by all the spectators. Recourse was had to art; the head of each actor was enveloped with a mask, the figure of which represented the part he was to play, and it was so contrived that the opening for the emission of his voice made the sounds clearer and more resounding, *vox personabat*, whence the name *persona* was given to the instrument or mask which facilitated the resounding of his voice. The name *persona* was afterwards applied to the part itself

The word "*homo*" corresponds to the English word "man," and, as the Romans expressed it, "*unus homo sustinet plures personas;*" *i. e.*, one man has many persons, or sustains many *status*, or many different conditions.[1]

Austin says: "The term 'person' has two meanings, which must be carefully distinguished. It denotes a man or human being; or it signifies some condition borne by a man. A person (as meaning a man) is one or individual, but a single or individual person (meaning a man) may sustain a number of persons (meaning condition or *status*)."[2]

Notice that this meaning is not so broad as that given by Ortolon (*post*, page 114). It does not include artificial persons.

Again he says: As throwing "light on the celebrated distinction between *jus rerum* and *jus personarum*, phrases which have been translated so absurdly by Blackstone and others,— *rights of persons* and *rights of things*, *jus personarum* did not mean *law* of persons, or rights of persons, but law of *status*, or condition. A *person* is here *not a physical or individual* person, *but the status* or condition with which he is invested. It is a remarkable confirmation of this that Gaius, in the margin purporting to give the title or heading of this part of the law, has entitled it thus: *De conditione hominum;* and Theophilus, in translating the Institutes of Justinian from Latin into Greek, has translated *jus personarum . . . divisio personarum;* understanding evidently by *persona . . .* not an individual or physical person, but the *status*, condition or character borne by physical persons. This distinctly shows the meaning of the phrase *jus personarum*, which has been involved in impenetrable obscurity by Blackstone and Hale. The law of *persons* is the law of *status* or condition; the law of *things* is the law of *rights and obligations*[3] considered in a general manner, or as distinguished from those peculiar collec-

which the actor had undertaken to play, because the face of the mask was adapted to the age and the character of him who was considered as speaking, and sometimes it was his own portrait. It is in this last sense of personage, or of the part which an individual plays, that the word *persona* is employed in jurisprudence, in opposition to the word man, *homo*. When we speak of a person, we only consider the state of the man, the part he plays in society, abstractly, without considering the individual." 1 Bouvier's Institutes, note 1.

[1] Austin's Jur. 362.

[2] Austin's Jur. 363.

[3] A word of caution is necessary here against accepting this statement as applicable to English and American law. See next chapter.

tions of rights and obligations which are styled conditions and considered apart."[1]

A moment's reflection enables one to see that *man* and *person* cannot be synonymous, for there cannot be an artificial man, though there are artificial persons. Thus the conclusion is easily reached that the law itself often creates an entity or a being which is called a person; the law cannot create an artificial man, but it can and frequently does invest him with artificial attributes; this is his personality, which we *see* and by which we are affected.

The law does not distinguish between men except by their personality, as king or magistrate, or as parent or husband or wife, etc. While the idea may be difficult for the tyro to grasp, the *personality*, *i. e.*, this condition or *status* of a man, is entirely the creation of the law. By nature all men are created free and equal, *i. e.*, of equal rank, equal rights; but the law does not look upon all men as equal, though in the law of the United States all men have equal *civil* rights.[2]

The question is asked, Who is that man? The reply would be, that is the king or lord so and so, or the chief justice or the president or governor. But what is the name of this personage? The name indicates the *man*, the title, rank or legal standing of the *person*.

The word "persons" denoted certain conditions of rank or *status* with which a man was clothed by law. To adopt the language of the same author, "the term '*person*,' as denoting a condition or *status*, is therefore equivalent to *character*.[3] It signified, originally, a mask worn by a player, and distinguished the character which he represented from the other characters in the play. From the mask which expressed the character, it was extended to the character itself. From characters represented by players, or from dramatic characters, it was further extended by a metaphor to conditions or *status*. For men, as subjects of law, are distinguished by their respective *conditions;* just as players, performing a play, are distinguished by the several *persons* which they respectively enact or sustain."[4] As we shall see, the word had a still broader meaning.

[1] Austin's Jur. 374.

[2] See Ex parte Virginia, 100 U. S. 368.

[3] Hale nowhere speaks of *status*, but uses the terms "character" or "capacity." See *post*, p. 121.

[4] Austin's Jur. 363.

"A slave," says Holland, "having, as such, neither rights or liabilities, had in Roman law, strictly speaking, no '*status*,' '*caput*,' or '*persona*.' On the day of his manumission, says Modestinus, '*incipit statum habere*.' Before manumission, as we read in the Institutes, '*nullum caput habuit*.'"[1]

The following is the explanation given by Mr. Sanders in his translation of the Institutes: "The word *persona* had, in the usage of the Roman law, a different meaning from that which we ordinarily attach to the word "person." Whoever or whatever was capable of having, and being subject to, rights, was a *persona*. All men possessing a reasonable will would *naturally* be *personæ;* but not all those who were, physically speaking, men, were *personæ*. Slaves, for instance, were not in a position to exercise their reason and will, and the law, therefore, refused to treat them as *personæ*."[2]

On the other hand, *many personæ had no physical existence.* The law clothed certain abstract conceptions with an existence, and attached to them the capability of having and being subject to rights. The law, for instance, spoke of the state as a *persona*. It was treated as being capable of having rights and of being subject to them. These rights really belong to the men who composed the state, and they flowed from the constitution and position of associated individuals. But, in the theory and language of law, the rights of the whole community were referred to the state, to an abstract conception interposed between these rights and the individual members of society. So, a corporation, or an eccleciastical institution, was a *persona*, quite apart from the individual *personæ* who formed the one and administered the other. Even the *fiscus*, or the imperial treasury, as being the symbol of the abstract conception of the emperor's claims, was spoken of as a *persona*. The technical term for the position of an individual regarded as a *legal person* was *status*.[3]

Ortolon's Explanation of Personality.[4]— The substance of the above was undoubtedly taken from Ortolon's treatment of the

[1] Holland's Jur. 81.

[2] Slaves were not persons in the United States until after the abolition of slavery. 1 Hammond's Blk., 334, note.

[3] Sanders' Justinian, Introduction, p. 26.

[4] Ortolon's History of the Roman Law is among the best. It is, unfortunately, not easily obtained.

subject as given in his History of the Roman Law, which is submitted because it is clear and concise:

"The word 'person' (*persona*) *does not* in the language of the law, as in ordinary language, designate the physical man. This word in law has two acceptations: In the *first*, it is every *being* considered as capable of *having* or *owing* rights, of being the active or passive subject of rights.

"We say *every being*, for *men are not alone* comprised therein. In fact, law, by its power of abstraction, *creates persons*, as we shall see that it creates things, which do not exist in nature. Thus, it erects into persons the state, cities, communities, charitable or other institutions, even purely material objects, such as the *fiscus*, or inheritance in abeyance, because it makes of them beings capable of having or owing rights. In the inverse sense, every man in Roman law is not a person. For example, slaves were considered as the property of the master, especially under the rigorous system of primitive legislation, because they are the object and not the subject of law. This, however, did not prevent the Romans from including them in another sense in the class of persons.

"We shall therefore have to discriminate between and to study two classes of *personæ:* physical or natural persons, for which we find no distinctive denomination in Roman jurisprudence except the expressions taken from Ulpian, *singularis persona;*[1] that is to say, the man-person; and abstract persons, which are fictitious and which have no existence except in law; that is to say, those which are purely legal conceptions or creations.

"In another sense, very frequently employed, the word 'person' designates each *character* man is called upon to play on the judicial stage; that is to say, each *quality* which gives him certain rights or certain obligations — for instance, the *person* of father; of son as subject to his father; of husband or guardian. In this sense the same man can have several *personæ* at the same time. In this respect he resembles the player in a comedy or drama."[2]

The last two paragraphs embrace all that Austin gives us in the quotation given above.

From what we have seen, the following conclusion may be

[1] Does not this equal "individuals?"

[2] Ortolon's History of Roman Law, 567–68.

drawn: The words *persona* and *status* were not synonymous, though very nearly so. The word "person" had two meanings:

First. Every being, artificial or natural, capable of having or *owing* rights.

Second. The characters, capacities, qualities or positions which the law ascribed to certain *men as individuals* — that is, rank, condition, capacity — *status.*

The technical term for the second meaning, namely, the position, quality, character which a man bears, is *status.*

Status is not so broad as person, but always related to physical men.

A slave had no rights, no rank, no standing, no capacity, and consequently no *status.* This applies, of course, only to the earlier days of Roman law, for subsequently slaves were given a standing as men.

"In the earlier days of Roman law," says Sanders, "no one would have conceived this to be unnatural."[1]

In the days of Gaius, it seems, he treats slaves as persons by saying "Persons are freemen or slaves."[2]

In England all *men* were persons, and were divided into certain classes or ranks by virtue of which they had especial characters, capacities, rights, privileges and immunities; for instance, the *right* of magistracy, as king, as lord, etc. These were artificial. In human societies men have certain standing, position, capacity, according as they are sovereign or subjects, parents and children, husband and wife, or citizens.

We have seen something of the etymology of the word, also its meaning and application as used in the Roman law. We know that the word "person" is a familiar one in English literature, both in England and America. We are endeavoring to ascertain whether in the English language we have a right to oppose *persons* to *things* for the purpose of classification of rules of law, and if thereby we convey intelligent ideas.

We know that all laws emanate from persons, and also that they operate against or upon *persons;*[3] that is, all law cer-

[1] Sanders' Justinian, Int., 27; Austin's Jur., lect. 12, p. 358.

[2] Gaius, 1–9; Austin's Jur. 358.

[3] Virginia v. Rives, 100 U. S. 332; 92 id. 554; United States v. Harris, 106 id. 629; Civil Rights Cases, 109 id. 3. A state may in a sense fall under the designation, and laws be directed against states; but as the state acts by individuals, in the same manner it is operated upon through individuals.

tainly addresses persons. So of rights. We know that rights belong to persons, and that in that sense there cannot be the rights of things. It should be borne in mind that we are endeavoring to classify the body *laws*, and not the rights which are resultant from laws, and that the principle of classification adopted is the difference in the objects to which the rules relate.

There can be found in the Commentaries of Blackstone no definition of the word *person*, nor any explanation of the meaning intended to be ascribed to the word "person," and the word is there used indiscriminately in the popular and legal sense, interchangeably with "man" and "individual," and also to designate artificial beings capable of having rights; and there is not the slightest hint that in using the Roman expressions there is any change intended from the Roman idea of the word "person," though he does treat under the rights of persons what he styles *absolute rights*, which would be called "things" in Roman law.

Sec. 86. *Scope of the Word "Thing."*— Of *things*,[1] which is the subject of the second book, Blackstone says: "The objects of your inquiry in this second book will be the *jura rerum*, or those rights which a man may acquire in and to such *external things as are unconnected with his person.*" Why not say unconnected with him, himself? These are what the writers in natural law style the "rights of dominion or property." This is the only definition given of the words "*property*" or "*thing;*" that is, the *jura rerum* equals those rights which a man may acquire in and to external things. Otherwise put, the rights of things are rights which a man may acquire to things unconnected with his person; and these are what writers in natural law style property; yet in the treatment of this subject the learned commentator treats the subject of contracts, the main feature of which is its obligation, or, in other words, the power which the law affords one person of enforcing it by compelling another person to perform it, or awarding damages for its breach by an appropriate action by one person against another.

The inquiring student will ask, Is a *thing* property, and are

[1] Observe the word "chose," which will be explained hereafter. Its meaning has an important bearing on the modified meaning of both "person" and "thing."

all things property? and if the word "thing" shall be held to embrace any rights not having a tangible object, why are not the rights of personal security, personal liberty and private property embraced within the word "things?" In the case of *Chisholm v. Georgia*,[1] Justice Wilson, being obliged to discuss the meaning of "states" and "sovereigns" in politics as applied to the jurisprudence of the United States, said: "In the place of those expressions, I intend not to substitute new ones, but the expressions themselves I shall certainly use for purposes different from those for which hitherto they have been frequently used."

Such, it is apprehended, is exactly what Hale and Blackstone did. In reality, they ascribed new and different meanings to words taken from the Roman law, either broader or narrower than the meanings of the same words in the Roman law, and they did arbitrarily mistranslate *jura*, meaning *law*, to *rights*, to suit the purpose.

So, in the prosecution of this work, in many instances we will find words which were in common use in the English law before the Revolution, which are now used in the jurisprudence of the United States with meanings very different from their old meanings; and the purpose of these inquiries as to the meanings of these words is to avoid confusion by ascertaining the appropriate meanings of the terms. It is for this reason that we investigated the meaning of these words in the Roman law and as used in English law by Blackstone.

Sec. 87. *Ortolon's Explanation of "Things."*—Volumes have been written on this subject, but I believe no authority is considered better upon the meaning of words in the Roman law than the opinion of Ortolon; and, as he expresses himself in the clearest and most concise manner, his explanation of the meaning of the word *thing* is submitted.[2]

"The word 'things' (*res*), even in law, is a flexible word, which lends itself with marvelous facility to the wants and whims of language. The question for us is its legal sense.

"In the same manner as the word *persona* designates in law every being considered as capable of becoming the active or passive subject of right, so the word *res* designates everything

[1] 2 Dall. 421.

[2] The work is quite scarce; I believe out of print.

which is considered susceptible of forming the object of rights; and in this category is included everything which man, the universal dominator, has been able to regard as subject, or at least destined to minister, to his wants and his pleasures; for, in reality, the end which a man proposes to effect by the exercise of rights is the satisfaction of his wants and the enjoyment of reasonable pleasures, either in his moral or physical perception.[1]

"We say everything — for physical and material objects are not alone comprised in it. In fact, just as there are persons of purely legal creation, so there are things which do not exist in nature, and which law alone has created. Law, by its power of abstraction, creates things as well as persons. Finally, if law sometimes raises purely material objects to the rank of persons, it sometimes inversely lowers man to the rank of things; such, for instance, are slaves, when they are considered as subjected, or as devoted, to the purpose of satisfying the wants of other men, incapable of being, in the relation of slave to master, the subject, but the object of rights.

"If what we have just said about *things* is compared with what we have already said about *persons*, it will be seen at once that the two cases are parallel.

"Roman jurists, indeed, have not laid down the definition of 'things' in the same wide and philosophical terms that we have adopted, which include *everything which can be the object of a right;* not only corporeal things, but also acts, *the status of persons* in different conditions, and, in general, *all rights.* Their ideas were at first directed to regarding things (*res*) as corporeal objects, which, being of some use or other to man, could form in relation to him the object of a right; but they afterwards extended the use of the word so as to make it include abstract ideas — objects of purely legal conception."[2]

From this it will be seen that the Latin scholar who was acquainted with the Roman meaning would not have obtained from reading the words *jura personarum* and *jura rerum* anything like the same ideas which Blackstone has ascribed as the meaning of these words.

"Rights," says Professor Hammond, "are (by Blackstone)

[1] The Declaration of Independence enumerates among inalienable rights, "life, liberty, and the pursuit of happiness."

nowhere defined or their nature investigated. It seems as if he would have dropped the term altogether if he could have done so without a tedious circumlocution."[1]

Blackstone does, in effect, define *property* to be "rights such as a man may acquire over external objects or things unconnected with his person."[2]

Sec. 88. *The Division of Subjects into Rights and Wrongs Discarded.*— Hale gives no reason for the division into rights and wrongs excepting the translation of *jura personarum* and *jura rerum* into rights of persons and rights of things, instead of law concerning persons and law concerning things. Blackstone went to great pains in order to prove that this division into rights and wrongs resulted naturally and necessarily from the definition of natural law, which is adopted as his definition of municipal law.

The division of the *law* as it relates to rights and wrongs, and again into rights of persons and rights of things, is but a change in form; the change is merely substituting for actions that concerning which actions are brought, viz., wrongs, and translating the Roman word *jura*, meaning *law*, into *rights*. Going back to the old form by translating *jura* into *law*, and using actions or remedies instead of wrongs, then we find that the laws of England do concern persons, things, and actions;— the substitution results from Blackstone's method analyzing *rights* instead of *law*.

Sec. 89. *The Agreement and Divergence Between Hale and Blackstone.*— Blackstone followed Hale in something more than

[1] Sanders' Justinian, Hammond's Introduction, p. 50.

Definitions of Rights.— "Jurisprudence is specifically concerned with such rights as are recognized by law and enforced by the power of the state. We may therefore define a 'legal right,' in what we shall hereafter see is the strictest sense of that term, as a capacity residing in one man of controlling, with the assent and assistance of the state, the actions of others." Holland's Jur., p. 71.

Chase, Justice, says: "When I say that a right is *vested* in a citizen, I mean that he has the power to do certain actions according to the law of the land." Calder v. Bull, 3 Dall. 394.

This definition is quoted by Webster in argument of the Dartmouth College Case, 4 Wheat. 516.

For exhaustive and scientific investigation of the jural conception of rights and a right, the student may consult Smith's Right and Law and the Law of Private Law. These works are small in size, but are among the most profound treatises by authors of our own land.

[2] 1 Blk. 122; 2 Blk. 1.

a mere matter of form. Hale's treatment of the subject of rights is as follows:

"*Civil rights* are of two sorts — *jura personarum*, or rights of persons, and *jura rerum*, rights of things. Civil rights of *persons* are such as do either *immediately concern the persons themselves*, or such as *relate to their goods and estates*.[1]

Origin of Absolute Rights.— "As to the persons themselves, they are either persons natural, or persons civil or politic; *i. e.*, bodies corporate.

Persons natural are considered two ways: *Absolutely*,[2] and simply in themselves; or, under some degree or respect of relation.

In persons natural, simply and *absolutely*[2] considered, we have these several considerations, viz.:

The *interest* which every man has in himself.

Their *capacities*, or *abilities*,[3] which respect their actions.

The interest which every person has in himself principally consists of three things, viz.:

The interest he has in the safety of his own person; and the wrongs which reflect upon that, are assaults,—affrays,—woundings.

The interest he has in his liberty or the freedom of his person; the injury whereto is duress and unlawful imprisonment.

The interest he has in his name and reputation; the injury whereto is scandal and defamation.

As to the other interest of *goods* and *estate*, though in truth they have a habitude, and are under some respect to the person, yet, because they are in their own nature *things separate* and *distinct from the person*, they will more properly come in under *jura rerum*.[4]

Sec. 90. *Lord Hale's Treatment of Status.*— The *capacity* that every person has, which is a *power* that *the law* variously assigns to person, according to the variety of certain *conditions* or *circumstances*, *wherein they are*, either *to take* or *to dispose*.

[1] Hale's Analysis, sec. 1.

[2] This is not saying that the persons are absolute, or that the rights are absolute, but it throws light upon how Hale uses the word "absolute," and this is the only reason for Blackstone's absolute rights. He might as well have said absolute persons or things as absolute rights. See *post*, ch. 4.

[3] This is the same as *status*.

[4] This is the keynote to the classification, "Rights of persons and rights of things."

And under this head we have —

First, the capacities themselves, which are especially two:

Capacities which a man has in his own right.

Capacities which he has *in auter droit*, or another's right.

Now, capacities which a man has in his own right are, either —

To acquire or take.

To alien or transfer.

And both these are either —

Of things personal.

Of things real.

The *second* kind of capacities are *in auter droit*,— in another right; as *executors*, *corporations*, *cestuy que use*, etc., whereof hereafter.

The various conditions or circumstances of persons with relation to those capacities, consisting of —

Ability.

Non-ability.

And all persons are presumed in law able in either of those capacities of taking or disposing who by law are not disabled; and those that are so disabled come under the title of non-ability, though that non-ability is various in its extent, viz.: to some more, to some less, as in the several instances following:

Aliens; here comes in the learning of aliens, as naturalization, denization, etc.

Attainted of treason or felony; here of attainders.

Persons *outlawed* in personal actions.

Infants; here of the non-ability of infants.[1]

Feme coverts; here of their disability.

Idiots and *lunatics;* here of that learning.

Persons under some *illegal* restraint or force, as duress, madness.

Villeins (now antiquated).

Bastards; and here of legitimation."

Sec. 91. *Lord Hale's Conception of "Things."*—Again at section 23, the title of which is "Concerning the *jura rerum*," he says: "And although the connection of things to persons has in the former part of these distributions given occasion to mention many of those *jura rerum* as particularly annexed to the

[1] Hale's Analysis, sec. 1.

consideration of persons under their several relations, yet I must again resume many of them, or at least refer unto them; and this without any just blame of tautology, because there they are considered only as *incidental* and relatively; but *here* they are considered *absolutely* — in their own nature or *kind*,— and with relation to themselves, or in their own nature, and the several interests in them, and transactions of them."

Obviously Hale's treatment does not warrant the criticism that he ascribed rights to things. He plainly says: "Civil rights of persons are such as do concern the persons themselves or such as relate to their goods and estates."[1] This leads one to believe that Professor Austin did not diligently endeavor to ascribe a reasonable meaning to the treatment of the subject by Hale as followed by Blackstone.

Sec. 92. *Substantial Difference Between Hale and Blackstone.*— The difference, in substance, between Hale and Blackstone's treatment and the treatment of the same matter in the Roman law consists in this: that inasmuch as all objects of rights, tangible or intangible, which the law protected, were under the Roman system "things," and consequently would fall under the *jura rerum* or law of things, Hale and Blackstone transferred from the law of things to the law of persons all such rights as *do immediately concern persons* themselves, and left under the *rights of things* interests of persons in goods and estates, *and obligations* from others, because they are in their own nature things *separate and distinct from the person*, as put by Hale, or external objects unconnected with the person, as put by Blackstone.

Sec. 93. *The English Conception of These Words.*— Dr. Hammond says: "And if our belief as to Blackstone's true meaning and method be the correct one, he could finally have informed Mr. Austin that what he proposed to do in the Commentaries was to *transfer to* the law of persons, or to locate in the proper place among the rights of persons, all such rights (and duties) as belonged to *all persons alike*, except such as had for their object 'external things *unconnected with the person*.'

"This last is in truth the cardinal point of the whole matter. Blackstone adopts (he should have said, from Hale) as his definition of a 'thing,' one quite different from that employed by

[1] Hale's Analysis, sec. 1.

the classical jurists; and all the departure from civilian precedent that can fairly be charged to him depends on, and is to be explained by, this changed sense in which he uses the word 'thing.'"[1]

Blackstone's use of the word "thing," if we have attended his language, is "*external objects* unconnected with the person." These objects are not always tangible, as we shall see later, though they were termed personal property or choses in action.

Dr. Hammond says: "Things are objects of rights, and, since Blackstone's time, the term has been confined in our law to external things unconnected with the person, such as land, chattels personal, etc."[2]

This is misleading, perhaps, in ascribing those changes to Blackstone. Dr. Hammond continues: "Prior to Blackstone's time the term 'things' had a much wider comprehension; it was identical with the objects of a right, whether that object had a tangible existence or not. Health, liberty, reputation were things in this sense; and even the indefinite imaginary objects of obligations, having no real existence, were also included under the term."[3]

Dr. Hammond is not accurate as to the time when this change in the meaning took place. One would suppose that Blackstone ascribed a new meaning to the words "persons" and "things," and recast the law of England in conformity therewith, whereas he only followed Hale in the use of these terms, and in so doing has received some criticism; and it would seem but fair for a person living in a later age to presume that Hale ascribed to these words a meaning which was natural and in conformity with the English use of terms. We are not, however, left to a matter of presumption.

Sec. 94. *The Word "Chose" Unknown in Roman Nomenclature.*— It is only necessary to examine the Commentaries of Blackstone and to remember the prior history of English law to understand that by including under the term "things" only those objects of rights which were denominated in the English law either real estate, chattels or choses in action, Hale and Blackstone did no violence to the vernacular of England. The word *chose* was a French (or Norman-French) word,

[1] Sanders' Justinian, Introduction by Hammond, pp. 55, 56.

[2] Hammond's Blk., 332, note.

[3] Id. See next chapter.

and, though its derivation is from the Latin *causa* or thing, its meaning corresponded to the things personal, in possession and in action as used by Hale and Blackstone. Undoubtedly, this is one of the ideas which grew out of the Norman-French occupation of England which was inaugurated by William the Conqueror.[1] When we contemplate lands and chattels, and then add to it what was embraced within the word *chose* in possession and *chose* in action, you have bounded the objects included by the word "things" in English law.

A *chose* in action was a right to receive or recover a debt, or money or damages for a breach of contract, or for a tort connected with a contract or connected with chattel property.[2]

Sec. 95. *The American Idea of a Right.*— As it has been asserted that Blackstone has nowhere defined rights or property, it will be well for us to arrive at the meaning of these two words. We have seen the definition of Holland that "a legal right is a capacity resting in one *man* of controlling, with the assent and assistance of the state, the actions of others."[3]

But inasmuch as the conflict may be between the state and the person, this definition will hardly do in American jurisprudence. The state is not the controlling force in our theory

[1] See 1 Schouler, Personal Prop. (2d ed.), § 11.

[2] See 1 Wilson's Works, 46; Bouvier's Dictionary; Gillett v. Fairchild, 4 Denio, 80; 2 Kent, Com. 351. "The term '*chose in action*' is one of comprehensive import. It includes the infinite variety of contracts, covenants and promises which confer on one party a right to recover a personal chattel or a sum of money from another by action. It is true, a deed or title for land does not come within this description. And it is true, also, that a mortgagee may avail himself of his legal title to recover in ejectment in a court of law. Yet even there he is considered as having but a chattel interest, while the mortgagor is treated as the true owner." Sheldon v. Sill, 8 How. (U. S.) 449, 450.

"Blackstone seems to have entertained the opinion that the term *chose*, or thing in action, only included debts due, or damages recoverable for the breach of contract, express or implied. (2 Blk. Com. 388, 396, 397.) But this definition is too limited. The term chose in *action* is used in contradistinction to chose in *possession*. It includes all rights to personal property not in possession which may be enforced by action; and it makes no difference whether the owner has been deprived of his property by the tortious act of another, or by his breach of contract, express or implied. In both cases, the debt or damages of the owner is a 'thing in action.' (2 Kent, 351; 1 Chit. G. P., p. 99, note; Tomlins' L. D., 'Chose;' The King v. Capper, 5 Price, 217; 1 Lilly, Ab. 378.)" Gillett v. Fairchild, 4 Den. 80–82.

[3] Holland's Jur. 71.

of jurisprudence; it is but one of the persons having and owing rights. We claim to have a government of *law*, not of men.

Perhaps the definition given by Justice Cushing, with Judge Kent's addition, comes as near being correct as anything to be found: "When I say that a right is vested in a citizen, I mean that he has the power to do certain actions or to *possess* certain things according to the law of the land."[1] Kent adds, "or to require from others."[2]

Sec. 96. "*Property*" *Defined.*— The word "property," although in common parlance frequently applied to a tract of land or a chattel, in its legal signification means only the *rights* of the owner in relation to it. It denotes a right over a determinate thing. Property is the right of any person to possess, use, enjoy and dispose of a thing.[3] The term "property" is often used to indicate the *res*, or subject of the property, rather than the property itself; but this is not its proper legal sense.[4]

[1] Calder v. Bull, 3 Dall. 386.

[2] 1 Kent, Com. 549; Wynehamer v. People, 13 N. Y. 378, 433.

[3] Rigney v. Chicago, 102 Ill. 77; Austin's Jur. 817.

[4] Eaton v. B. C. & M. Ry., 51 N. H. 504; s. c., 12 Am. Rep. 147.

Property.— John Marshall (afterwards chief justice of the Supreme Court of the United States), speaking of the legal conception of property, said: "It is not necessary to inquire how the judicial authority should act, if the legislature were evidently to violate any of the laws of God; but property is the creature of civil society, and subject in all respects to the disposition and control of civil institutions. . . . It must be repeated, that the law of property in its origin and operation is the offspring of the social state, not incident of a state of nature." Argument, Ware v. Hylton, 3 Dall. 211.

National Supreme Court.— "The words 'life, liberty and property' are constitutional terms, and are to be taken in their broadest sense. They indicate the three great subdivisions of all civil rights. The term 'property' in this clause embraces all valuable interests which a man may possess *outside of himself*, that is to say, outside of his life and liberty. It is not confined to mere technical property, but extends to every species of vested right." Camp v. Holt, 115 U. S. 620; Board of Education v. Blodgett, 155 Ill. 441.

The New York Court of Appeals.— "Now I can form no notion of property which does not include the essential characteristics and attributes with which it is clothed by the laws of society. In a state of nature, property did not exist at all. 'Every man might then take to his own use what he pleased, and retain it if he had sufficient power; but when men entered into society, and industry, arts and sciences were introduced, property was gained by various means, for the securing whereof proper laws were ordained.' Tomlins' Law Dict., Property; 2 Blk. Com. 34. Material objects, therefore, are property in the true sense, because they are impressed by the laws and usages of society with certain quali-

Horses and cattle and land were created by nature. "Property," strictly speaking, is an artificial conception of man.

"It seems to me," says Justice Cushing, "that the right of property in its origin could only arise from *compact express or implied*, and I think it the better opinion that the *right* as well as the *mode* or *manner* of acquiring property, and of alienating or transferring, inheriting or transmitting it, is *conferred* by society; it is regulated by civil institutions, and is always subject to the rules prescribed by *positive law*.[1]

ties, among which are, fundamentally, the right of the occupant to *use* and *enjoy* them exclusively, and his absolute power to *sell and dispose of them;* and as property consists in the artificial impression of these qualities upon material things, so whatever removes the impression destroys the notion of property, although the things themselves may remain physically untouched." Wynehamer v. The People, 13 N. Y. 396.

Illinois Supreme Court.—"Property in its broadest and most comprehensive sense includes all rights and interest in real and personal property, and also in easements, franchises and incorporeal hereditaments. That which may be taken for public uses is not exclusively tangible property." Met. City Ry. Co. v. Chicago W. D. Ry. Co., 87 Ill. 324.

"Property, in its appropriate sense, means that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or subjects, and generally to the exclusion of all others, and doubtless this is substantially the sense in which it is used in the constitution; yet the term is often used to indicate the *res* or *subject of property*, rather than the property itself, and it is evidently used in this sense in some of the cases in connection with the expression 'physical injury,' while at other times it is probably used in its more appropriate sense, as above mentioned." Rigney v. Chicago, 102 Ill. 77.

New Hampshire Supreme Court.—"In strict legal sense, land is not 'property,' but the subject of property. The term 'property,' although in common parlance frequently applied to a tract of land or a chattel, in its legal signification 'means only the rights of the owner in relation to it.' 'It denotes a right . . . over a determinate thing.' 'Property is the right of any person to possess, use, enjoy and dispose of a thing.' Selden, J., in Wynehamer v. People, 13 N. Y. 378, 433; 1 Blk. Com. 138; 2 Austin's Jur. (3d ed.) 817, 818.

"If property in land consists in certain essential rights, and a physical interference with the land substantially subverts one of those rights, such interference 'takes,' *pro tanto*, the owner's 'property.' The right of indefinite user (or of using indefinitely) is an essential quality or attribute of absolute property, without which absolute property can have no legal existence. 'Use is the real side of property.'" Eaton v. Boston, Concord & Montreal R. R., 51 N. H. 504; s. c., 12 Am. Rep. 151.

Missouri Supreme Court.—A man may be said to have a special property in his possession or calling by means of which he makes his support, and he can be deprived of it only by due process of law. Blair v. Ridgely, 41 Mo. 173; 97 Am. Dec. 248.

[1] Calder v. Bull, 3 Dall. 386.

Sec. 97. *Concluding Observations.*— We have now seen the meaning of the words "law" and "rights," and that rights are creations of law. We have also seen that the words "person" and "thing" and "property" have each, in legal parlance, a meaning different from the meaning often ascribed to them in common parlance. "Person" is to be distinguished from "man" and "individual," though including them. "Property" is not at all synonymous with "things," but relates to the right or interest in them; and the word "thing," in English and American jurisprudence, has a meaning *broader* than the *common* use of the word "thing," and *narrower* than the Roman use of the word "*res.*"

In our jurisprudence it included those objects which were denominated choses in action, and excluded all rights of a purely personal nature. Blackstone's description of property, and his treatment of it, correspond very nearly to the notions as they obtained in England in his day. He clearly indicates that he does not treat a horse, or land, or a chose, as property, but as the subjects of property.

CHAPTER V.

RIGHTS, OBLIGATIONS AND REMEDIES.

Sec. 98. *Complex State of the Subject.*—In the preceding chapter an endeavor was made to present the legal conception of the terms which designate the three departments into which the Roman jurists divided the great body of the civil law—*person*, *thing*, *action*.

The changed meaning ascribed to the same expressions by English jurists is there also pointed out, and it is shown that subjects are by the latter transferred from one department of law to another, according to the differing conception of these words.

In the course of that discussion the word "right" was defined, and the word "obligation" mentioned in connection with the Roman distribution of rights of persons.

The word *chose* was also introduced as a word adopted into the English law from a source other than the Roman law, and that these were divided into choses in possession and choses in action.

The English conception of these words, quite different from the meaning ascribed to them in the Roman law, resulted in radical departures in formal arrangement of English treatises.

The adoption of a new classification of certain rights under the designation *choses* in possession and *choses* in action, and the subordination of one of the great departments of the Roman classification, viz., obligation, brought about radical changes in the nomenclature.

New conceptions of the nature of property, ownership or dominion, with the use of the expressions real and personal property to designate respectively rights in land and in movable things and choses,[1] rendered the expression of the English

[1] "A vested cause of action is property, in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Where it (the cause of action) *springs from contract* or from the principle of *the common law*, it is not competent for the legislature to

law by the English jurists, who uniformly persist in making use of words borrowed from the civil law with an entirely new meaning, simply distracting to a civilian, and only intelligible to an English reader by the use of labored qualifying phrases.

The American student encounters all of these difficulties and others in addition, occasioned by reason of new elements introduced and still further changes and variations in the meaning of old words.

It will perhaps facilitate the understanding of the nature and classification of rights and obligations to present briefly the ancient meaning and classification of these words in the systems whence they are derived.

In the last chapter we saw that Blackstone translated *jura personarum* rights of persons, and *jura rerum* rights of things. To these words he added the qualifying phrases, segregating rights into two primary classes: Those "connected with the persons of men" and those "unconnected with his person."

All the changes from civilian methods result from these changes — the perverted use of *person* and the new conception of *res*.[1]

Sec. 99. *Remedies to Protect and Enforce are Essential Parts of the Definition of Right and Obligation.*— Before proceeding with the treatment of these words it will be wise to

take it away." Cooley's Const. Lim., 443, quoted in Board of Education v. Blodgett, 155 Ill. 441.

[1] "The student of the Institutes will hardly need to be informed that in the classical jurists, and among civilians generally (until within the last century), the term *res* and the term '*object of a right*' are strictly synonymous. No right could be conceived the object of which might not be designated *res*. The right of a man to security, to liberty, to reputation, to health, had for the object of each, respectively, a 'thing' — *res* — although that '*thing*' was merely the right itself, so to speak, *objectified*. Hence these rights, as well as any others, could be included among the *jura rerum* — rights considered in reference to their objects; they gave rise to actions *in rem*, and they are excluded from the *jus personarum*, which was reserved for rights appropriated to some particular class of persons. Blackstone, however, changed this by adding to the word *thing* the further limitation, 'unconnected with the person.' All his other changes are mere consequences of this. It is evident that security, liberty, reputation, health, the body, limbs, life itself, are all so connected with the person that they cannot be treated as 'things' under this new definition. The right to the safe enjoyment of all these is still, as much as ever, a right against all persons whatsoever. It is a *jus in rem*, if you please, but it certainly is no longer a *jus rerum*. There is but one alternative, and that is to place these

refer again to the meaning of *right* and *obligation*. A right was defined to be the capacity to do or have, or to compel others to do or refrain from doing.[1]

Now, an obligation is the duty resting upon the party from whom some action is due, together with the *vinculum jus*, the binding tie of the law. The duty may be simply a moral obligation, but the obligation which the law recognizes is something more tangible; it is the artificial or civil obligation.

All rights and obligations are included within the terms person, thing, and action.

The distinction between right and obligation, and the classification of rights herein pointed out, has a very material influence upon the classification of actions or remedies.

It should be observed that the protected right, and the enforced obligation, are the efficacious ones, and that the element of "capacity to enforce, with the aid of the law," is an essential element in the definition of a legal right. In other words, the remedy to enforce and protect is an essential part of a right, and the power to enforce is the obliging part of an obligation.

The supreme court of the United States has declared: "Nothing, in short, can be more clear, upon the principles of law and reason, than that a law which denies to the owner of land a remedy to recover the possession of it when withheld by any person, however innocently he may have obtained it, or to recover the profits received from it by the occupant, or which clogs his recovery of such possession and profits by conditions and restrictions tending to diminish the value and amount of the thing recovered, impairs his right to, and interest in, the property. If there be no remedy to recover the possession, the law necessarily presumes a want of right to it. If the remedy afforded be qualified and restrained by conditions of any kind, the right of the owner may indeed subsist and be acknowledged, but it is impaired and rendered insecure, according to the nature and extent of such restrictions."[2]

In another case Justice Taney quotes the language used in *Green v. Biddle* and adds: "And no one, we presume, would say

right where, under Blackstone's definition, they properly belong — with the other rights of persons." Hammond's Int. to Sanders' Justinian, lvi.

[1] *Ante*, p. 120, note.

[2] Green v. Biddle, 8 Wheat. 75.

that there is any substantial difference between a retrospective law declaring a particular contract or class of contracts to be abrogated and void, and one which took away *all* remedy to enforce them, *or incumbered it with conditions that rendered it useless or impracticable to pursue it.* Blackstone, in his Commentaries on the Laws of England (vol. 1, p. 55), after having treated of the declaratory and directory parts of the law, defines the remedial in the following words: 'The remedial part of the law is so necessary a consequence of the former two, that laws must be very vague and imperfect without it. For in vain would rights be declared, in vain directed to be observed, if there were no method of recovering and asserting those rights when wrongfully withheld or invaded. This is what we mean properly when we speak of the protection of the law.' We have quoted the entire paragraph, because it shows in a few plain words, and illustrates by a familiar example, the connection of the remedy with the right. It is the part of the municipal law which protects the *right* and the *obligation* by which it enforces and maintains it. It is this protection which the clause in the constitution now in question mainly intended to secure. And it would be unjust to the memory of the distinguished men who framed it, to suppose that it was designed to protect a mere *barren and abstract* right without any practical operation upon the business of life."[1]

Sec. 100. *The Classification by Civilians of Rights as Real and Personal.*— We are obliged now to notice the same word "*jus*" in its other signification, meaning rights; and it may be said by way of encouragement to students that it is not to be expected that a clear comprehension will be obtained of this intricate subject at a single perusal. A matter of this nature requires study and thought.

Ortolan's Presentation of Real and Personal Rights.[2]— *Personal Rights; Real Rights* (*a Classification Not Adopted in the Roman Law*).[3] — Right is any faculty that a person has to do, to omit, or to exact something.

[1] Bronson v. Kinzie, 1 How. 317.

[2] Ortolan's Hist. Rom. Law, 647, 648, 650, 651, 652, 653. In the case of extracts from Ortolan's writings no apology is necessary for indulging in copious quotations; but there are many cases where an author of an institutional treatise best serves his reader by exact quotation, rather than by garbled paraphrase. The duty of the honest author is fair use and frank acknowledgment.

[3] Nor are they adopted in English or American law.

Roman jurisprudence did not recognize any general division of rights. That which is now commonly received, however, though not belonging to, was derived from Roman law.

Rights are divided into personal and real rights.

We accept this division because it is exact, provided it is well defined.

Idea of Personal and of Real Rights.— Leaving for a moment Roman traditions, if we confine ourselves to pure reason, the following notions appear to be forced upon us:

No right exists except from one person to another; every right has therefore, necessarily, one active subject, and one or more passive subjects; which, whether active or passive, can only be persons. In that respect all rights are therefore personal.

Every right, besides the active and passive subject, has moreover, and necessarily, an object, which, in its widest sense, is designated a thing. Every right has, therefore, a thing for its object; and, in that respect, every right is real.[1]

Therefore every right, without any exception, is at once personal as to its active as well as passive subject, and real as to its object.

But the mode in which persons as subject, active or passive, or things as object, can appear and act in the right, assumes two very distinct phases.

The Relation of Right and Obligation.— Every right, if we go to principles, is summed up in the faculty which the active subject has to exact something from the passive subject. Now, the only thing which it is possible immediately to exact from a person is that that person should do or abstain from doing something; that is to say, action or inaction. It is to this that every right is reduced. This necessity for the passive subject to do or to abstain from doing something is what is called, in legal language, an obligation.

Every right, therefore, without exception, if we go to principles, consists in *obligations.*[2]

[1] These distinctions are important because they determine whether the vindication of the right shall be by an action *in personam* or an action *in rem;* hence the occasion for the care in explanation at this point.

[2] This word "obligation" had an importance in Roman jurisprudence far above the same word in English law. In the former it was the foundation of every right *in personam;* in the latter the word was of tech-

To sum up, a personal right is that in which a person is individually the passive subject of it.

A real right is that in which no person is individually the passive subject of the right.

Or, in other terms, a personal right is that which gives the faculty of individually obliging another to do or to abstain from doing something.

A real right is that which gives the faculty of deriving advantage from a thing.[1]

In both cases we may leave out of the question the community in general, bound to non-interference.[2]

The definition thus given is wide. All rights, without any exception, in whatever manner they may be acquired, exercised or sued for at law, and whatever may be the corporeal or the incorporeal thing which is the object of them, come under one category or the other.

It is not an arbitrary definition, but one which necessarily emanates from the nature of things; it is subject to no change, and reproduces itself inevitably in every legislation. [He means every system of law designations.]

Sec. 101. *Various Denominations of Real Rights and of Personal Rights.*—*Jus in re*, the expression for real rights, and *jus ad rem* for personal rights, are barbarous expressions introduced in the middle ages, and which have never belonged to the language of Roman law. The former already appears in the *Brachylogus*, the summary of the law of Justinian compiled in Lombardy in the twelfth century. Both are to be met with in the thirteenth century, opposed to each other in the papal constitutions; and it is from the canon law that they seemed to have passed into secular jurisprudence. We must rid our judicial language of it.[3]

nical import and meant a particular species of contract. By reason of the constitutional provision prohibiting any state from passing any law impairing the obligation of a contract, this word has attained an importance greater than it ever before had. See *post*, p. 141.

[1] By exercising dominion over it. This word "thing" is here used in the very broadest sense. The obligation of a contract would be a "thing" in that sense.

[2] Like all generalities, like many such indulged in by theoretical writers, this must not be taken too implicitly. The community is not always bound to non-interference. A striking example is Louisiana v. New Orleans, 109 U. S. 285.

[3] This is simply an impossibility. We must accept the language of the

Jus in Rem and Jus in Personam not of Roman Origin.—The expressions *jus in rem* for real rights, and *jus in personam* for personal rights, framed after the model of some analogous expressions of Roman law, do not, any more than the preceding, really belong to it.

Absolute and Relative Rights.[1]— This is a philosophic division altogether foreign to Roman jurisprudence. It is certainly more rational than the last; but it is equally objectionable, because it seems to imply the idea that absolute right exists with regard to everybody, whilst the personal or relative right only exists with regard to persons the passive subjects of this right. Every right, from the moment it exists, exists with respect to all, and must be protected, if needs be, against all. *Only, in the case of real rights*, no person whatever is individually the passive subject of them; whilst, *in the case of personal rights, a person is individually* the passive subject of them. . . .

But, in conclusion, we desire to point out that these expressions are both equally foreign to the law of the Romans, and that in this law no such general division was ever made nor had it any place in their system.

Sec. 102. *Same Subject—John Austin's Presentation.*—"*Jus Reale sive Jura Realia*" *et* "*Jus Personale sive Jura Personalia:*" In the language of modern civilians, and in the language of the various systems which are offsets from the Roman law, rights availing against persons *universally* or *generally*, and rights availing against persons *certain* or *determinate*, are not infrequently denoted by the distinctive names of "*jus reale*" and "*jus personale;*" the adjective *reale* being substituted for "*in rem*," and the adjective *personale* for "*in personam.*"

These expressions are so ambiguous that the following cautions may be useful to the student:

1. "*Jus reale*" and "*jus personale*," which signifies rights *in rem* and rights *in personam*, must not be confounded with "*jus rerum*" and "*jus personarum;*" i. e., "*law* of things" and "*law* of persons."

law and endeavor to master the meaning of it. These expressions are in our law to stay, although they mean now almost the opposite of their former meaning.

[1] See next chapter.

2. The distinction of the civilians between *real* and *personal* rights must not be confounded with the distinction of the English lawyers between *real* property or interests and *personal* property or interests. *Real* rights (in the sense of the English lawyers) comprise rights which are *personal* as well as rights which are *real* (in the sense of the civilians); and *personal* rights (in the sense of the former) embrace rights which are *real* as well as rights which are *personal* (in the sense of the latter).

The Distinction is an Essential One.— The difference between *real* and *personal* (as the terms are understood by the civilians) is essential and necessary. It runs through the English law just as it pervades the Roman, although it is obscured in the English by that crowd of gratuitous distinctions which darken and disgrace the system. But the difference between *real* and *personal* (in the sense of the English lawyers) is accidental.[1] In the Roman law there is not the faintest trace of it.

3. In the sense of the civilians, "*jus personale*" signifies *any* right which avails against a person *certain* or against persons *certain*. In the English law "*personal*" sometimes signifies a *sort* or *species* of such rights, viz.: those *rights of action* which, in the language of the Roman lawyers, "*nec heredibus nec in heredes competunt*," which neither pass to the persons who *represent* the injured parties, nor avail against the persons who *represent* the injuring parties. Being limited to parties who are directly affected by wrong, and only availing against parties who are authors of wrong, these rights of action are styled by English lawyers *personal*, or (more properly) they are said to *expire* (or *to be extinguished*) with the *persons* of the injured or injuring.

"*Actio personalis moritur cum persona*"[2] is a rule or maxim applied to the rights in question. But, like a thousand phrases dignified with the name of maxims, this wretched saw is a purely identical proposition. For a *personal* action (as the

[1] *Personal, personalis, le,* adj. It hath in our common law one strange signification, being joined with the substantive, things, goods or chattels, as things personal, goods personal, chattels personal; for thus it signifieth any corporeal and movable thing belonging to any man, be it quick or dead. Old Law-French Dic., by F. O., 1701. That is to say, land is no more real than a horse; it is no more property than is a chattel; in fact, not so much in the English law.

[2] Bro. Max. 904.

term is here understood) means a right of action which expires or is extinguished with the party.[1]

Sec. 103. *Rights and Obligations Not Generic Terms in English and American Law.*— In the preceding chapter great pains was taken to explain the meaning of Blackstone's division of rights, as those which concern and are annexed to the persons of men, and such as men may acquire under external things unconnected with his person,[2] and we have just shown that these conceptions are peculiar to English jurisprudence.

Attention was called to the fact that an intangible object might still be the object of a right, and such, as we pointed out, was the case of the word *chose*.[3] We shall see other intangible rights besides choses.

To the English lawyers all classes of rights were either political rights, as magistrate and people, or fell within the compass of domestic relations, or they were rights to real property, personal security, or private property. These latter Blackstone classes under the head of absolute rights.

This classification and the designation of certain rights as absolute has had such an intimate association and so wide an influence in American law that it is imperative that we examine and accept or reject it before the subject of rights and obligations in American law can be properly understood and expressed. But, before we proceed with this examination, attention may be directed to a distinction between different classes of rights so obvious and natural that even the beginner may easily grasp it, by applying his reason to his every-day observation.

The subject of property, ownership and dominion is so apparent and prevalent as to obtrude itself upon the view of every one. In daily life we see the exercise of dominion over land, the control of tangible chattels, and the display of ownership of intangible choses, such as stocks, bonds, warehouse receipts, and the enforcement of promises made by one man to another, or agreements made by one man with another.

Now it is plain that ownership or dominion of property differs in its nature from the contracts or agreements we have spoken of.

The distinction between the two is in the nature of the obligation incumbent upon third persons in reference thereto.

[1] 2 Austin's Jur., pp. 1011–13.
[2] *Ante*, pp. 108–123.
[3] *Ante*, sec. 94.

Right of ownership is in and to a definite, determinate thing, tangible or intangible. The obligation of third persons as to one's property applies equally to all persons. In the case of contracts or agreements, the obligation rests primarily upon a certain determinate person or aggregation of persons. But rights against a certain determinate person may arise independent of contract, viz.: by unlawful conduct towards or treatment of one person by another. These are called *delicts* by the Roman jurists, and *torts* by the Norman-French jurists, and consequently we have in the English law the actions *ex delicto*, based upon conduct passing under the generic term *tort*. These transactions which give rise to contracts or agreements as well as conduct which gives rise to an obligation to respond in damages are all between certain determinate persons.

Anomalous Obligation.— There are obligations which arise from a combination of transaction and action or conduct; for example, the breach of a contract may be accompanied with such conduct as to partake of the nature of a tort, or a tort may occur under such circumstances and in relation to the property of another as to enable the person injured to select what deduction he shall draw from the whole circumstance. The wrong connected with a contract or some fiduciary relation is *quasi ex contractu* and *quasi ex delicto*.[1] This results from the co-operation of act, conduct and law, and a character is affixed by the use of what are called fictions; and it is sometimes said that the law, by the use of fictions, creates rights and imposes obligations. The idea of creation seems less applicable to the process than the term usually employed, that the law "implies" the contract, because the latter term allows the implication to arise from the acts or conduct of the party.[2]

[1] "There are kindred principles in equity jurisprudence, whence indeed these rules of the common law seem to have been derived. Where a trustee has abused his trust in the same manner, the *cestui que trust* has the option to take the original or substituted property; and if either has passed into the hands of a *bona fide* purchaser without notice, then its value in money. If the trust property comes back into the hands of the trustee, that fact does not affect the rights of the *cestui que trust*. The cardinal principle is that the wrong-doer shall derive no benefit from his wrong. The entire profits belong to the *cestui que trust*, and equity will so mould and apply the remedy as to give them to him." May v. Le Claire, 11 Wall. 236; Bro. Max. 279.

[2] Central Bridge Corp. v. Abbott, 4 Cush. 473.

Other obligations arise without any immediate act, contract or conduct, merely from the fact of the existence of persons in relation to each other.

These give rise to rights of one person over or against some other definite person and also against all the world; *e. g.*, the husband and wife by the marriage acquire such rights. So do parent and child. Again, by the death of one or the other, rights and obligations, new in their nature, arise, all independent of contract or tort (*ex mero jure*) by mere force of law. These may be property rights by inheritance, or a right of an anomalous nature, *e. g.*, the right of support and protection,[1] or it may be a mere *personal* right, or, as Hale terms it, the interest one has in his own person, the obligation to respect which rests upon all persons alike, and upon no definite specific person. In such a case the public or the law (formerly the sovereign) assumes the position of authority, and acts in the matter as a parent or one having a superior position would act if in existence or acting as *parens patriæ*, the father of the whole country.[2]

It will be observed that the obligation attendant upon all of these rights is distinguishable, on account of the orbit of persons upon *whom it rests*, into two classes. The *first*, some particular person or set of persons; the *second*, the community at large, and no more upon one than upon all.

The real rights — first spoken of obtained against all.

The personal right against particular persons.

The *jus in rem* corresponds to the first; the *jus in personam* to the second.[3]

[1] "The right of the wife to support during marriage is not an interest, strictly speaking, in the property of her husband. It is a benefit arising out of the marital relation by implication of law. Treating the provision which the law makes for the widow and the children residing with her, by the allowance of specific articles of property, as a means of support, it cannot be said to be an interest in the property itself of the husband. It comes within no definition of property. It is a benefit created in their favor by positive law, and adopted for reasons deemed wise and politic." Phelps v. Phelps, 72 Ill. 547.

[2] Aymar v. Roff, 3 John. Ch. 49. "We also understand that, in theory of law, the state, in its character of *parens patriæ*, may rightfully exercise the same power and control over the persons and property of lunatics and idiots that was exercised by the Crown of England through the Lord Chancellor at the period referred to." Dodge v. Cole, 97 Ill. 354.

[3] "The phrase *in rem* denotes the *compass* and not the *subject* of the right. It denotes that the right in

The classification had no reference to that about which the right existed, that is to say, the object of the right, whether it be land or contract, tangible or intangible.

It is now sufficiently plain that the classification of rights as real and personal, or *ad rem* and *ad in personam certam*, was not made the basis of any division of subjects in legal classification, although it points out a natural distinction between classes of rights. It is also clear that it does not obtain as a basis of classification in English or American law. Our separation is of the objects of rights rather than of the rights themselves.

Sec. 104. *Right and Obligation Correlative Terms; a Right is a Possession; an Obligation is a Burden.*— In the Roman law *obligation* was a generic word embracing in its scope several species, distinguished from each other by the manner in which they arose. The first class arose out of *transactions* between persons, which gave rise to contracts express or implied. The second class arose from conduct inimical to the rights of another, and gave rise to what we term *wrongs* or *torts*. In the English law, obligation was degraded from its position as a great generic term to the position of the designation of a single

question avails against persons generally; and *not* that the right in question is a right over a *thing*. For, as I shall show hereafter, many of the rights which are *jura* or rights *in rem* are either rights over or to *persons* or have *no* subject (person or thing). The phrase *in personam* is an elliptical or abridged expression for '*in personam certam sive determinatam*.' Like the phrase *in rem* it denotes the *compass* of the right. It denotes that the right avails *exclusively* against a *determinate* person or against *determinate* persons." 1 Austin's Jur. 379, 380.

Ownership or Property.— "Ownership or property is, therefore, a *species* of *jus in rem*. For ownership is a right residing in a person *over* or *to* a person or thing, and *availing against other persons universally or generally*. It is a right implying and exclusively resting upon obligations which are at once *universal* and *negative*. Where the subject of a right *in rem* happens to be a person, the position of the party who is invested with the right wears a double aspect. He has a right (or rights) *over* or *to* the subject as against other persons generally. He has also rights (*in personam*) against the *subject*, or lies under *obligations* (in the sense of the Roman lawyers) towards the subject. But this is a matter to which I shall revert presently." 1 Austin's Jur. 383.

Contracts belong to rights *in personam*. "All rights arising from *contracts* belong to this last-mentioned class, although there are certain cases (to which I shall presently avert) wherein the right of ownership, and others of the same kind, are said (by a solecism) to arise from contracts, or are even talked of (with flagrant absurdity) as if they arose from *obligations* (in the sense of the Roman lawyers)." 1 Austin's Jur. 384.

class of agreements under seal.[1] In the United States the word has obtained vast importance by reason of its introduction into the constitution, whereby the states are prohibited from passing any law impairing the obligation of a contract.

The peculiarity of the phrase *obligation of a contract* seems to imply that the obligation is something distinct from the stipulation, agreement or contract, and continues after the contract is executed.[2] This subject will be treated in the proper place, but it may be excusable to here observe that the constitution does not mention obligations arising *ex delicto*.

The nature of obligation is thus stated by Mr. Justice Johnson in *Ogden v. Saunders:*[3] "Right and obligation are considered by all ethical writers as correlative terms; whatever I, by contract, give another a right to require of me, I, by that act, lay myself under an obligation to yield or bestow. The obligations of every contract will then consist of that right or power over my will or actions which I, by my contract, confer on another. And that right and power will be found to be measured neither by moral law alone, nor universal law alone, nor by the laws of society alone, but by a combination of the three — an operation in which the moral law is explained and applied by the law of nature, and both modified and adapted to the exigencies of society by positive law. The constitution was framed for society, and an advanced state of society, in which I will undertake to say that all the contracts of men receive a *relative* and not a positive[4] interpretation; for the rights of all must be held and enjoyed in subserviency to the good of the whole. The state construes them, the state applies them, the state controls them, and the state decides how far the social exercise of the rights they give us over each other can be justly asserted. I say the social exercise of

[1] Ingraham v. Edwards, 64 Ill. 526. The narrow meaning of the word in the common law is for the present sufficiently pointed out by the following definition: "*An obligation, obligato, onis. f.* Obligation is a word of its own nature, of large extent, but it is commonly taken in the common law for a bond containing a penalty, with condition for payment of money, or to do or suffer any act or thing, and a bill is most commonly taken for a single bond without condition. Coke on Lit., lib. 3, cap. 1, sec. 259." From an Old Dictionary by F. O., [1701].

[2] See Fletcher v. Peck, 6 Cranch, 87; Ogden v. Saunders, 12 Wheat. 213–217.

[3] 12 Wheat. 281.

[4] *i. e.*, absolute.

these rights, because in a state of nature they are asserted over a fellow *creature*, but in a state of society over a *fellow citizen*. Yet, it is worthy of observation how closely the analogy is preserved between the assertion of these rights in a state of nature and a state of society in their application to the class of contracts under consideration."[1]

Use Made of the Distinction.— As pointed out above, English jurists set aside and disregarded entirely the above distinction so far as it related to the classification of rights, but it is retained and made the basis of one of the most important distinctions between actions to enforce rights.

Actions *in rem* and actions *in personam* depend for their distinguishing features upon the identical principles above pointed out, and involve respectively *rights in rem* and rights *in personam*.

These matters will be considered in their appropriate places, but the student may the better understand this matter by examining the cases cited below.[2]

In place of this classification we find, in Blackstone's classification, a separation differing entirely in its expression and taking a double form, viz.: First, the right of persons and the rights of things, which has been examined. Second, the rights of persons is by him classified as *absolute* and *relative*. This latter classification will next require our attention.

Sec. 105. *Absolute and Relative Rights.*— There is another designation of the nature of rights of individuals which has come to us from England and exists as a sort of tradition of the legal profession, and which constitutes a stumbling block in the way of a proper understanding of the law of private rights or the nature of constitutional law. This is the so-called absolute right, which forms such a prominent feature of Blackstone's treatment.

He very properly distinguishes between natural persons and artificial persons and corporations. The rights of natural persons he classifies as absolute rights and relative rights. He includes under and as a part of the absolute rights of individuals, personal security, personal liberty, and the right of private property, without any hint that a portion of these rights belong

[1] Ogden v. Saunders, 12 Wheat. 281–82.

[2] Grigg v. Arnett, 134 U. S. 316; Woodruff v. Taylor, 20 Vt. 63; Cooper v. Reynolds, 10 Wall. 308.

as well to corporations as to individuals; for example, the inviolability of contracts, and protection against unreasonable seizure and searches.

For this reason alone the classification of rights into absolute and relative, as applied by him, is defective.

There is, however, a more powerful reason for discarding the whole notion of absolute rights. The first book of the Commentaries treats of all of those reciprocal rights, duties, prerogatives and jurisdictions which make up the sum of governmental relations, including the entire attributes of sovereignty, legislative, executive, judicial, and also the rights of individuals, a portion of which are there designated absolute rights, another class of which are called relative rights or *domestic relations*, and finally in the same book the subject of corporations is treated.

Absolute rights are there explained to be such as pertain or belong to particular men as individuals or single persons, and such as would belong to them merely in *a state of nature.*

Relative rights — those which are incident to them as members of society and standing in various relations to each other.[1]

Hammond says this division into absolute and relative rights depends on a theory common to all writers of his time, English and Continental.[2] This was the obsolete theory of natural rights, and he says the definition may be set aside with the obsolete theory to which it belongs.[3]

Sec. 106. *All Rights are Relative, not Absolute.*— This division into absolute and relative rights we shall show is neither a natural division, nor yet is it one which accords with reason or the facts. There is no such thing as natural rights or absolute rights existing within organized society; all rights within the body politic are relative and subject to the law of the land.[4]

[1] 1 Blk. Com. 123.

[2] Int. to Sanders' Justinian, p. lii.

[3] Id., Justinian, p. liv.

[4] Calder v. Bull, 3 Dall. 386; People v. Town of Salem, 20 Mich. 452; 4 Am. Rep. 400–10. "Every man has an abstract right to the exclusive use of his own property, for his own enjoyment, in such a manner as he shall choose; but if he should choose to create a nuisance upon it, or to do anything which would preclude a reasonable enjoyment of adjacent property, the law would interfere to impose restraints. He is said to own his private lot to the center of the earth, but he would not be allowed to excavate it indefinitely, lest his neighbor's lot should disappear in the excavation. The abstract right to make use of his own property, in his own way, is compelled to yield to the

What one has a right to is his; and to call it absolute does not make it any more his own. What Blackstone probably meant was that these were rights inviolate, even against the government.

James Wilson, afterwards justice of the supreme court of the United States, in his address in vindication of the colonies, says: "*Liberty* [the equivalent of absolute right] is by the constitution (of England) of equal stability, of equal antiquity, and of equal authority, with prerogative. Those duties of the king and those duties of the subject are plainly *reciprocal;* they can be violated on neither side unless they be performed on the other. The law is the common standard, by which the excesses of prerogative, as well as the excesses of liberty, are to be regulated and reformed."

Blackstone's Treatment Does Not Justify the Designation.— Blackstone's comment upon the subject does not warrant or justify the division. He says (Book I, page 125): "Every man when he enters into society gives up a part of his natural liberty. The absolute rights of man are usually summed up in one general appellation, and denominated the natural liberty of mankind."

Again, "political or civil liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws as it is necessary and expedient for the public good." This definition is taken bodily from the Institutes.[1]

general comfort and protection of the community, and to a proper regard for the relative rights of others. The situation of his property may even be such that he is compelled to dispose of it, because the law will not suffer his regular business to be carried on upon it. A needful and lawful species of manufacture may so injuriously affect the health and comfort of the vicinity that it cannot be tolerated in a densely settled neighborhood; and therefore the owner of a lot in that neighborhood will not be allowed to engage in that manufacture upon it, even though it be his regular and legitimate business. The butcher, in the vicinity of whose premises a village has grown up, finds himself compelled to remove his business elsewhere, because his right to make use of his lot as a place for the slaughter of cattle has become inconsistent with the superior right of the community to the enjoyment of pure air and the accompanying blessings and comforts. The owner of a lot within the fire limits of a city may be compelled to part with the property because he is unable to erect a brick or stone structure upon it, and the local regulations will not permit one of wood." People v. Town of Salem, 20 Mich. 452; 4 Am. Rep. 410, 411.

[1] Institutes, 1–3–1.

Again he says: "The absolute rights of every Englishman, which (taken in a political and extensive sense) are usually called their liberties," etc.[1]

These are explained to be such as depend upon the fundamental articles of their government, viz.: the Great Charter, the statute called the "*Confirmatio cartarum*," the petition of rights, *habeas corpus* act, bill of rights, acts of settlement, etc.

He then proceeds: "Thus much for the declaration of our rights and liberties. The rights themselves thus defined by these several statutes consist in a number of private immunities, which will appear from what has promised to be, indeed, no other than either that *residuum* of natural liberty which is not required by the laws of society to be sacrificed to public convenience, or else those civil privileges which society has engaged to provide in lieu of the natural liberties so given up by individuals." These, he says, are the right of personal security, personal liberty, and the right of private property. Thus he says absolute rights are natural rights, and then says that these are given up.[2]

These rights, he has asserted, are the first and primary end of human law.[3] It needs no argument to prove that these are the rights referred to in the preamble of the Federal constitution as "the blessings of liberty," and more especially enumerated in the amendments proposed by the first congress.[4] These rights were treated by Blackstone as standing alone, or rather opposed to the powers of government, *i. e.*, absolute; and then follows chapters relating to the king and his dominion, parliament and its powers, the courts and their jurisdictions. In *no* sense is this in strict harmony with the facts. Their first palladium was the Great Charter, which was obtained by the barons from King John, and so on through the list of petitions, bills and acts that define and defend these rights, there is an appearance of an agreement with the sovereigns for the preservation of those rights which are (by him) called absolute, but are spoken of as franchises and immunities.[5]

Sec. 107. *Lord Hale Did Not Recognize Absolute Rights.*—Lord Hale in his analysis puts these matters in a different man-

[1] 1 Blk. Com. 127.
[2] 1 Cooley's Blk. 125, note.
[3] 1 Blk. Com. 125.
[4] 1 Sharswood's Blk. 125, note.
[5] See Opinion of Jay, J., in Chisholm v. Georgia, 2 Dall. 470.

ner. After outlining the main divisions in accordance with the Roman law, he speaks of natural persons thus: "Persons natural are considered in two ways: *absolutely*, and simply *in* themselves, or under some degree or respect of relation." As considered *absolutely*, he speaks of their *interest* and their *capacities* or *abilities*. Hale does not use the word *status*, but uses the English equivalents, and as *status* was always spoken of in connection with man or individual, so he treats capacities or abilities of natural persons *considered absolutely in themselves*, *i. e.*, as individuals. The treatment of capacity he refers to the ability to take and hold rights. This makes the matter perfectly clear, and robs Blackstone of any excuse for the term "absolute rights."

Hale, in his analysis (sec. 2), the title of which is: "Of the relations of persons and the rights thereby arising," says: "Now, as to persons considered in respect of relation. The rights thereby arising are of three kinds, namely: Political, economical, civil." Then proceeding: "The political relation of persons, and the rights emergent thereupon, are the magistrate and the people or subject;" section 3, of the king's person; 4, his prerogatives; 5, his domain and power; 6, his jurisdiction; 7, his royal revenue; 8, his temporal revenue; 9, his relative prerogatives; 10, of the subordinate magistrates; 11, temporal magistrates; 12, inferior magistrates. In section 13 he approaches again the rights of the people, which he says are rights of duty (?) to be performed; rights of privilege to be enjoyed; and continuing, he says, on page 28: "The *rights* and *liberties* to be enjoyed by the people, both in *relation* to the *king and all his subordinate magistrates*, *are:* that they may be protected by them and treated according to the laws of the kingdom in relation to *their lives*, *their liberties*, *their estates*. And here falls in all the learning upon the statute of Magna Charta and Charta de Foresta, which concerns the liberty of the subject, especially Magna Charta (ch. 29) and those other statutes that relate to the imprisonment of the subject without due process of law, as the learning of *habeas corpus* and the law relative to taxation, the petition of rights, monopolies, martial law, and he asserts the *subject* is in a strict sense the correlative of the prince."[1]

[1] Accords with Ogden v. Saunders, *ante*, p. 141.

SEC. 108. *Distinction Between Hale's and Blackstone's Treatment.*— A great distinction between Hale and Blackstone is, that Hale treats all of these matters pertaining to personal security, personal liberty and private property as being a part of the rules governing the *relation* of persons *in society* and the rights thereby arising (see sec. 2) (*i. e.*, he does not recognize as to these matters any such division as absolute and relative rights), and classifying them where they very clearly belong, among the *civil* rights of men.[1] He classes under political relations that of which Blackstone says: "Political, therefore, or civil liberty, which is that of a member of society, is none other than natural liberty, so far as restrained, etc.;"[2] or, "The absolute rights of every Englishman, which, taken in an extensive and political sense, are usually called their liberties."[3]

SEC. 109. *Rights are Secured, not Surrendered, by Creating Government.*—"In a state of natural liberty every one is allowed to act according to his own inclination, provided he transgress not those limits which are assigned to him by the law of nature; in a state of civil liberty he is allowed to act according to his own inclination, provided he transgress not those limits which are assigned to him by the municipal law. True it is that by the municipal law other things may be prohibited which are not prohibited by the law of nature; but equally true it is that under a government which is wise and good, every citizen will gain more liberty than he can lose by these prohibitions. He will gain more by the limitation of other men's freedom than he can lose by the diminution of his own. He will gain more by the enlarged and undisturbed exercise of his natural liberty in innumerable instances than he can lose by the restriction of it in a few.[4]

[1] They are not rights *in personam* at all.

[2] 1 Blk. Com., p. 125.

[3] 1 Blk. Com., p. 127.

[4] *Civil Rights.*—"But when men form a social compact, and organize a civil government, they necessarily surrender the *regulation* and *control* of these natural rights and obligations into the hands of the government. Admitting it then to be true that, in general, men derive the right of private property and of contracting engagements from the principles of natural universal law; admitting that these rights are, in the general, not derived from or created by society, but are brought into it; and that no express, declaratory, municipal law be necessary for their creation or recognition; yet it is equally true that these rights, and the obligations resulting from them, are subject to be regulated, modified, and

"Upon the whole, therefore, man's natural liberty, instead of being abridged, may be increased and secured in a government which is good and wise. And as it is with regard to his natural liberty, so it is with regard to his other natural rights."[1]

The distinction between the position of Blackstone and other transatlantic writers, and that assumed by Wilson and the other Revolutionary fathers, may be concisely put thus: By the former, civil liberty consists of natural liberty restrained by law; by the latter, society is considered as a natural state. Civil liberty is natural liberty secured by law. Government is by the latter held to be but the means of enforcing the safeguards provided by the social compact which is called the constitution. The constitution does not create society, but is created thereby. It may create or change the government.

Sec. 110. *Resumé of the Statements.*— The distinctions pointed out above will be made clearer by a comparison of Blackstone's analysis with the treatment of Lord Hale above given and the statements of the author.

sometimes absolutely restrained, by the positive enactions of municipal law. I think it incontestably true that the natural obligation of private contracts between individuals in society ceases, and is converted into a civil obligation, by the very act of surrendering the right and power of enforcing performance into the hands of the government. The right and power of enforcing performance exists, as I think, all must admit, only in the law of the land, and the obligation resulting from this condition is a civil obligation. As, in a state of nature, the natural obligation of a contract consists in the right and potential capacity to take or enforce the delivery of the thing due to him by the contract, or its equivalent, so, in the social state, the obligation of a contract consists in the efficacy of the civil law, which attaches to a contract and enforces its performance or gives an equivalent in lieu of performance. From these principles it seem to result as a necessary corollary, that the obligation of a contract made within a sovereign state must be precisely that allowed by the law of the state, and none other. I say allowed, because, if there be nothing in the municipal law to the contrary, the civil obligation being, by the very nature of government, substituted for and put in the place of natural obligation, would be co-extensive with it; but if by positive enactions the civil obligation is regulated and modified so as that it does not correspond with the natural obligation, it is plain the extent of the obligation must depend wholly upon the municipal law. If the positive law of the state declares the contract shall have no obligation it can have no obligation, whatever may be the principles of the natural law in relation to such a contract. This doctrine has been held and maintained by all states and nations." Ogden v. Saunders, 12 Wheat. 319, 320; also *ante*, p. 141.

[1] 2 Wilson's Works, 300.

Blackstone's analysis is as follows:

Chapter 4, Section I. The objects of the laws of England are: 1, rights; 2, wrongs.

Section II. Rights are the rights of persons, or the rights of things.

Section III. The rights of persons are such as concern and are annexed to the persons of men.

Section V. The rights of *natural* persons are: 1, *absolute*, or such as belong to *individuals;* 2, *relative*, or such as regard members of society.

Section VI. The *absolute* rights of *individuals*, regarded by the municipal laws, compose what is called political or civil *liberty*.

Section VII. Political or civil *liberty* is the natural liberty of mankind, so far restrained by human laws as is necessary for the good of society.

Section VIII. The absolute rights or civil liberties of *Englishmen*, as frequently declared in parliament, are principally three: the right of *personal security*, of *personal liberty*, and of *private property*.

Sec. 111. *Civil Liberty and Blackstone's Absolute Rights the Same.*— From the above it is clear that *absolute rights* are synonymous with political or civil liberty, and so treated under the seventh head or section, "Political liberty is natural liberty restrained by human laws." There is evident confusion between sections 7 and 8 and the statement implied in section 5. Section 5 affirms that only relative rights belong to members of society. Sections 7 and 8 are repugnant thereto. It seems perfectly clear that there is no such distinctions between the various rights which are guaranteed and enforced by the law as that one part of them may be denominated absolute in any modern idea of the word, and another portion of them relative; and it is clear that the law, so far as it relates to persons and those rights which are annexed to the persons of men, irrespective of rights over external things or property, regards them as they stand in public relations or private relations.

Of this peculiarity of Blackstone's handling of the subject, Austin says: "Blackstone here runs into a singular confusion of ideas, for he opposes these natural or inborn rights, by the name of *absolute* rights, to what he calls the relative rights of

persons. But there are no such things as absolute rights; all rights are relative; they suppose duties incumbent on other persons. He defines these absolute rights to be rights appertaining to them merely as *individuals or single persons.*[1] . . . He further defines them as rights which would belong to persons in a state of nature, rights which they would be entitled to enjoy either in or out of society. . . . As to legal rights, with which alone Blackstone was properly concerned, they, it is obvious, can only belong to a man in society. . . . Amongst others of these absurdities, Blackstone instances, as an absolute right, the right of private property — a right which, it is quite obvious, cannot exist out of a state of society."[2]

Mr. Austin, criticising Lord Hale, says: "The only gross mistakes that I have found in his masterly outline are his glaring and strange mistranslation of '*jus personarum et rerum*,' and his placing under the department assigned to the *status* of persons, certain rights of persons which he styles their *absolute* rights."[3]

Lord Hale is not subject to the latter criticism, and his expression does not furnish the ground, although undoubtedly it did contribute to Blackstone's error. Hale does say of persons that they are persons natural, or persons civil, *i. e.*, bodies politic. "Persons natural are considered two ways: *absolutely*, and simply in themselves, or under some degree or respect of relation. In persons natural, simply and absolutely considered, we have these several considerations, namely: 1. The interest which every person has in himself. 2. Their capacities or abilities, etc.;" but at the same time, in section 2 and section 13, he treats the rights and liberties to be enjoyed by the people in relation to their *lives*, their *liberties*, their *estates*,— treating them there as relative rights. Another confirmation of this is that, when speaking of rights of things in section 23, he says here they (rights of things) are considered *absolutely* and simply in themselves. Blackstone might as well have said absolute rights of things.

Sec. 112. *Possible Explanation of Blackstone's Meaning.*— The peculiar notions at that time obtaining in reference to nat-

[1] Had Blackstone stopped here, he would have avoided the error.

[2] Austin's Jur., lect. 43. See also notes to table 2, vol. 2, p. 982.

[3] Austin's Jur. (3d ed.), 1869, p. 71.

ural rights, together with the idea that we must not lose sight of, namely, the form of government being monarchial, the attribute of sovereignty inhering in the sense of a divine, or at least hereditary, right in the *person* of the *king*, and not remaining or being, as with us, in the people, may have seemed to Blackstone to require a treatment as distinct, independent, *i. e.*, absolute, even against government, of those rights possessed by individuals in their particular persons and defined in such constitutional documents as we have mentioned. The idea was peculiar, and rested upon a seeming antagonism between the "people" and the government.

Sec. 113. *Law Relates to Personal Relations, Things, Actions.*— It seems obvious that in our scheme of government such enactments and regulations as are treated by Blackstone as protecting *absolute* rights of persons must be embraced within those rules governing the relations of the people, either in political affairs or in private conduct, as Hale classes them, or falling within the system that has grown up with us under the name of Constitutional Law.

Every rule of law creates or affect rights, so that every rule relates to a right. Every rule is addressed to a person, so that all law is the law of persons, and a thing can have no rights; nor can the law address things; so that, properly speaking, there are no such distinctions as rights of persons and rights of things. But some rules relate to the *relations of persons* in society, having no reference to external, tangible, alienable things. Other rules relate to the *dominion* of persons over things, or, briefly expressed, to property.[1] Still another set of rules relate to those things without which rights in law would be valueless, namely: the means of redressing or punishing injuries to them; which latter branch may be classed under the head of *actions*, which a learned writer on jurisprudence says "includes civil actions or legal demands of a right by an individual in which the end is compensation, and a state of prosecution in which the end is punishment."[2]

We have endeavored to disentangle the substance embraced within the body of the law from the obscurity which has enveloped it on account of forms of expression borrowed from

[1] Wynehammer v. People, 13 N. Y. 378; Rigney v. Chicago, 102 Ill. 64.

[2] Heron on Jurisprudence, 67.

another system, and, if we have succeeded, it is now plain to us, from a consideration of the Institutes of Gaius and Justinian, and the analyses of Hale and Blackstone, that the rules of municipal law may be classified as follows:

First. The rules which designate what are persons and regulate their relations in society, i. e., *the law of persons* or personal relations.

Second. The rules which regulate the nature of and manner of holding *things*, i. e., *the law of property.*

Third. The rules providing remedies, both public and private, i. e., *actions;* and this is the sense in which we say the law relates to *persons*, to *things*, and to *actions.*

CHAPTER VI.

MAGISTRATE AND PEOPLE.

Sec. 114. *The Relation of Men in Society and the Rights Depending Thereon.*— Sufficient has been said to indicate that our treatment is of subjects as affected by municipal or civil law, excluding the laws of nature and divine law, except in so far as they receive recognition by the civil law. The point has been reached where must be pointed out the different relations men may bear toward each other and toward society, and the rights and duties which flow from such relations.

The idea of absolute rights has been shown to be but a mere figure of speech, and the assertion has been ventured that Lord Hale's treatment gives no warrant for such a designation of rights. The prominence given in American law to civil rights renders Hale's treatment peculiarly interesting.

Lord Hale says of the relation of persons and the rights thereby arising: "The rights thereby arising are of three kinds, viz.: Political,[1] economical,[2] and civil.[3]

[1] "Political rights consist in the power to participate, directly or indirectly, in the establishment or management of government. These political rights are fixed by the constitution. Every citizen has the right of voting for public officers, and of being elected; these are the political rights which the humblest citizen possesses." Bouvier's Dic., tit. Rights, p. 485.

"A *civil* right *under* a government is a distinct thing from a *political* right *in* it. Thus, a state may deny to females the right to vote, but it cannot deny to them the right to sue in courts, or impose upon their property all the burdens of the community. To hold otherwise would lead to the affirmation of the right of the state to make race or color or religion or age or stature the criterion of civil rights, and to exert the absolute right of confiscation by classes or descriptions; for in such a case every person of that class or description would stand on an equality with his fellow-victims." County of Santa Clara v. S. P. R. Co., 18 Fed. Rep. 429.

[2] Under this title Hale classes what we term *domestic relations* thus: "Of the rights of persons under relations economical; and first, of husband and wife."

"Thus far the rights of persons under a political relation; now concerning the rights of persons under a relation economical. And they are these: Husband and wife; parent and child; master and servant." Hale's Anal., p. 29.

[3] Hale's civil rights are not the same as civil rights under our system.

"*Concerning Relations Civil.* I have done with relations political

Sec. 115. *Magistrate and People.*— "The political relation of persons, and the rights emergent thereupon, are,— the magistrate; the people or subject."

"*The supreme magistrates*," says Hale, "are legislative — *the parliament* (with whose rights I shall not here intermeddle); executive — *the king*."

Of the king he says: "Inasmuch as the king is by the law the

and also economical, and therefore come now to those which I call *civil*. Though it is true that term, in a general acceptation, is also applicable to the two former relations. But in a *limited* and *legal* sense, I distinguish civil relations into four kinds, viz.: Ancestor and heir, lord and tenant, guardian and pupil, lord and villein." Hale's Anal., p. 33.

Rights — Natural, Civil, Political. In Luther v. Borden, 7 How. 1, Mr. Whipple, with whom was Mr. Webster, argued as follows: "There are three classes of rights: *natural*, such as those recognized in the Declaration of Independence; *civil*, such as the rights of property; and *political* rights. Society has nothing to do with natural rights except to protect them. Civil rights belong equally to all. Every one has the right to acquire property, and even in infants the laws of all governments preserve this. But political rights are matters of practical utility. A right to vote comes under this class. If it was a natural right, it would pertain to every human being, females and minors." 7 How. 28.

In harmony with this is the language of Justice Field in Ex parte Virginia: "In the consideration of questions growing out of these amendments much confusion has arisen from a failure to distinguish between *civil* and *political* rights of citizens. Civil rights are absolute and personal. Political rights, on the other hand, are conditioned and dependent upon the discretion of the elective or appointing power, whether that be the people acting through the ballot, or one of the departments of their government. The civil rights of the individual are never to be withheld, and may be always judicially enforced. The political rights which he may enjoy, such as holding office and discharging a public trust, are qualified because their possession depends on his fitness, to be adjudged by those whom society has clothed with the elective authority. The thirteenth and fourteenth amendments are designed to secure the civil rights of all persons, of every race, color, and condition; but they left to the states to determine to whom the possession of the political powers were to be intrusted. This is manifest from the fact that when it was desired to confer political power upon the newly-made citizens of the states, as was done by inhibiting the denial to them of the suffrage on account of race, color and previous condition of servitude, a new amendment was required." 100 U. S. 368.

"Civil rights are those which have no relation to the establishment, support or management of the government. These consist in the power of acquiring and enjoying property, of exercising the paternal and martial powers, and the like. It will be observed that every one, unless deprived of them by a sentence of civil death, is in the enjoyment of his civil rights,— which is not the case with political rights; for an alien, for example, has no political, although in full enjoyment of his civil, rights." Bouvier's Dic., tit. Rights, p. 485.

head of the kingdom and people, the laws of the kingdom, *eo intuitu*, have lodged in him certain rights, the better to enable him to govern and protect his people."[1]

The next section is entitled, "Of such rights as relate to the king's *person*," "because they do belong to a king under this relation as king."[2] And under this head Hale treats the capacities of the king as being of two kinds—his political capacity, his natural capacity; thus, "As to his political capacity, he is a sole corporation of a more transcendent nature and constitution than other corporations; whereby he is discharged from any incapacities which, in the case of other persons, would obstruct his succession, as alienee, etc.; disable his actions, as infancy or coverture."

It thereby appears that the king is a sole corporation; it is also made plain that he is a political corporation. The kingdom of Great Britain is in the same sense a corporation. *Section four* of the analysis concerns the prerogatives of the king, "and those prerogatives are of two kinds: direct and substantive prerogatives, incidental and relative prerogatives."

The direct and substantive prerogatives may be distributed under three branches, viz.: *Jura majestatis, vel summi imperii*, i. e., the right of dominion; *potestas jurisdictionis, vel mixti imperii*, i. e., the power of jurisdiction; *census regalis*, or the royal revenues.

Blackstone says: "The most universal public relation by which men are connected together is that of government, namely, as governors and governed, or, in other words, as magistrate and people. Of magistrates, some are supreme, in whom the sovereign power of the state resides. In England this supreme power is divided into two branches: the one legislative, to wit, the parliament, consisting of kings, lords and commons; the other executive, consisting of the king alone." He then asserts: "In the British parliament is vested the legislative power and, *of course*, the supreme and absolute authority."[3] The nature of legislative power in the United States will be examined in another connection, but it may be here

[1] Hale's Anal., sec. 2.

[2] Id.

[3] Blk. Com. 147. "The power and jurisdiction of parliament," says Blackstone, quoting from Sir Edward Coke, "is so transcendent and absolute that it cannot be confined either for causes or persons. It hath sovereign and uncontrolled authority in making, affirming, enlarging,

observed that this expression by Blackstone will not do for the United States.[1]

Sec. 116. *Classes of Magistrate.*—Blackstone divides magistracy into supreme and subordinate, following in this Hale's analysis: "All subordinate magistracy is derived from the supreme, either immediately or mediately, either by express grant from him or by something that implies or supposes it in its original, viz.: custom or prescription."[2]

Blackstone says of magistrates: "Some, also, are supreme, in whom the sovereign power of the state resides; others are subordinates, deriving all their authority from the supreme magistrate and accountable to him for their conduct, and acting in an inferior, secondary sphere."[3] This comports logically with the facts as they existed at that time in England,—one set of magistrates derived power from another.

Sec. 117. *Magistrates in the United States.*—There is a radical difference between the nature of public officers and Blackstone's description of magistrates and people under the English constitution. Under our law, all officers derive their power from the people.[4] It follows that the reason not exist-

restraining, abrogating, repealing, reviving and expounding of laws." 1 Blk. Com. 160. The quotation from Coke, as pointed out by Judge Wilson, is not only not literal, but omits important qualifications. Coke added that parliament was sovereign for making laws and proceeding by bill, meaning that parliament was the supreme legislative authority. 1 Wilson's Works, 164. "Parliament," says Matthew Hale, "is the highest and greatest of courts." As Judge Cooley justly observes, "Parliament was not merely a law-making parliament, but could execute the law" (1 Cooley's Blk., 3d ed., 161, note); and, as pointed out by Blackstone and Coke, it was the supreme authority in expounding laws. Such attributes are judicial in their nature. Even in the United States there have been instances where the exercise of judicial power is held to have been retained by the legislature, and especially so much of equity as the legislature sees fit *not* to delegate. Instances to which allusion is made is perhaps peculiar to the Pennsylvania constitution as expounded by the supreme court of the United States; the other case arising in the action of the legislature of Connecticut, as shown in the case to which allusion has heretofore been made. Such cases illustrate the imperfect separation of the departments of government. See Livingston v. Moore, 7 Pet. 469; Calder v. Bull, 3 Dall. 386.

[1] Taylor v. Porter, 4 Hill, 140; 40 Am. Dec. 274; Regents v. Williams, 9 Gill & J. 365; 31 Am. Dec. 72.

[2] Hale's Anal., sec. 10.

[3] 1 Com., ch. 2.

[4] See Marbury v. Madison, 1 Cranch, 137. As to the nature and several kinds of offices, see McCormick v. Pratt, 8 Utah, 298, 17 L. R. A. 243, and a valuable note in the last report.

ing for the distinction between supreme and subordinate magistrates, made by Hale and Blackstone, it is unnecessary to make such a division in this analysis.

National and State Officers.— Our magistrates, who are all included within the appellation "officers,"[1] are, however, naturally divisible into two great classes, on account of the sphere in which they perform their official duty, viz.: as they are federal officers or state officers. It would not, however, be proper to say that one class of officers was superior or supreme, and the others subordinate, because they are each and all merely official agents created by the will of the people, and, in the main, independent of each other, and within the sphere assigned them they are independent of all other officers.[2]

A distinctive feature of the American system of government, which pervades every part of it, is the idea of delegating the administration of certain subjects to one branch of magistracy and the administration of certain other subjects to another branch, but each, while dependent upon the same source for power, is constituted by that power, within the respective sphere of each, independent of the other. In this the people

[1] "It is impossible to conceive how, under our form of government, a person can own or have a title to a governmental office. Offices are created for administration of public affairs. When a person is inducted into office, he thereby becomes empowered to exercise its powers and perform its duties, not for his but for the public benefit. It would be a misnomer and a perversion of terms to say that an incumbent owned an office or had any title to it. The doctrine on this subject is thus stated in the case of Conner v. The Mayor of New York, 1 Seld. 285: 'Public offices in this state are not incorporeal hereditaments, nor have they the character or quality of grants. They are agencies. With few exceptions they are voluntarily taken and may at any time be resigned. They are created for the benefit of the public and not granted for the benefit of the incumbent. Their terms are fixed with a view to utility and convenience, and not for the purpose of granting emoluments during that period to the office-holder. . . . The prospective salary or other emoluments of a public office are not property of the officer, nor the property of the state. They are not property at all. They are like daily wages unearned and which may never be earned. The incumbent may die or resign, and his place be filled, and the wages be earned by another. The right to the compensation grows out of the rendition of services and not out of any contract between the government and the officer that the services shall be rendered by him.'" Donahue v. County of Will et al., 100 Ill. 94–103.

[2] Charles River Bridge v. Warren Bridge, 11 Pet. 139; Tennessee v. Davis, 100 U. S. 263; United States v. Cruikshank et al., 92 U. S. 547; Ex parte Virginia, 100 U. S. 346.

are truly the sovereigns, and it is vain to denominate certain aggregations of the people as sovereign and independent states, who have irrevocably renounced a portion of the sovereignty.[1]

The great and radical vice of the constitution of the old confederacy was the principle of *legislation* for *states or governments* in their *corporate or collective capacities*, and as contradistinguished from the *individuals* of whom they consisted.[2]

The radical change which was made by the adoption of the new constitution was that in the main all laws of the confederation were addressed to the states in their political capacity, not to the individual citizens, as is now the case in the United States; the citizen of any state being addressed by the laws of both jurisdictions. This line of demarkation is not territorial, but with reference to certain objects of jurisdiction. The idea cannot be better stated than it is in No. XXXIX of the Federalist:[3] "First. In order to ascertain the real character of the government, it may be considered in the relation to the foundation on which it is to be established; to the sources from which its ordinary powers are to be drawn; to the operation of those powers; to the extent of them, and to the authority by which future changes in the government are to be introduced.[4] . . . The difference between a Federal and National government, as it relates to the operation of the government, is, by the adversaries of the plan of the convention, supposed to consist in this: that in the former (Federal) the powers operate on the *political bodies* composing the *confederacy*, in their political capacities; in the latter, on the *individual* citizens composing the nation, in their individual capacities. On trying the constitution by this criterion it falls under the National, not the Federal, character; though perhaps not so completely as has been understood. In several cases, and particularly in the trial of controversies to which states may be parties, they must be viewed and proceeded against in their collective and political capacities only. But the operation of the government on the people in their individual capacities, in its ordinary and most essential proceedings,

[1] Ogden v. Saunders, 12 Wheat. 350; United States v. Booth, 21 How. 516; Dodge v. Woolsey, 18 How. 331–347.

[2] Federalist, No. 15.

[3] See also Ogden v. Saunders, 12 Wheat. 350, Marshall, J.

[4] Van Horne's Lessee v. Dorrance, 2 Dall. 308; Chisholm v. Georgia, 2 Dall. 416.

will, on the whole, in the sense of its opponents, designate it, in this relation, a national government.

"But if the government be national, with regard to the operation of its powers, it changes its aspect again when we contemplate it in relation to the extent of its powers. The idea of a national government involves in it not only an authority over the individual citizens, but an indefinite supremacy over all persons and *all things* so far as they are objects of lawful government. Among a people consolidated into one nation, this supremacy is completely vested in the national legislature. Among communities united for particular purposes, it is vested partly in the general and partly in the municipal legislatures. In the former case all local authorities are subordinate to the supreme, and may be controlled, directed or abolished by it at pleasure. In the latter the local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority, than the general authority is subject to them within its own sphere. In this relation, then, the proposed government cannot be deemed a national one, since its jurisdiction extends to certain enumerated objects only, and leaves to the several states a residuary and inviolable sovereignty over all other objects."

If we compare the British government with our own,[1] keeping in view the above distinctions, we may plainly see that for the former government Blackstone's division of magistrates into supreme and subordinate accords with the principles of the English constitution, that people consolidated into one nation with the supreme legislative authority vested in parliament, the supreme executive authority in the person of the king; the others are subordinate magistrates deriving all their authority from the supreme magistrates, accountable to them for their conduct, acting in an inferior secondary sphere as subordinate magistrates, being classed sheriffs, coroners, justices of the peace, constables, surveyors of highways and overseers of the poor. It follows that in our government the state officers cannot be said to be in any manner inferior or subordinate to those of the general government, while the state magistrates, bearing the

[1] See Mr. Justice Wilson's comparison of the constitution of the United States with that of Great Britain. 1 Wilson's Works, ch. XI.

same names and having similar authority as the subordinate magistrates named by Blackstone, might be said to be subordinate state magistrates.

Our primary division of magistrates or officers will be therefore into federal and state.[1]

There are certain officers who derive their position from appointment of other officers, to whom the terms *inferior* or *subordinate* might be applied, *e. g.*, the cabinet of the president and similar state officers; but these are not of the class mentioned by Blackstone, and the mode of appointment does not always indicate the nature of powers to be exercised.

It is unnecessary here to enter into the details of comments on each particular subdivision of the federal offices, as the reasons for the divisions are apparent and familiar to every one.

Federal officers are divided, according to the department in which they act, into legislative, executive, and judicial.

As to state officers it is not deemed advisable to observe the division made by Blackstone into supreme and subordinate magistrates, for the reason that it appears from the opening words of his chapter on subordinate magistrates that he might well have included other officers not so designated, and for the further reason that the plan of the division we shall adopt seems more simple and natural.[2]

In one class of state officers will be included all such officers as may be termed "general state officers," including in it legislative, executive and judicial officers of the state. Under the other head, "local officers," we will include county officers, township officers and municipal officers, using this latter term in the more restricted sense with reference to municipal corporations.

Sec. 118. *Public Persons.*— In American law the word "person" embraces all the beings and entities, official, individual, bodies politic and corporate, capable of having, owning or

[1] Federalist, No. 39.

[2] Under the English system many offices were property and classed as incorporeal hereditaments, giving the individual incumbent a right to the office and its emoluments. A man was said to have an *estate* in them. Certain offices or public duties annexed to the possession of real estate. 2 Cooley's Blk. (3d ed.), p. 36; Rex v. Knollys, 1 Ld. Ray. 13. The American theory of government does not permit ownership of offices and they are not hereditaments. 3 Kent, *454; *ante*, p. 157.

exercising rights;[1] and under this title will be discussed the capacities, rights, duties and privileges of the various persons, official and private, recognized by our law. A classification of persons familiar to any one who has had even a slight acquaintance with law is that into natural persons and artificial persons. This classification is not because of any difference in the nature or capacity to own or enjoy rights. This is the classification of Blackstone, and he treats parliament among natural persons, and also as a body politic. Inasmuch as the title "artificial persons" embraces not only private corporations, but all bodies politic, including the United States, the states, etc., by following this classification we violate the principle of classification adopted, and treat under artificial persons, persons moving in entirely different spheres of action.[2] Whereas, the private corporation, so far as concerns its ordinary rights and the sphere in which it moves, does not differ materially from a natural individual, the corporation simply has not so many kinds of rights. While, therefore, this natural classification is not disregarded, we will adopt, as a primary division of persons, a classification which contrasts them because of the essential differences between the modes in which they arise, and the differences between their legal attributes and capacity and the sphere in which they move. In that view, all persons recognized by the law of the United States may be arranged under two great classes — public persons and private persons.[3] This classification enables us to use the next obvious and natural classification of public persons, namely, magistrates and people. Under it may be brought into view, in that position and prominence due to the legal personage which in reality constitutes the body politic, *the people*, and permit its treatment from the American standpoint, which is entirely different from the nature of the same title-head as used in the English law.

If the student will but turn to the Commentaries of Blackstone, he will find that under the head "*People*," the people

[1] "*Personable, personabilis, le. adj.* One who may maintain a plea in a court, *qui habet personam standi in judicio.*" From Old Dictionary by F. O., 1701.

[2] All corporations, strictly so called, are created by the government or by the people. The nation and the states come into existence by original agreement or convention of the people.

[3] Walker, Am. Law, p. 59.

is used as synonymous with subjects, and only noticed as individuals. They are not said to be a part of the body politic. Justice Wilson very correctly brings this out as follows: "The parliament formed the great body politic of England. What, then, or where, are the people? Nothing; nowhere. From legal contemplation they totally disappear. They are not so much as the baseless fabric of a vision. Am I not warranted in saying that, if this is a just description, a government so, and justly so, described, is a despotic government."[1]

Sec. 119. *The People of the United States*, in their aggregate capacity, constitute the great body politic, the nation, and are commonly spoken of as the sovereign people. The identity, capacity and obligations of the people may be examined under this classification.

The people of the United States appear in a double aspect — as the people of the nation and of the states. Private persons are likewise naturally classified as individuals and corporations, which corresponds identically with the natural and artificial persons of Blackstone.

The word "magistrate" is used in conformity with the prevailing idea in the United States, and in conformity with the meaning of the word "person" as heretofore explained, designating not, in strictness, the individual who holds the office, because we are not concerned with who he is, but with what is his legal or political capacity or personality.[2]

Officers are State and Federal.— In the treatment of these subjects it will be observed that not only the meanings of the words "people" and "magistrate" are different from the ideas associated with the same words in the English law, but the position of the treatment and classification is transposed, for the reason that it is more natural and convenient that we address ourselves to the principal personage first, viz., the people,[3]

[1] Chisholm v. Georgia, 2 Dall. 462.

[2] Mississippi v. Johnson, 4 Wall. 475, 501; Marbury v. Madison, 1 Cranch, 137.

[3] The editor of the fourth edition of McCrary on Elections says: "In the great case of Chisholm, Ex'r, v. The State of Georgia, decided in 1793, Justice Wilson, one of the chief architects of our sytem of government, said: 'The well-known address of Demosthenes, when he harangued and animated his assembled countrymen, was: "O men of Athens." With the strictest propriety, therefore, classical and political, our national scene opens with the most magnificent object which the nation

and next, to their agents or officers, after which, in the proper place, may be treated, in their order, private persons, artificial and natural, domestic relations, property and procedure or actions. The criminal law may conclude the subject of municipal law, after which the other branch of jurisprudence, international law, may be briefly treated.

In order to obtain a clear conception of the political relations of the various persons that compose the body politic, it is necessary that we obtain a distinct idea of the nature of the persons themselves.

Sec. 120. *Definition of Terms.*—The words *society*, *people*, *nation*, *state*, *government*, *citizen* and *magistrate* are all familiar words, and each is supposed to have, and in fact should have, distinct and definite meaning. It would be beyond the scope of this work to enter into an extended discussion of the origin and nature of society prior to the time when it had progressed so far as to be properly denominated civil society. Those discussions will be found in the writings of a century ago, and were then great and practical questions, having for their object the determination of what was the true basis and origin of government, that is, whether the right of administration of laws or the right of kingship or the right of government was of divine origin, or whether all civil government was an invention of man and was based upon the consent of the governed, or, to put it otherwise, whether the government was superior to the man.[1]

Sec. 121. *Society, Natural and Civil.*—We have been told that there was an original and natural state of society antedating civil society, by which we mean an association of individuals united by common consent for a common purpose, ordinarily for the protection of private rights;[2] but it is apprehended that as near an approach to the state of natural society discoverable, or in fact worthy of investigation, is found in the condition of the Indian tribes which inhabited America at the time of its settlement by our ancestors, and who are presumably held together by the natural ties of a common ancestry.

could present. "The people of the United States" are the first personages introduced. Who were those people? They were the citizens of the thirteen states.'" Sec. 15.

[1] Chisholm v. Georgia, 2 Dall. 463.

[2] Declaration of Independence.

Questions relating to title and to real property, and claims by or in behalf of Indian tribes or members thereof, or citizens of the Union living among the Indians, have elicited several careful and able discussions of the state of society among the Indians which may be noticed hereafter. A mere citation will here suffice.[1]

Sec. 122. *The People.*—Before treating the several public persons in detail it will be useful to here consider concisely all the various persons. By thus examining them in close connection and obtaining a slight prenotion of each, we may be able the more easily to perceive the distinguishing features of each. We will briefly outline what is meant by the *people*, *state*, *government*, and *citizen*.

The word "people" means a body of persons regarded collectively. "The people," using the term in its proper legal acceptation, means the whole mass of male and female citizens, and this mass or body constitutes the political unit.[2]

But in the constitution the word "people" is often used where the whole unit is not intended, but individuals are meant; thus, in the Bill of Rights, in all provisions in reference to seizures and searches, jury trial, right to assemble,—in fact, in all reference to personal liberty.

Sec. 123. *Government, Magistrates, Officers.*—Government is that organization to which the exercise of political *powers* is intrusted. It is the political system created by the agreement of the people, evidenced by the constitution or fundamental law. Government is not sovereign. "The sovereignty of the government is an idea belonging to the other side of the Atlantic."[3] The departments of government simply exercise delegated powers as the agents of the people.[4] The government manifests itself in various forms of magistracy. These *magistrates* are *officers;* they have no personal powers, dignities or pre-eminences—nothing but official. The government nor any branch of it has any political rights of its own; it simply represents others who have. The constitution makes a plain distinc-

[1] Johnson, Lessee, v. McIntosh, 8 Wheat. 543; Cherokee Nation v. Georgia, 5 Pet. 1; Worcester v. Georgia, 6 Pet. 512.

[2] McCrary on Elections (4th ed.), § 13.

[3] Webster's Reply to Calhoun on the Foote Resolution.

[4] Lane Co. v. Oregon, 7 Wall. 71–76; White v. Hart, 13 Wall. 650; 2 Sharswood's Blk. 47, note.

tion between the people and the government.[1] *The citizens* are private persons, either individuals or private corporations, although the latter have no political rights.

Sec. 124. *Double Meaning of State.—A state*, using the expression in its broadest political sense, as nation — as the community organized under a constitution and exercising its constitutional powers,— includes all persons, citizens, the people and the magistrate.[2] Thus we say citizens, meaning individuals which compose the state; the people of a state, meaning the body in whom the *right* of government inheres; the government, meaning those magistrates to whom is delegated the *power* to administer the law. The people collectively constitute a person — a body politic, *possessing rights*, affairs, duties and property; but you cannot say of the government — that is, the legislature of the state, the executive of the state, or the judiciary of the state, or of the three combined — that they constitute a person,[3] although, as magistrates, each officer has legal personality. The greatest person of the trinity is doubtless the people, for it is the body politic of the state. But the most important person is the individual. Thus we say government is made for man. The chief end and purpose of government is the protection of private rights. By naming one part less than that whole[4] you do not express the full meaning of the state, but altogether they constitute that glorious fabric of which philosophers delight to speak under the designation of a state.[5]

"A state, however," says Chief Justice Chase, "in the ordinary sense of the constitution, is a political community of free citizens occupying a territory of definite bounds and organized under a government sanctioned and limited by a written constitution and established by the consent of the governed." The picture cannot be exhibited in clearer light than by using the language used by him. "It is the union of such states under a common constitution which forms the distinct and greater political unit which the constitution designates as the *United States*, and makes of the people and states which compose it one people and one country." And it is in this sense

[1] Texas v. White, 7 Wall. 700-721.

[2] State v. Young, 29 Minn. 536; Jameson on Const. Con. 15.

[3] State v. Young, 29 Minn. 536.

[4] Penhallow v. Doane, 3 Dall. 93.

[5] Texas v. White, 3 Wall. 721; Penhallow v. Doane, 3 Dall. 93.

in which he used the expression, "The constitution in all its provisions looks to an indestructible Union composed of indestructible states."[1]

"The word 'state' has a meaning peculiar to the United States. It means a certain political society forming a constituent part of the Union. There can be no state unless it be entitled to a representation in the senate. It must have its separate executive, legislative and judicial powers."[2]

Sec. 125. *Complexity of the State and National System.*— The ordinary citizen and the casual observer as he daily sees the peaceful working of our governmental system, developed by the experience and study of a century, has no occasion to notice the exceeding complexity of the system of laws under which we live. But in fact the American system of law is the most complex that the history of mankind presents.[3]

"Our country exhibits the extraordinary spectacle of distinct, and in many respects independent, governments over the same territory and the same people;"[4] but, to make the anomaly striking, those functions which are declared or commonly called the government are not sovereign. The people have not delegated the sovereignty itself to any one; they have rather

[1] "All the rights of the states as independent nations were surrendered to the United States. The states are not nations, either as between themselves or towards foreign nations. They are sovereign within their spheres, but their sovereignty stops short of nationality. Their political *status* at home and abroad is that of states in the United States. They can neither make war or peace without the consent of the national government. Neither can they, except with like consent, 'enter into any agreement or compact with another state.' Art. 1, sec. 10, cl. 3." New Hampshire v. Louisiana, New York v. Louisiana, 108 U. S. 90.

[2] Hepburn et al. v. Ellzey, 2 Cranch, 445.

[3] Bryce, Am. Con., vol. 1, part 1, p. 14. Mr. Bryce observes: "The casual reader of American political intelligence in European newspapers is not struck by this phenomenon, because state politics and state affairs generally are seldom noticed in Europe. Even the traveler who visits America does not realize its importance, because the things that meet his eye are superficially similar all over the continent, and that which Europeans call the machinery of government is in America conspicuous chiefly by its absence. But a due comprehension of this double organization is the first and indispensable step to the comprehension of American institutions; as the elaborate devices whereby the two systems of government are kept from clashing are the most curious subject of study which those institutions present." Page 15.

[4] Ogden v. Saunders, 12 Wheat. 350.

destroyed the old idea of sovereignty. The constitution, together with treaties made under it and laws passed in conformity with it, are the *supreme law* of the land, and, as the words imply, there is no higher power.[1] Certain officers are elected with authority over certain subjects throughout the whole domain of the nation. For other purposes, territorial limits exist, the people of which constitute a body politic, and this person (the state) exercises its power through officers appointed with power to do everything not delegated to federal officers or not reserved to the people.

The chief difference between the power of the United States and the state consists not in the manner of their creation or operation, but in the objects of control, for each exercises only delegated power; one enumerated, the other limited only by the limitations of the state constitution and what has been already granted to the national government. Both exercise delegated powers as agents of the people.[2] This, with the constitutional adjustment of the judicial power, independent of and separate from and co-ordinate with the legislative and executive departments, and clothed with the authority to declare void and of non-effect all acts of legislation, from whatever source emanating, which contravene the provisions of the federal or the state constitutions, present the unique and striking features of the American constitution,[3] the adoption of which, in its day, was regarded a prodigy.

Sec. 126. *Development by Conflict.*— The present approximate perfection of our scheme of government has not been accomplished without bitter strife and the fiercest of conflict in the judicial forum, and, in several instances, resort to armed force has been necessary. The national character of the federal government several times barely escaped shipwreck upon that ever-threatening rock which has been designated by the name of "state's sovereignty." The early tendency was toward the disintegration of the nation.

The first decision of the supreme court upon a constitutional question[4] was answered by an act of the state legislature de-

[1] Peel Splint Coal Co. v. West Virginia, 36 W. Va. 802; 17 L. R. A. 387; White v. Hunt, 13 Wall. 650.

[2] McCullough v. Maryland, 4 Wheat. 410; Chisholm v. Georgia, 2 Dall. 419.

[3] Peel Splint Coal Co. v. West Virginia, 36 W. Va. 802; 17 Law Rep. 387.

[4] Chisholm v. Georgia, 2 Dall. 419. See Hans v. Louisiana, 134 U. S. 1.

claring the penalty of death against any or all persons who should attempt the enforcement of the decision.[1] Another decision, involving another phase of the same question,[2] met forcible resistance by the order of the governor of Pennsylvania.[3] Jefferson[4] and Lincoln[5] each ignored and disregarded the findings of the supreme tribunal. It should be observed that they only ignored what they called extra-judicial findings, and did not openly affirm the right to disregard a decision of the court; while Jackson refused to execute the decision of the supreme court in *Worcester v. Georgia*, 6 Pet. 515–597.

Sec. 127. *Great Questions Still Unsettled.*—To-day the greatest unsettled questions under the constitution relate to the line of demarkation between federal and state jurisdiction, unless possibly it may be the relations of church and state.

It has taken years for the people to thoroughly acquaint themselves with the real character of these co-ordinate jurisdictions and the true position of the states within the nation.

When this is thoroughly settled (and one justice of the supreme court has said it is time it should be) and their real relations are admitted by the individual, the people of the states, the people of the United States, and the government of each, the true grandeur of the achievement of the sages who framed our constitution, the lawyers who have construed it, and the patriots who have preserved it, and likewise the beauty, symmetry and strength of this government, adapted as it is to resist the attacks upon the liberty of the whole people and to protect the humblest citizen in his private rights, will be apparent.[6]

[1] Const. Hist. Am. Law, 70.

[2] United States v. Peters, 5 Cranch, 136.

[3] Const. Hist. Am. Law, 83–85.

[4] Marbury v. Madison, 1 Cranch, 137.

[5] Dred Scott Case, 19 How. 393.

[6] This is not the place to indulge in doleful foreboding on account of existing tendencies, and yet it is unwise, when viewing the beauty and strength of the plan and structure, not to perceive that the permanency of it all depends upon the foundation upon which the structure rests, the character of individual man.

CHAPTER VII.

THE PEOPLE.

"It seems to me, therefore, that we only perplex ourselves when we attempt to explain the relations existing between the general government and the several state governments, according to the ideas of sovereignty which prevail under systems essentially different from our own." — Webster's Reply to Calhoun.

SEC. 128. *The People — Identity.* — In the United States the people are brought on the stage as an acting political entity, acting, it is true, always through representatives. As expressed by Wilson, one of the signers of the Declaration of Independence: "In free states the people form an artificial person or body politic, the highest and noblest that can be known."[1]

By "the people" of a state is meant all of the members which compose that state and are integral parts of it, together making a body politic.[2]

"The people as a corporate unit form an artificial person or body politic; thus constituted they form a moral person."[3] "It is this person we call a state."[4] "There is no distinction between the people and the state."[5]

It must not be forgotten that, in using the expression "the people," there is a distinction between the population of the nation, as individuals, and the same population organized under a constitution. By "the people," in this connection, we intend a body politic, a corporate unity. Because of the quality of singleness we may properly use the pronoun "it," though this is not usual. It is hard for the citizen to lose sight of the individuals in the body; but correctly viewed, as drops of water lose their forms as drops when they mingle with the whole and become not drops, but one body, even so the citizen in his political capacity loses the civil capacity of an individual when viewed as a part of that great unit "*the people.*"

[1] 2 Wilson's Works, 6.

[2] Penhallow v. Doane, 3 Dall. 55, 93; Wells v. Bain, 75 Pa. St. 39; Scott (Dred) v. Sanford, 19 How. 393.

[3] Keith v. Clark, 97 U. S. 460; 2 Wilson's Works, 321.

[4] 1 Wilson's Works, 321-25; 2 Wilson's Works, 6.

[5] Penhallow v. Doane, 3 Dall. 93.

It is the whole mass, and not a majority of the individuals composing it, which constitutes the people, and the people are to be regarded, not as an unorganized mob, but as a corporate unity composing a society.[1] There are *dicta* to the effect that the people, when spoken of in the political sense, means only those persons having the right to vote,— that is, the electors; and it is at the same time said that in the electors is vested the sovereignty.[2] Thus stated, the idea does not, as we shall see, properly obtain, and is contrary to the principles of American institutions.[3] Voters are but parts of the machinery of government. In the constitution "the people" is sometimes used to indicate persons or individuals. So in all provisions in reference to unreasonable seizures and searches. In such provision it is identical with the use in Blackstone.

Sec. 129. *Capacity — Power — Sovereignty.*— We may now examine the powers of the people, and in the course of this ex-

[1] Jameson, Const. Con. (4th ed.), pp. 18, 19, notes; Von Holst's Con. Law, 48, 49; Penhallow v. Doane, 3 Dall. 92.

"A distinction was taken at the bar between *a state* and *the people of the state*. It is a distinction I am not capable of comprehending. By a *state* forming a republic (speaking of it as a *moral person*), I do not mean the legislature of the state, the executive of the state, of the judiciary, but *all the citizens which compose the state, and are, if I may so express myself, integral parts of it; all together forming a body politic*. The great distinction between monarchies and republics (at least our republics) in general is, that in the former the monarchy is considered as the sovereign, and each individual of his nation as a subject to him, though in some countries with many important special limitations. This, I say, is generally the case, for it has not been so universally. But in a republic, all the citizens, as such, are equal, and no citizen can rightfully exercise any authority over another but in virtue of a power constitutionally given by the whole community, and such authority, when exercised, is in effect an act of the whole community, which forms such body politic. In such governments, therefore, the sovereignty resides in the great body of the people, but it resides in them not as so many distinct individuals, but in their politic capacity only. Thus A., B., C. and D. are citizens of *Pennsylvania*, and as such, *together with all the citizens of Pennsylvania*, share in the sovereignty of the state. Suppose a state to consist exactly of the number of 100,000 citizens, and it were practicable for them all to assemble at one time and in one place, and that 99,999 did actually assemble. The state would not be in fact assemble. Why? Because the state in fact is composed of *all* the citizens, not of *a part* only, however large the part may be, and one is wanting." Penhallow v. Doane, 3 Dall. 93.

[2] Cooley's Const. Lim. 40, citing Blair v. Ridgely, 41 Mo. 63; 97 Am. Dec. 248.

[3] 2 Wilson's Works, App'x A, p. 566; McCrary on Elections (4th ed.), sec. 13.

amination but little time need be spent upon theory or metaphysical discussion of what ought to be the law governing the matter, but will, as far as possible, be confined to the practical, visible facts.

The discussion of the capacities of that person we term "the people" necessarily involves the discussion of what is termed sovereignty. Let no one suppose that this question is an impracticable one and that it has no further value than the theoretical or metaphysical, or a display of mental acrobatics or ingenuity; for it will be seen that the question is one which lately, on several important occasions, has been the only discussion indulged in for the determination of great cases in court, and is liable to arise as a practical question at any time.

The discussion of the "sovereignty of the people," a term so often used, and we might say so much abused, involves the very foundation principle of this government. There was a time when even to discuss the sovereignty was like entering the holy of holies. Thus said Bacon: "Concerning government, it is a part of knowledge secret and retired in both these respects in which things are deemed secret; for some things are deemed secret because *they are hard to know*, and some because they are not *fit to utter*. Very often the discussion is approached more as the philosopher than as the lawyer." And as the same great writer said: "As for the philosophers, they make imaginary laws for imaginary commonwealths, and their discourses are as the stars, which give little light because they are so high; but the lawyers, they write according to the states where they live, what is received law — not what ought to be law; for the wisdom of a law-maker is one and of a lawyer another."

There are two methods of discussing sovereignty: one the theoretical, star-gazing, phantom-chasing quests; another the practical, which consists in nothing more or less than determining what acts the alleged sovereign can legally perform. Thus Hale and Blackstone show us what the king and parliament had the legal right to do in the time of each, respectively, and by the changes in legal power the sovereignty is seen to change from the king, in the time of the former, to parliament in the day of the latter.[1] The course of the inquiry will be to

[1] Const. Hist. Am. Law, 32.

determine, first, the nature of sovereignty; second, its existence in our jurisprudence.

Sec. 130. *Early Idea of Sovereignty in English Law.*— The question must be examined in the light of our own constitutional history, and the references made to English history are for the purpose of illustrating precisely the changes made by our ancestors, who established our present constitution.

To fully appreciate the idea of sovereignty and the changes which have taken place in the meaning of the word since its introduction in England upon feudal principles, we should go back so far at least as the time of Lord Bacon and Lord Hale.

Section Three of Hale's analysis is entitled "Of such rights as relate to the king's person." Under this he speaks of the king thus: "Then, as to his *natural* capacity, as he is king; the great concerns of government requiring a great assistance to the king's natural capacity, the laws and customs of the kingdoms have furnished him with divers *assisting councils*, which are of two kinds, viz. (to abbreviate): ordinary and extraordinary councils. The ordinary council consists of privy council, council at law (the lord chancellor, etc.). This court had jurisdiction of appeals from the colonies.[1] His extraordinary councils are two — secular and ecclesiastical. The secular councils are the house of peers and house of commons."

"*Section Four*, concerning the prerogatives of the king. Having shown you what rights belong to the king's person (the parliament being the council of the king), we come now to those rights which concern his prerogatives, namely: *Jura majestatis, vel summi imperii*, that is, the right of dominion; *potestas jurisdictionis, vel mixti imperii*, that is, the power of jurisdiction.

"*Section Five*, concerning the *jura summa majestatis*, or rights of the king's empire or dominion.

"*Section Six*, of the *potestas jurisdictionis*, or the king's right or power of jurisdiction. Hitherto of the *jura summi imperii*, or rights of empire or dominion; now we come to the *jura mixti imperii*, or *potestas jurisdictionis*, wherein the king generally acts by his delegates, officers or representatives."[2]

[1] The Sarah, 8 Wheat. 396, note; Penn v. Lord Baltimore, 1 Ves. 444; Hale's Anal.

[2] Hale's Anal.

This brief summary discloses that the parliament was originally treated as occupying a subordinate capacity as an advisory council of the king, while the *jura summi imperii*, which Blackstone calls the right of sovereignty, is not treated as residing anywhere else but as an attribute of the king's person — he has the *jura majestatis, vel summi imperii*, or the right of dominion, and the *potestas jurisdictionis, vel mixti imperii*, that is, the power of jurisdiction.[1] The central idea is that, while the king has this sovereign power over his subjects, there is no legal power to control him; he was *natural* ruler, and all charters of liberty take the form of grants from the crown confirmed by parliament. "When a government," says Judge Cooley, "*grants* a constitution, it remains supreme over it."[2]

Sec. 131. *The Divided Sovereignty of Blackstone's Time.*— Between the time of Hale and Blackstone great changes took place. The convention parliament denied that the king was the natural lord, destroying forever the doctrine of divine right. But in his day, says Blackstone, "the law ascribed to the king certain attributes of a great and transcendent nature, by which the people are led to consider him in the light of a *superior being*, and pay him that awful respect which may enable him, with greater ease, to carry on the business of government." This, he says, is what I understand to be the royal dignity, the several branches of which we will now proceed to examine. First, the law ascribed to the king the attribute of *sovereignty* or *pre-eminence*,[3] and all subjects owed to him allegiance, which was a personal feudal tie. Thus, a single personal sovereignty is retained, but the *jura summi imperii*, or the supreme power, is transferred from the king to the parliament, whereby parliament is raised up as the supreme power[4] of the kingdom,[5] whereof the king was a constituent part, and this unit, parliament being a body corporate, is invested with supreme, irresistible, absolute, uncontrolled authority.[6] "For to set bounds is to distrust and destroy, and the law being incapable of distrusting those whom it has invested with any part of the supreme power, since such distrust would render the exercise of

[1] See also 1 Blk. Com. 237.
[2] Con. Hist. Am. Law, p. 31.
[3] 1 Cooley's Blk. 241.
[4] Con. Hist. Am. Law, 33.
[5] 1 Cooley's Blk. 153.
[6] Id. 49. See Cooley's notes (3d ed.).

that power precarious and impracticable, for wherever the law expresses its distrust of abuse of power, it always vests a superior coercive authority in some other hand to correct it, the very notion of which *destroys the idea of sovereignty*."[1]

Thus we see the modern English sovereignty in an omnipotent parliament *without any judge upon earth to define its powers*, which are without limit, because[2] it is said to set limits against the abuse of power destroys the idea of sovereignty.[3]

In that day the limitations upon the king's prerogative were certain and numerous.[4]

The privileges and powers of parliament were uncertain and indefinite as well as unlimited.[5]

Sec. 132. *Effect of Declaring Equality.*— From the premises furnished by this statement from Blackstone's treatment of English law, we may now ask the question,—

When inequalities of rank are destroyed, and plainly defined bounds are set upon the power of legislation, and an independent tribunal created which has jurisdiction at the instance of an individual[6] to annul an act of the legislative body and to keep all power within the defined limits, is not sovereignty destroyed?

It will be admitted by all that sovereignty is not recognized in American law in the same sense in which it was said to

[1] 1 Cooley's Blk. 244.

[2] 1 Blk. 48.

[3] Id. 244.

[4] Id. 141, 233, 237; Miller on Constitution, 67, note.

[5] 1 Blk. 163–64. This view of Blackstone was not generally accepted by the English people. The following view of Junius is nearer to a just conception: "The power of king, lords and commons is not an arbitrary power; they are the trustees, and not the owners, of the estate. The fee simple is in us; they cannot alienate; they cannot waste. When we say that the legislature is supreme, we mean that it is the highest power known to the constitution; that it is the highest, in comparison with the other subordinate powers, established by the laws. In this sense the word 'supreme' is relative, not absolute. The power of the legislature is limited, not only by the general rules of natural justice and the welfare of the community, but by the forms and the principles of our particular constitution. If this doctrine be not true, we must admit that king, lords and commons have no rule to direct their resolutions, but merely their own will and pleasure; they might unite the legislative and executive power in the same hands and dissolve the constitution by an act of parliament." Woodfall's Junius, pp. vi, vii. See also Stockdale v. Hansard, [1839] 9 Ad. & El. 1; 36 E. C. L. 1.

[6] Inglis v. Trustee, 3 Pet. 158; Marbury v. Madison, 1 Cranch, 137.

exist under the English constitution, for it there existed as a right, a substantial right, an absolute right in a corporate body, a person, *i. e.*, parliament.

Strange as it seems, allegiance was not due to the person possessed with the supreme power in the state. It is apparent, therefore, that in the English system sovereignty was not synonymous with the supreme power in the state; that the former was a limited power; the latter absolute and unlimited.

The king was a sovereign in the sense that all citizens of all ranks were subject to him and owed *allegiance*, not to the people of England, *not to the laws of parliament*, but to the person of the king.[1]

The king was the head of the kingdom, *a constituent part of parliament;* he held his power of no one. Within the kingdom he represented no one but himself; was personally accountable to no one for what he might do; in fact, he held his office as an absolute right. But after the convention of 1688 this sovereign and king was not the supreme power in the state.

Sec. 133. *Extravagant Claim of Power at the Beginning of the American Revolution.*— When Mr. Blackstone wrote, he asserts as the prevailing doctrine in England, that whatever the forms of government, "however they began, or by what right soever they subsist, there is and must be in all of them a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty, reside. . . . By the sovereign power is meant the making of laws; for wherever that power resides, all others must conform to and be directed by it, whatever appearance the outward form and administration of the government may put upon it."[2]

Parliament had *sovereign* and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving and *expounding of laws* concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime or criminal; this being the place where that absolute despotic power, which must in all governments reside somewhere, is *intrusted* by the constitution of these kingdoms."[3]

[1] Inglis v. Trustee, 3 Pet. 158.

[2] 1 Blk. Com. 49.

[3] Id. 160. The nature and extent of legislative power will be fully treated in connection with the division of power into legislative, judicial and executive.

Parliament could change the succession of the crown,[1] remodel the constitution, change the established religion,—in fact, do anything not physically impossible. The dignity of the parliament was by the same commentator asserted to rest upon the uncertainty of its privileges and that it had a constitution peculiar unto itself.[2]

Sec. 134. *Contrary View in America.*—The resistance of the American colonies, well begun in 1765, subsequently ripened into an absolute and specific denial of the unwarranted assumption of power by parliament. The consummation which resulted in the Revolution resulted from the attempt by parliament to exercise the power of legislation over the colonies, in violation of the ancient principles of consent and representation, and the assent to this by the king resulted in such a state of affairs as to justify, according to the idea of the same commentator, the right of revolution, of which there were several precedents.[3]

If there were earls or lords or knights among the colonists who rebelled, their rank ceased when allegiance was renounced, and by the declaration of the whole that all were equal.[4]

The colonists insisted upon two ancient principles, or rather one principle embodying two ideas, as the basis of all law, namely: that no law was of any effect which was passed without the consent of the governed given by representatives.[5]

Sec. 135. *How the People of the United States Obtained Supreme Power.*—The framers of the Declaration of Independence evidently had in mind the precedent furnished by the convention parliament of 1688–89, which declared the throne vacant,[6] of which Blackstone says: Parliament held "that the misconduct of King James amounted to an *endeavor* to subvert the constitution, and not an actual subversion or total dis-

[1] This the parliament did in 1688 without having any king in parliament.

[2] 1 Blk. Com. 164. This whole doctrine of Blackstone has long since been discarded in England. It is inserted here upon the principle that all acts and instruments of the people (Declaration of Independence) must be construed in the light of the surrounding circumstances and the evils intended to be remedied. Iredell, J., 2 Dall. 432; Hans v. Louisiana, 134 U. S. 1.

[3] 1 Blk. Com. 211–245. See Wilson's speech in vindication of the colonies, 2 Works, 501.

[4] Swift's System of Laws, 27; Jameson, Const. Con., sec. 13.

[5] 2 Wilson's Works, 507, 508.

[6] Inglis v. Trustee, 3 Pet. 158.

solution of government, which, according to the principle of Mr. Locke, reduced society almost to a state of nature, leveled all distinctions of honor, rank, offices and property, would have annihilated the sovereign power, and in consequence would have repealed all positive laws, and would have left the people at liberty to have erected a new system of state upon a new foundation of polity."[1]

Sec. 136. *When Allegiance Was Renounced All Power Returned to the People.*— A very slight change in the words of Blackstone describing the action of the convention parliament of 1688 describes the acts of the convention which framed the Declaration of Independence. They therefore very prudently declared the action of the king to amount to no more than an abdication of government,[2] for they declare that the king had repeatedly dissolved representative houses and refused to cause others to be elected, "whereby the *legislative powers incapable of annihilation have returned to the people at large for their exercise.*" They also declared that the king had combined with others (meaning the English parliament) "to subject us to a jurisdiction foreign to our constitution and unacknowledged by our law, giving his assent to their acts of *pretended* legislation." Then follows a recital of what these pretended acts of legislation were, namely: depriving them of trial by jury, altering fundamentally the forms of government, and then this recital, referring evidently to the declaratory act, "for suspending our own legislature and declaring themselves (parliament) invested with power to legislate for us in all cases whatsoever;" and finally, "he has abdicated government here by declaring us out of his protection and waging war against us."

According to the theory of Justice Blackstone, that there must exist somewhere, in all governments, an absolute despotic power,[3] and which idea forms a distinctive branch of his definition of law, the colonists, by declaring independence and *equality*, and that the *legislative power had returned to the people*, put them in identically the position which he described where he says the *devolution of power to the people at large* includes in it a dissolution of the whole form of government estab-

[1] 1 Blk. Com. 213.

[2] Id. See Declaration of Independence.

[3] 1 Blk. Com. 48, 162.

lished by that people; reduces all the members to their original *state or equality*, and, by *annihilating the sovereign power*, repeals all the positive laws whatsoever.[1]

According to the doctrines of political law as they obtained in England, the action of the colonists, as evidenced by the Declaration of Independence, reduced the individuals who inhabited the colonies to a state of nature; for, says Blackstone, "when civil society is once formed, government at the same time results of course, as necessary to preserve and keep that society in order. *Unless some superior be constituted* whose commands and decisions all the members are bound to obey, they would still remain in a state of nature *without any judge upon earth to define* their several rights and redress their several wrongs. But as all members which compose this society were naturally equal, it may be asked, in whose hands are the reins of government to be intrusted?"[2]

Sec. 137. *The Declaration of Equality Destroyed Personal Sovereignty.*— Here it is that the learned commentator confounds society with government, and very naturally; for with him the parliament is the great body politic, the state, and also the government, and the people are no more, no less, than individual subjects.[3]

It is evident that the framers of the Declaration of Independence did not acquiesce in the view that such acts repealed all their laws; for while they deny the powers of parliament over them upon the ground that they are not represented, and declare that the crown has abdicated the government, they do not admit that their laws are repealed.[4]

It was a well known rule that a change in form of government, or in the persons who exercise it, does not repeal existing laws.[5]

At the time of the Declaration of Independence the colonists affirmed that they had existing among them what they had brought with them, developed and possessed as their birthright, the common law of England, which they contended was

[1] 1 Blk. Com. 213.

[2] Id. 48, 213.

[3] Shar. Blk. 48, 213, notes; 1 Wilson's Works, 270, 271.

[4] Society v. New Haven, 8 Wheat. 464; Inglis v. Trustee, 3 Pet. 168. See also Webster's reply to Calhoun; Marshall's argument in Ware v. Hylton, 3 Dall. 211.

[5] American Ins. Co. v. Bales of Cotton, 1 Pet. 540; C. & P. Ry. Co. v. McGlinn, 114 U. S. 542–46.

founded upon two ancient pillars — consent and representation.[1] Throughout all their subsequent acts and doings they professed to observe the principle that all authority was derived from the people they represented, either expressly given or impliedly ratified,[2] thus excluding any idea of the supremacy of any person or class over the whole mass or any member thereof, and they did not agree that because there were no inequalities of rank nor any orders of nobility they were and must remain without laws.[3] It must be confessed that they stood as Englishmen never stood before,— equals in rank, equals in right.

Sec. 138. *Consent of Equals the Basis of American Law.*— The inhabitants of the colonies, by declaring that all men were created *equal*,[4] and further declaring that governments must derive their just powers from the governed, placed themselves

[1] The binding force of an act of parliament arises from the idea of representation, and that every citizen is a party to it and consents to it. Middleton v. Crofts, 2 Atk. 654; Matthews v. Burdett, 2 Salk. 673. See also 1 Blk. Com. 234; Swift's System of Laws, p. 27; Inglis v. Trustee, 3 Dall. 158.

[2] Ware v. Hylton, 3 Dall. 232. See 2 Wilson's Works, 566.

[3] 1 Wilson's Works, 321.

[4] The Declaration is, not that all men are created *free* and *equal*, or born free and equal. The Declaration is frequently misquoted. The origin of the principle stated in the Declaration, that "all men are created equal," is frequently accredited to French publicists, and the language ascribed to Thomas Jefferson and his associates who penned the last draft of the document. Prof. Hammond says: "The Declaration beginning with the statement that all men are *born* free and equal," etc., and adds (in language translated almost literally from the writings of Voltaire) (1 Ham. Blk. 276), thus seeming to credit Voltaire with the invention of the language of the Declaration. An objection to Hammond's statement is that he himself misquotes the words, and it is not easy to see how a *translation* can be *literal* — it may be liberal." See 2 Wilson's Works, 507, note.

It is well in such matters to be exact. August 17, 1774, James Wilson, in a speech in vindication of the colonies, said: "All men are by nature equal and free; no one has a right to any authority over another without his consent; all lawful government is founded on the consent of those who are subject to it; such consent was given with a view to insure and to increase the happiness of the governed above what they could enjoy in an independent and unconnected state of nature. The consequence is that the happiness of the society is the *first* law of every government." A comparison of the second clause of the Declaration of Independence with this clause of the address discloses that every essential idea of the former is expressed in the latter, except the right of separation, which it would have been injudicious to have then expressed. See 2 Wilson's Works, 507, 508; *ante*, § 11.

in a position never occupied by Englishmen nor recognized by the English constitution.

The theory adopted by Blackstone, that both government and law were swept away, was not admitted.[1]

The lawyers of the colonists had imbibed other notions of the nature of law and government. The solution of the problem of self-government involved an examination of that branch of Blackstone's definition of law wherein it is asserted that the "*law is a rule prescribed by the supreme power in the state.*" This is the basis and pith of the whole matter.

In the great case of *Chisholm v. Georgia* the supreme court went to the very root of this question of sovereignty while commenting upon the principle announced by Blackstone, which at that time obtained sanction from the Crown party in England.[2]

Justice Wilson in his opinion says: "This position is only a branch of a much more extended principle upon which a plan of systematic despotism has been *lately formed in England* and prosecuted with unwearying assiduity and care. Of this plan the author of the Commentaries, if not the introducer, was at least the great supporter. He has been followed in it by writers later and less known; and his doctrines have, both on the other and *this* side of the Atlantic, been implicitly and generally received by those who neither examined their principles nor their consequences. The principle is that all human law must be prescribed by a *superior*. This principle I mean not now to examine. Suffice it at present to say that another principle, very different in its nature and operations, forms, in my judgment, the basis of sound and genuine jurisprudence; laws derived from the pure source of *equality* and justice must be founded on the *consent* of those whose obedience they require. The *sovereign*, when traced to his source, must be found in the man."[3]

In his lectures before the Philadelphia Law School in 1791 he had investigated that question with care. He pertinently inquires: "Is it *essential to law* that inferiority should be involved in the obligation to obey it? Are these distinctions at the root of *all* legislation? . . .

[1] *Ante*, secs. 135, 136.

[2] This was a new doctrine and was not universally approved.

[3] Chisholm v. Georgia, 2 Dall. 458.

"If I mistake not, this notion of superiority which is introduced as an *essential* part in the definition of a law — for we are told that a law *always* supposes one superior who is to make it — this notion of superiority contains the germ of the divine right." . . . "Despotism by an artful use of '*superiority*' in politics, and scepticism by an artful use of 'ideas' in metaphysics, have endeavored — and their endeavors have frequently been attended with too much success — to destroy all true liberty and sound philosophy. By their baneful effects the science of man and the science of government have been poisoned to their very fountains." Professor Hammond says truly: "By these arguments Judge Wilson has shown that Blackstone's definition ranked him, in spite of himself, with the supporters of divine right and absolute power."[1]

Sec. 139. *Legislative Power Not Supreme or Absolute.*— It is in his fifth chapter, the subject of which is "Of Municipal Law," that he eradicates root and branch this heresy in political doctrine. He says: "In regard to this point in the definition, I must beg leave to assign the epithet 'dangerous and unsound.' It is of high import to the liberties of the United States that the seeds of despotism be not permitted to lurk at the roots of our municipal law."[2] He then examines Blackstone's exposition of the legislative power and the powers of parliament, and as to the idea that there is and must somewhere be absolute and despotic power, as implied by this definition, says: "Let us now pause and reflect. After what we see can be done, after what we see has been done (in the United States), in the delegation and distribution of the rights and powers of *society*, can we subscribe to the doctrine of the Commentaries, that the authority which is legislative must be supreme? Can we consent that this doctrine should form a first principle in our system of municipal law? Certainly not. This definition is not calculated for the meridian of the United States."

Blackstone seems to have omitted to notice the opinion of the judges of England that the binding force of an act of parliament arises from the idea of representation, *and that every citizen, as a party to it, consents to it.*[3]

[1] 1 Ham. Blk., note 11, p. 112.

[2] 1 Wilson's Works, 159–60.

[3] Id. 160–175; Middleton v. Cross, Atk. 65; Matthews v. Burdette, 2 Salk. 672; 1 Shar. Blk. 147, note.

Sec. 140. *Official Power is Never Allowed as a Personal Right.* Having seen the origin and nature of sovereignty and that its essential attributes are inequality and unlimited power, and noticed that inequality and personal superiority are repudiated by the Declaration of Independence, it remains to inquire whether this society of equals has created or recognized, as inhering in any person, body or class, the other attribute, viz., unlimited power. The first peculiar principle is the republican one, that official power is never *exercised* as of personal right.[1] In England two branches of the legislative body exercise their authority as of individual right; that is, the king, because he was king, had a voice in legislation, and likewise the lords, because they were lords, had a voice, and when they voted or acted they voted or acted for themselves and in their own right and not as representing or acting for any one else. Judicial and executive power were exercised by the king as of right. The only representative body was the Commons, and historically their right in the parliament was originally derived from a command to send representatives to parliament, which ripened into a right by long usage.[2] In a democracy, inasmuch as, theoretically, all may participate in legislation, each exercises these rights for himself, and does not delegate anything excepting the executive administration of these democratic laws. In America, by reason of the equality of the citizens, the principle naturally existed, by virtue of their situation, that no individual or body had any right or authority over any one else, and it naturally resulted that no power or authority should be exercised excepting by the consent of the governed and through representatives chosen for that purpose.

Sec. 141. *The People Expressly Limit Their Power.*— They established also another novel principle. Experience had taught them by many examples[3] that legislative power by the many or the few might be abused, and the declaration that the legislative power had returned to the people at large, coupled with those just mentioned, namely, that government derived its powers from consent, and that men were equal, re-

[1] Swift's System of Laws, 27.

[2] Id. 26; Webster's Argument in Luther v. Borden, 7 How. 1; 2 Wilson's Works, 573.

[3] See a great many cited in arguing and deciding Stockdale v. Hansard, 9 Ad. & El. 1; s. c., 36 E. C. L. R. 1.

sulted in a situation which is well expressed in the preamble to the constitution of Massachusetts,[1] wherein the people of that state acknowledge the goodness of Providence in affording them an opportunity, deliberately and peaceably, without fraud, violence or surprise, of entering into an original, explicit and solemn compact with *each other*, and of forming a new constitution of civil government for themselves and our posterity, and which, after explicitly declaring the rights of the citizens of the commonwealth, they declare that they established it to "the end that it might be a government of laws and not of men."[2]

Sec. 142. *All Legislative Power is Limited.*—In America there are recognized two distinct branches of legislative power.[3] The one political, exercised originally, in the formation of the United States constitution, by the electors as the immediate representatives of the people, and now habitually exercised in assemblages which have become familiar in the states under the name of constitutional conventions, and properly so, because they are confined in their actions to the enactment of fundamental or political legislation.[4] The other, the ordinary legislation exercised by congress or the general assemblages existing in all the states—always exercised by representatives chosen by the electors.[5] None of the legislatures have any power to make changes in the constitution. In England a *constitutional* convention was unknown (except the revolutionary bodies unwarranted by the constitution).[6] Parliament possessed and exercised all legislative power. In America only the people can make changes in the constitution. The people of the United States have made provision for amendments proposed to them by congress or devised by themselves at a constitutional convention, though in all cases the legislative assemblies must be consulted, while the people of the states usually act in the latter mode. When the people make a constitution they are acting politically; they are agreeing upon fundamental laws for the purpose of limiting the exercise of

[1] 1780.

[2] Mass. Const. 1780; Marbury v. Madison, 1 Cranch, 137.

[3] 1 Cooley's Blk. (3d ed.) 161. This subject will be more fully treated in connection with the legislative power.

[4] See Grimkie's Argument, 2 Hill (S. C.), 16.

[5] U. S. Const., arts. I and V.

[6] See Jameson on Const. Conv., § 8.

authority; and it is settled law that they can and have set limits upon the extent and mode of law-making even by themselves.

The new principle which pervades all of their acts, viz., that no power shall be exercised as of personal right, but officially as a trust,[1] resulted in an entirely new application of the old idea of representation, and put a new aspect upon the doctrine of consent very different from the old idea. It was the voluntary consent of equals, not the submission of subjects.

They did not cast off old principles and disregard ancient landmarks. The liberty of our fathers was not the license of anarchy, but the liberty of law.[2] Long before the constitution,

[1] 2 Dall. 472 (Jay, J.).

[2] Cooley's Principles, 23; Dodge v. Woolsey, 18 How. 331. "The clearest and most concise analysis of the general features of our political system may be found in the celebrated argument of the eminent statesman and great constitutional lawyer, Mr. Webster, in the case of Luther v. Borden, 7 How. 1, in the supreme court of the United States, which arose out of what is known as the 'Dorr Rebellion.' He said in substance that the only source of political power is in the people; that they are sovereign, that is to say, the aggregate community, the accumulated will of the people, is sovereign, but that *it is not the sovereignty* which acts in the daily exercise of sovereign power. The people cannot act daily as the people. They must establish a government, invest it with so much of the sovereign power as the case requires; and this sovereign power being delegated and placed in the hands of the government becomes what is familiarly called the *state*. The next principle is that, as the exercise of legislative power and the other powers of the government immediately by the people themselves is impracticable, they must be exercised by representatives of the people. The basis of this representation is suffrage. The right to choose representatives is every elector's part in the exercise of sovereign power. To have a voice in it, if he has the proper qualifications, is the portion of political power belonging to every elector. That is the beginning. That is the mode in which power emanates from its source and enters into the hands of conventions, legislatures, courts of law, and the chair of executive. Suffrage is the delegation of the power of an individual to some agent. Then follow two other great principles of the American system. The first one is that the right of suffrage shall be guarded, protected and secured against force and against fraud; and the second is that its exercise shall be prescribed by previous law,—that every man entitled to vote may vote; that his vote may be sent forward and counted, so that he may exercise *his part* of sovereignty in common with his fellow-citizens. There is another principle equally true, that the people often limit themselves, and set bounds to their own power, to secure the institutions which they have established against the sudden impulses of mere majorities, and also that they may limit themselves by their constitutions in regard to the qualifications of the electors and the qualifications of the elected. Webster's Works, vol. 6,

James Wilson in the Pennsylvania convention asserted that "the law is the common standard by which the excesses of prerogative as well as the excesses of liberty are to be regulated and conformed," plainly indicating that they understood both that power and liberty might have excesses, and were to be regulated.

The formation and existence of state governments ever since the Declaration of Independence were based upon voluntary consent.[1]

Sec. 143. *The Natural Right of Revolution is Recognized.*— There is inherent in the people a justifiable right (a sovereignty, if one chooses so to term it) to abolish or alter the existing *form* of government whenever it is found inadequate to the purposes intended. It ought not to be denied by us, having been asserted by our forefathers and exercised by them. But it is quite as frequently forgotten that this is nothing more or less than a justification for the exercise of revolution. A minority may as justifiably rebel as a majority; indeed, the colonists were not a majority of King George's subjects.[2]

Sec. 144. *The Original Consent Required Was Individual Consent.*— All fellow-subjects among the colonists who so desired were allowed to retain their allegiance to the king.[3] But when it is said that government is established by *consent*, the question arises, By the consent of whom? The consent of the people as a body or the consent of the individuals? It is an axiom in American law that government derives all its just powers from the consent of the *governed*,[4] and not from the submission of subjects to a government promulgated by a supreme power. As a political fact, as a practical fact, as a legal fact, the consent involved is the consent of the individual; and this established the supreme law and made it obligatory upon each and all. How was consent given? Judge Sharswood says:

pp. 221–227, cited by the court with approval in In re Duncan, 139 U. S. 461. See Vanhorne's Lessee v. Dorrance, 2 Dall. 308." State v. Cunningham, 81 Wis. 440, 497, 498.

[1] Ware v. Hylton, 3 Dall. 232.

[2] Jameson, Const. Con., § 239; State v. Hunt, 1 Hill (S. C.), 172; Bliss on Sov., p. 143; Luther v. Borden, 7 How. 1.

[3] 1 Shar. Blk. 47, note.

[4] Fed., No. 40. The Declaration of Independence asserts it.

"It is to be remarked that in the freest nations, even in the republics which compose the United States, the consent of the *entire body* of the people has never been *expressly* obtained." "The people" comprise all of the men, women and children of every age and class, but they were not one people in the same sense until the constitution was adopted. A certain number of men have *assumed to act in the name of all the community*.[1]

Sec. 145. *The Right of Expatriation Allows the Constant Exercise of Assent or Dissent.*— "Very plainly, then, it is essential to the American doctrine of consent to hold that every citizen shall have a *right at any time* to expatriate himself.[2] How can the consent of the *governed* be in any sense implied if the *citizen* is coerced to remain a member of the state through all the changes which its form of government may undergo, whether with or without his approbation (that would be submission). It is clear that in any such case he may remove himself and his property to any country he chooses, and he must be allowed reasonable time to make his election. This course was adopted at all periods of the American Revolution. All persons, whether natives or inhabitants, were considered entitled to make their choice — either to remain *subjects* of the British crown or to become *citizens* of one or other of the United States. This choice was necessarily to be made within a reasonable time."[3]

The majority of a colony, upon assuming to be an independent state, did not assume, against the will of the minority of the inhabitants, the right to make them members of the state.

[1] Ware v. Hylton, 3 Dall. 232; Fed., No. 40.

[2] "*Prima facie*, and as a general rule, the character in which the American *antenati* are to be considered will depend upon, and be determined by, the situation of the party and the *election* made at the date of the Declaration of Independence, according to our rule; or the Treaty of Peace, according to the British rule. But this general rule must necessarily be controlled by special circumstances attending particular cases. And if the right of election is at all admitted, it must be determined in most cases by what took place during the struggle, and between the Declaration of Independence and the Treaty of Peace. To say that the election must have been made before, or immediately at, the Declaration of Independence, would render the right nugatory. The doctrine of perpetual allegiance is not applied by the British courts to the American *antenati*. This is fully shown in the late case of Doe v. Acklam, 2 Barn. & Cres. 779." Inglis v. Trustees of Sailor's Snug Harbor, 3 Pet. 121.

[3] 1 Shar. Blk. 47, note 11.

In order, therefore, to make such persons members of the state, there must be some overt act of consent on their own part to assume such a character, and then, and then only, could they be deemed to have determined their right of election.[1] The consent of each individual could in no other mode be practically ascertained.

Sec. 146. *All Political Action Was Taken in the Name of the People.*— In all societies some must originally assume to act. In some societies those who assume to act assume to act in *their own right*, thus usurping the right to govern. This is the origin of feudal sovereignty.[2] In the formation of our governments, by express declaration, those who assumed to act, in each step towards the formation of this government have assumed to act, not on their own behalf, not of right, but in a representative capacity. "In the name of the good people of these colonies,"[3] or in the name of the people. It is only such acts as are professedly performed that can, according to the rule of agency, be ratified. By accepting and ratifying such acts, they are made the acts of each individual. The doctrine of consent, by exercising the right of election after a reasonable period within which to exercise it, is the basis of each man's consent to the form of government.[4] The fact of acknowledging this right of choice involves the admission, on the part of those assuming to act, that they were acting for others.

[1] Inglis v. Trustees et al., 3 Pet. 158.

[2] Chisholm v. Georgia, 2 Dall. 419.

[3] Declaration of Independence.

[4] Declaration of Independence; Inglis v. Trustees, 3 Pet. 160; Talbot v. Jansen, 3 Dall. 13. "From these conventions the constitution derives its whole authority. The government proceeds directly from the people; is 'ordained and established' in the name of the people; and is declared to be ordained 'in order to form a more perfect union, establish justice, insure domestic tranquillity, and secure the blessings of liberty to themselves and their posterity.' The assent of the states, in their sovereign capacity, is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it, and their act was final. It required not the affirmance and could not be negatived by the state governments. The constitution, when thus adopted, was of complete obligation, and bound the state sovereignties. It has been said that the people had already surrendered all their powers to the state sovereignties, and had nothing more to give. But surely, the question whether they may resume and modify the powers granted to government does not remain to be settled in this country. Much more might

The Convention of 1787 Acted in Autre Droit.[1] — The action of the convention of 1787 and the adoption of the present constitution has been said to have been revolutionary; but the delegates who met in convention were careful not to violate the fundamental principle which had been adopted by all bodies of Americans as the pole-star of all their acts when in convention assembled, namely: That all persons and all assemblages assuming to act or advise should assume to act in the name of the people, and while so acting should never perform an act having any force or validity from the mere performance, deriving force and validity and life by virtue of previous instruction or subsequent ratification of the people, a principle guaranteeing absolute safety; for, whether beyond the constitutional bounds or within them, the rejection of the proposed rule in one case nullified the act, and the approbation of it in the other had the effect of blotting out antecedent errors and irregularities.[2]

Sec. 147. *The Sanction of the Constitution Was Its Adoption by the People.*— Therefore, the present constitution, being before its adoption an unauthorized proposition, was submitted to the people for adoption, assent and ratification, and not published and prescribed.[3] The convention was not a convention of the people of the United States.[4] There was no authority to call a general convention of the people.[5] Indeed, Rhode Island never took part in the convention and sent no delegates to it. It was submitted to the citizens of the thirteen states, between whom existed a league, not because there was any authority from each of the thirteen to formulate a plan and submit a draft, but simply because of the plenary power of any body of

the legitimacy of the general government be doubted, had it been created by the states. The powers delegated to the state sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty created by themselves. To the formation of a league, such as was the confederation, the state sovereignties were certainly competent. But when, 'in order to form a more perfect union,' it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly upon the people, the necessity of referring to the people, and of deriving its powers directly from them, was felt and acknowledged by all." McCulloch v. Maryland, 4 Wheat. 403, 404.

[1] In the right of another.

[2] Fed., No. 40.

[3] Duer's Outlines, sec. 859.

[4] Fed., No. 40.

[5] Baldwin's Views, 11 Pet. (App.) 19.

freemen to submit a proposition to any other body or individual, when impelled to do so from the exigency of the occasion. It did not bind any individual till he assented to it. It did not affect any state or government, therefore, till its citizens, through their representatives, assented to it. It did not bind the people of any state until and unless eight other states joined with them. It then only bound those who adopted it, and when thus adopted by nine states it dissolved the league and ceased to be a proposal, and became a constitution.

Sec. 148. *The Act of Adopting the New Constitution Violated the Compact of Confederation Between the States.*—Because it did not require the ratification of all the states it was in disregard of the articles of confederation, which provided that the compact could not be superseded without the unanimous consent of the parties to that instrument, and North Carolina and Rhode Island not ratifying it (the latter not taking any legal steps in recognition of it), had the legal right to insist that the act was revolutionary, and so it was.[1]

Sec. 149. *The Autonomy of the States Was Preserved.*—But the ratification did not dissolve the states. The citizens of the ratifying states became citizens also of the new state called under the old name — the United States,[2]— and then, and then only, were the people created one people and one nation.[3] The old confederacy was a league between states and depended upon state action, having no means of enforcing individual obedience. The constitution of the United States creates direct relations between the United States government and individuals.[4] Webster, in his reply to Calhoun, says: "The constitution utters its behests in the name and by the authority of the people, and it exacts not from states any plighted public faith to maintain it. On the contrary, it makes its own preservation depend on individual duty and individual obligations."[5] The states cannot, by neglect, stop the wheels of government. The individual oath of office of the state legislative

[1] Duer's Outlines, sec. 855; Cooley's Prin. 16; Fed., Nos. 40–43.

[2] Scott v. Sanford, 19 How. 393; White v. Hart, 13 Wall. 650.

[3] Miller on Const. 83; Baldwin's Views, 11 Pet. (App.) 19.

[4] White v. Hart, 13 Wall. 650; Iredell, J., in Chisholm v. Georgia, 2 Dall. 335.

[5] Iredell, J., in Chisholm v. Georgia, 2 Dall. 435.

bodies to support the constitution of the United States compels them to act at stated terms.[1]

Sec. 150. *The Relation of the People, the States and Minorities.*— It is often said that the people are sovereign,— that is, the whole mass is sovereign because they created the constitution; and it is asked, Is not the creator sovereign to the creature? But the people of the old union did not act *en masse* or as citizens of one great body politic in creating the constitution.[2] Rhode Island never participated and North Carolina did not ratify. Confusion about this question arises from treating different things as the same thing because they are called by the same name. The political unity was created by the constitution, consisting of eleven states and the people thereof; that is, the artificial person as we see it now, then came into being, and then, for the first time, were known citizens of the United States.[3] The members of the old confederacy were states of the new nation, individuals and states. It is their universal consent to the terms of this instrument which creates the body politic called the United States.

Sec. 151. *Republican Form of Government Described.*— In England government was based on sovereignty; here it is derived from citizenship. There obedience depended upon subjection; here it depends upon consent. Submission and allegiance imply inequality; consent assumes equality. Allegiance was a badge of inferiority; citizenship is the charter of equality. In the United States there are citizens but no subjects. There is no oath of allegiance other than to support the constitution and laws.[4] To the constitution of the United States the term *sovereignty* is unknown. Government is exercised by magistrates who perform official duties and exercise delegated powers. By destroying inequality and applying the doctrine of delegated power to all subjects and departments of government and establishing a public service without rank or *jura potestas*, they destroyed the idea of sovereignty[5] and established a gov-

[1] Ibid.; Duer's Outlines, 214. See also Ex parte Yarbrough, 110 U. S. 651.

[2] Worcester v. Georgia, 6 Pet. 515–569; Cooley's Lectures (Ann Arbor, 1889), p. 33; Von Holst's Const. Law, 48; Fed., No. 40.

[3] Miller on Const. 83; Scott v. Sanford, 19 How. 393; White v. Hart, 13 Wall. 650.

[4] State ex rel. McCready v. Hunt, 2 Hill (S. C.), 1.

[5] Ham. Blk. 141; Webster's Reply to Calhoun.

ernment republican in form, to define which so exactly that nothing could be added and nothing taken away is perhaps beyond the wit of man. *Republicanism* requires, as asserted, that magistracy be *derived* from the great body of the society, not from an inconsiderable portion or from a favored class of it; and it is sufficient for such a government that the magistrates be appointed directly or indirectly by the people, and that they hold their offices for a limited period or during good behavior.[1]

The Form of Government is Not Democratic.— It is frequently forgotten that this government is not democratic in form or in substance, the difference being that in a democracy the people as a mass *have and may exercise* political power. In a republic, while all power is derived from the great body of the people, they never in a single instance actually participate as a body in the administration of government.[2] Representation is an essential feature of the republic; power must be delegated or lie dormant.[3]

Sec. 152. *Limitation of All Power.*— The assent of each individual is coupled with the agreement of every other individual that they all and each shall be bound by the terms expressed in the constitution. By adopting the acts done in convention on their behalf and expressed in the proposal for a constitution, the people in their double capacity, as individuals and citizens of states,[4] established a constitution providing for a common government over all concerning certain objects, preserving the separate state governments for other objects, each of which was to be perpetual and each supreme within the limits prescribed, and this proposal, when assented to, changed its nature from a proposal to a constitution; and this constitution is the only grant, warrant, charter or authority to which any person, whether body politic, class or individual, can refer as justifying the assertion and exercise of power. The intention was expressed in the preamble to form a more perfect *union* (of individuals and states), *establish justice* and *secure liberty;* and the more perfectly to do this, they declare that the *constitution* and *laws made in pursuance of it*, and all *treaties made under*

[1] Fed., No. 43; Chisholm v. Georgia, 2 Dall. 457.

[2] Jay, C. J., in Chisholm v. Georgia, 2 Dall. 452.

[3] Gibbons v. Ogden, 9 Wheat. 1.

[4] Dodge v. Woolsey, 18 How. 331.

the authority of the United States, shall be the *supreme law of the land*, and the judges in every state bound thereby, notwithstanding any state constitution or state laws in contravention thereof.[1]

It is sometimes asserted that sovereignty in the people exists as an original right, inhering as a necessary attribute, and this claim takes the form that the people have absolute, uncontrolled power and can constitutionally do anything. If this be true, then Blackstone was right, and absolute, uncontrolled, despotic power exists in this government.

When a government, whatever the form, *grants* a constitution, it necessarily remains supreme over it.[2]

Constitutional Amendments.— When a constitution results from the agreement of equals, it is entirely consistent with their dignity that they obligate themselves to the observation of its provisions in reference to changes or modifications, and it is essential to its character as a constitution that it be the supreme rule of conduct for all persons under all circumstances.[3] The doctrine of the inherent, absolute power of the people is in substance, though differing somewhat in form, that the right to adopt a constitution necessarily includes the right to abolish, reform and to alter any existing *form* of government; that this right exists as a right of sovereignty and is not derived from human authority, and may be and must be effected to such an extent and in such manner as the people may determine. It is now settled that such action is the exercise of revolutionary powers and not sovereignty.[4] That the people of the United States can make no changes in the United States constitution except in the manner provided by that instrument for constitutional amendments,[5] and that the people of the United States are limited as to what changes (in form or substance) may be made by the provisions of the constitution.[6] That by the constitution the people divested themselves of the sovereign power of making changes in the fundamental law except by the method in the constitution agreed upon.[7]

[1] Const., art. VI; 2 Hill (S. C.), 1.
[2] Cooley's Const. Hist. Am. Law, 31.
[3] Dodge v. Woolsey, 18 How. 331.
[4] Cooley's Const. Hist. Am. Law. 31.
[5] Luther v. Borden, 7 How. 1; State v. Hunt, 2 Hill (S. C.), 1; Wells v. Bain, 75 Pa. St. 39; Koehler et al. v. Hill, 60 Iowa, 568; State v. Young, 29 Minn. 509.
[6] Iredell, J., in 2 Dall. 419.
[7] Cooley's Prin. 23; Gibbons v. Ogden, 9 Wheat. 1.

That any attempt by the whole people, or by any majority of them, or any portion of them, to accomplish the same in any other mode, would be legally nugatory, unconstitutional and revolutionary, and that the people have expressly guarded themselves against the will of majorities and have rendered themselves incapable of destroying the autonomy of the states, by guaranteeing to each a republican form of government.[1]

"A government," says Justice Miller, "which holds the lives and liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power is after all a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than many. The theory of our government, state and national, is opposed to the deposit of unlimited power anywhere."[2]

[1] See Amendment of State Constitutions.

Constitution — Amendments to.— "The constitution is supreme over all of them, because the people who ratified it have made it so; consequently, anything which may be done unauthorized by it is unlawful. But it is not only over the departments of the government that the constitution is supreme. It is so, to the extent of its delegated powers, over all who made themselves parties to it, states as well as persons, within those concessions of sovereign powers yielded by the people of the states when they accepted the constitution in their conventions. Nor does its supremacy end there. It is supreme over the people of the United States, aggregately and in their separate sovereignties, because they have excluded themselves from any direct or immediate agency in making amendments to it, and have directed that amendments should be made representatively for them, by the congress of the United States, when two-thirds of both houses shall propose them, or where the legislatures of two-thirds of the several states shall call a convention for proposing amendments, which, in either case, become valid, to all intents and purposes, as a part of the constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths of them, as one or the other mode of ratification may be proposed by congress." Dodge v. Woolsey, 18 How. 331 (348).

[2] Loan Ass'n v. Topeka, 20 Wall. 662. See In re Duncan, 134 U. S. 449–461.

CHAPTER VIII.

THE PEOPLE OF THE STATES.

Sec. 153. *Identity of the People.*— Attention may now be directed to another entity possessing rights, powers and duties, namely, that other great person called a state, using the latter word in its familiar sense as designating a member of the national union.

The individuals constituting a state have as such no political but only civil rights, except as an organized body, that is, except when acting by its recognized organs. The entire population of a state *already constituted* (that is, organized under a constitution), were it assembled on some vast plain, could not constitutionally pass a law or try an offender.[1]

States existed prior to the adoption of the constitution and still exist as component parts of the greater person — the United States. One of the provisions of the constitution, and one doubtless without which its adoption could not have been obtained, is the clause guaranteeing to each of the states a republican form of government. This clause in the constitution operates in a double way. It is a limitation upon the powers of the people and of the United States in favor of the people of the states, and secures the preservation of the autonomy [2] of the states.[3]

[1] Jameson, Const. Conv. 237.

[2] See Bouvier's Law Dict., tit. Autonomy.

[3] Texas v. White, 7 Wall. 725. "'The people of each state compose a state, having its own government and endowed with all the functions essential to separate and independent existence,' and that 'without the states in union there could be no such political body as the United States.' Not only, therefore, can there be no loss of separate and independent autonomy to the states through their union under the constitution, but it may be not unreasonably said that the preservation of the states and the maintenance of their governments are as much within the design and care of the constitution as the preservation of the Union and the maintenance of the national government. The constitution, in all its provisions, looks to an indestructible Union composed of indestructible states." Texas v. White, 7 Wall. 725. See Reconstruction.

Sec. 154. *States Are Essential Constituents of the Nation.*— It is also a limitation upon the powers of the majority of the people of a state in favor of each and every citizen thereof, insuring to the individual that the form of government of the state, as well as of the nation, shall be republican. Doubtless it had its origin in the jealousy of the states of the danger of encroachment of the nation upon the powers of the states;[1] but in actual operation, it justified the prediction that the encroachment would most likely come from the states.[2]

The reconstruction of the seceded states was largely based upon this provision.[3]

Sec. 155. *Position of the State as to Independence.*— It was at first generally supposed that the sovereignty of the people of the states, even in the qualified sense as designating their independence and exemption from the jurisdiction or control of any higher authority, was destroyed or given up by entering into the Union, and it is settled law that a state may be sued in a United States court. From this fact alone, it follows that if the obligation to submit to a tribunal not created by itself is inconsistent with sovereignty, then a state is not, in that sense, sovereign. It was decided by the supreme court that the people of the United States had the power to create and had created a tribunal having jurisdiction over a state at the suit of an individual.[4]

Although that suit was one against a state by a citizen of another state, it is now settled that it is immaterial whether the citizen suing is a resident or a non-resident of the state sued.[5] That according to the letter of the constitution, a state might be sued by an individual is admitted by all;[6] but by an amendment of the constitution, the courts are prohibited from so construing the constitution; the provision being that the constitution must not be construed as giving jurisdiction to the United States courts over a suit between a citizen of one state and another state.

[1] Miller, Lect. on Const. 596.

[2] Ibid.

[3] Texas v. White, 7 Wall. 700; White v. Hart, 13 Wall. 646. The report of the Committee on Reconstruction treats the subdued seceding states as conquered persons having no rights. See Reconstruction.

[4] Chisholm v. Georgia, 2 Dall. 416.

[5] Hans v. Louisiana, 134 U. S. 1.

[6] Baldwin's Views, 11 Pet. (App.) 19.

Sec. 156. *A State Cannot be Sued by an Individual Except by Consent.*— The decisions have been uniform that a state cannot be sued in any court by an individual without its consent.[1] There have been *dicta* that the reason for the eleventh amendment was because it was incompatible with the sovereignty of the state, in analogy to the rule of the English law that the king could not be sued in his own court; but when we consider that the court which was supposed to have the jurisdiction is not a court created by a state, and that the court in which it is said a state cannot be sued by an individual has jurisdiction to entertain a suit against a state by another state, or appellate jurisdiction of a suit by a state against an individual,[2] the analogy cannot be made to hold good; and if the denial is attempted to be justified upon the other reason, that it is incompatible with the dignity of a state to be sued, then the fact that it may legally be sued in the same court leaves remaining but the flimsy pretext that it is incompatible with the dignity of a state to be sued by a citizen. The United States and many states now allow it.[4] A sufficient reason for the circumstance is found in the expression, "it is the written law," and it is quite immaterial what motives induced the adoption of the eleventh amendment.

Sec. 157. *An Individual Contracts with a State at his Peril.* It is now well settled that there is no judicial remedy in favor of an individual against a state to compel the performance of a contract,[4] though it is settled that a state can pass no law impairing the obligation of a contract once made. However, one dealing with a state need not complain that there is any injustice in this condition of the law, it being well settled that the only security for state loans rests on the plighted faith of the state as a political community; that is, upon the same basis as contracts with independent governments,— the same basis, for example, as loans made by the United States under the authority of congress; that is to say, the good faith of the government making the loan and its ability to fulfill its engagement. The party making the contract, being presumed to know

[1] Hans v. Louisiana, 134 U. S. 1; State v. Young, 29 Minn. 509.

[2] Cohen v. Virginia, 6 Wheat. 264.

[3] Chappell v. United States, 34 Fed. Rep. 673.

[4] State v. Young, 29 Minn. 509; Hans v. Louisiana, 134 U. S. 1.

the law, is not legally injured by being refused an action in court to enforce the obligation.

Sec. 158. *The Authority of the States.*— The people of the states are supreme in their authority over all subjects of government within the boundaries of the state which are not delegated to the United States government.

Sec. 159. *Limitation on Their Mode of Action.*— But even within these limits and in regard to these subjects, over which they have undoubted jurisdiction, the people of the states have no absolute, uncontrolled authority. The people of a state can only act through the legally constituted agencies of the law.[1] They cannot change, alter or amend the constitution except in the modes provided by the existing law;[2] and these are either through the action of a constitutional convention or the submission of amendments by the legislature, as pointed out by the constitution; but the constitutional convention cannot act independently of the existing state authority.

Sec. 160. *The National Constitution is Supreme.*— A provision in the constitution of a state in contravention of the constitution of the United States is void, though contained in the constitution when the state is admitted into the Union.

An amendment of the state constitution in contravention of the United States constitution is void, though accompanied with all the formalities of the law.[3]

Sec. 161. *Amendments of State Constitutions*, though all new provisions are within the unquestioned powers of the people, which are adopted without observing the forms prescribed in the existing state constitution, are void.[4]

An amendment of a state constitution, all the provisions of which are within the undoubted powers of the state, which are not made through the ordinarily existing state agencies for determining the will of the people, is revolutionary and void.[5]

The people of a state cannot lawfully secede from the Union.[6] They may be compelled to establish a government republican in form.[7]

[1] Luther v. Borden, 7 How. 1.

[2] Koehler et al. v. Hill, 60 Iowa, 568; In re Duncan, 139 U. S. 449–61.

[3] State v. Hunt, 2 Hill, 1; State v. Young, 29 Minn. 509.

[4] Koehler v. Hill, 60 Iowa, 568.

[5] Luther v. Borden, 7 How. 1; Koehler v. Hill, 60 Iowa, 568.

[6] Texas v. White, 7 Wall. 721.

[7] Id.; White v. Hart, 13 Wall. 646.

The people of a state cannot act *en masse* — they must choose representatives.[1]

The people act immediately through electors or voters, who are the immediate representatives of the great mass of the people.

Sec. 162. *Nature of Suffrage.*— The right to vote in American commonwealths is not of the same origin as the right to vote in England.[2] This will be examined under the qualifications of citizens to vote. Suffice it to say here, that the right to vote is not a natural right — it is purely conventional.[3]

Sec. 163. *Voters are Agents of the People, Not Ruler.*— Sometimes when we speak of the people of a state we do not allude to the whole body of inhabitants, but generally to the people in connection with the exercise of political power. It is said by an able lawyer that then the mind turns from the whole body to that portion of them in whom is constitutionally *vested* the right to exercise the power of suffrage.[4] The decision in that case seems to have been the basis for the expression by a text-writer that, as a practical fact, the sovereignty is *vested* in those persons who are permitted by the constitution of the state to exercise the elective franchise.[5]

Neither the argument of Mr. Drake nor the opinion of the court warrants such a conclusion. The judge of the court in that case drew the line sharply between the right of the English freeholder to vote as an incident to his tenancy in burgage, under which doctrine the right to vote was a vested right, and clearly explained the difference between the privilege or franchise in America, saying the right to vote is not vested — it is purely conventional.[6] Noticing that in some states those who were originally allowed to vote had been by the constitution divested of the power, he said: "We presume the law-makers considered that they were not discreet persons to be *intrusted* with the ballot."[7] The electors, as an actual fact, as a practical

[1] Jameson on Const. Conv., §§ 237, 348.

[2] Luther v. Borden, 7 How. 1; Blair v. Ridgley, 41 Mo. 63; State v. Hunt, 2 Hill (S. C.), 1. See McCrary on Elections, §§ 9, 10, 11.

[3] Ibid.; Jameson, Const. Conv. 331–2.

[4] Mr. Drake in argument, Blair v. Ridgley, 41 Mo. 63.

[5] Cooley's Const. Lim., p. 40.

[6] Blair v. Ridgley, 41 Mo. 63. See this question exhaustively examined in a note by the author, 2 Wilson's Works, 566. Also McCrary on Elections, *supra*.

[7] Blair v. Ridgley, 41 Mo. 63.

fact, as a legal fact, are the agents and representatives of the people.[1]

Sec. 164. *The New Meaning of Sovereignty.*— There are jurists of high standing who insist that sovereignty does not mean anything in America, and should be dropped from our legal nomenclature, but it is not the province of an author to dictate what our nomenclature shall be. A text-writer must take the terms of the law as found in daily use in judicial arguments, and his humble province is to ascertain and explain, as near as may be, the sense in which the term is appropriately used.

Sovereignty, like many other words which have come to us from other days, has changed with the development of the law, and the idea associated with the use of the word is not at all synonymous or even analogous to the old idea which the word represented. Even so, this word "sovereignty" in American law, though not found in the constitution,[2] has been in constant and daily use in American law, but it is disassociated from both the ideas which it bore in the English law at the time of the Revolution. Sovereignty does not mean unlimited, absolute power, nor does it mean personal authority; but sovereignty, when properly applied to the people of the United States as a political entity, may properly, in a guarded sense, mean personal superiority; that is, that there is a public person from which all power emanates, than whose will there can be no other superior authority.[3]

The people are sovereign in the limited sense that there is no external power which can be recognized as having authority over them, and likewise there can be no internal tribunal with inherent powers, that is, powers not granted by the people, which can have jurisdiction over them. Therefore, there having been no judicial tribunal created by the constitution with express jurisdiction of a suit against the United States, the doctrine naturally followed, not because of any analogy between the people and the king of Great Britain, not because the people cannot be bound by the obligations of a law, but

[1] Jameson on Const. Conv., pp. 324, 331–333, 335, 337, 352, 354; Pomeroy, Const. Law, pp. 5–28; Penhallow v. Doane, 3 Dall. 54.

[2] See Chisholm v. Georgia, 2 Dall. 219.

[3] 1 Bouvier's Institutes, §§ 13, 149, 150, 182.

because they have not seen fit to invest any such tribunal with such power.[1]

Doubtless the word has had a bad effect upon American law, and, because of its evil associations and improper use, it had been well had the same silence been observed by the lawyers which was observed by the people in the constitution.[2]

Sec. 165. *The Method by Which the People Bound Themselves.*— We may now safely affirm that the sovereignty of the people consisted in this: that being originally equal in rights and without any superior, they had a right to establish any form of government upon any terms they could agree upon. That without violating the ancient principle that government derived its just powers from the consent of the governed, no majority had the right to coerce the minority.

Second. That it was competent for them, by the terms of the constitution, to agree upon the manner in which all power should be exercised, and that all jointly, or any portion of them, should have no right to change the fundamental law in any manner other than by the modes therein provided.[3]

Third. That they did so agree and did set plain limitations upon the exercise of all power by themselves, as well as by those to whom they delegated the exercise of the government, and did agree upon the republican principle that the people cannot act *en masse*, but must act through representatives. That they, by their constitution, created the judicial power independent of and co-ordinate with the legislative branch, and clothed with a power and duty unknown[4] to governments where sovereignty was recognized — namely: to declare null and void any acts of the people, whether exercised through their electors or by the legislatures, or the executive, or by all combined, which contravene the fundamental law; and finally, they have declared this constitution to be the supreme law of the land, and binding upon all individuals, bodies politic, magistrates or agents.[5]

[1] Martin v. Hunter, 1 Wheat. 304, 329. See note, 136 U. S. 606; Marbury v. Madison, 1 Cranch, 137.

[2] Bliss on Sov. 175; Smith's Right & Law, §§ 508–22.

[3] Marbury v. Madison, 1 Cranch, 137.

[4] Cohen v. Virginia, 6 Wheat. 264; Cooley, Const. Lim. 58, notes; Marbury v. Madison, 1 Cranch, 137; Justice Field's Address, 134 U. S. (App.) 737.

[5] "The constitution," says Justice Davis, "is a law for rulers and people equally in war and in peace, and covers with the shield of its protection all classes of men at all times and under all circumstances." Ex parte Milligan, 4 Wall. 120.

Sec. 166. *Government of Law Established.*— We may summarize the following acts of the people destructive of the then existing notions of sovereignty as evidenced by their constitutional documents: They abolished rank and established equality. They limited power and the manner of its exercise. They created a tribunal with power to define the limits of right and interpret, construe, expound and apply the law, whose duty it is to declare void acts contrary to the constitution. They abolished personal allegiance and substituted an oath of citizenship to obey and support the constitution and enforce the law.[1] The supreme object is declared to be to establish justice and secure the blessings of liberty, to the end that this may be a government of laws and not of men.[2]

The chief principle now firmly established by the constitution[3] is an equality in rights and in obligations, wherein is exhibited that *jus æquum*, that equal law, in which the Romans placed true freedom.[4] Very apt is the illustration taken from the custom of the Spaniards of Arragon, who, when they elect a king, introduce as in a play a personage whom they dignify by the name of law — "La Justiza of Arragon." This personage they declare, by public decree, to be greater and more powerful than their king.[5]

Sec. 167. *The Fundamental Principles of Self-Government.* But one conclusion can be drawn from the facts surrounding the institution of this government and the experience of the century upon the question of the nature of the power of legislation, whether in the people or elsewhere, and in relation to the nature of law and the doctrine of unlimited power. The result is the destruction of personal sovereignty in the many or the few, and the substitution of the obligation of consent as the vital principle of law. Whether it consists in the plighted faith of the nation by way of treaty, the behest or limitation of a constitution, a statute duly enacted, or a system universally adopted, they are all, in truth and form, of the people, by the people, for the people,— the actual application of the theory of self-government.

[1] State v. McCreedy, 2 Hill (S. C.), 1.

[2] Mass. Dec. of Rights; Marbury v. Madison, 1 Cranch, 163.

[3] Fourteenth Amendment.

[4] 1 Wilson's Works, 308. See Santa Clara Co. v. Railway Co., 18 Fed. Rep. 398.

[5] See p. 203, note 2.

The crowning achievement of our ancestors was the subordination of all powers to the supremacy of the law.

The conception of an independent tribunal, with the untried and far-reaching power of nullifying acts of other departments of government, is the best proof of the scope of their wisdom and the strength and boldness of their purpose. The events of intervening history have proven that this is a desideratum in any scheme of self-government, essential alike to the preservation of the liberty of the individual, the power of the states, and the perpetuity of the Union.

A learned advocate of codification has spoken of the Romans as "that magnificent people which once ruled the world by the sword, and have since held a half dominion by the silent empire of law;"[1] and even so, an American may point with pride to the triumphs of American genius in all the arts of peace and war; but I doubt not the grandest and most enduring achievement of this people is that which has crowned the first century of its existence, and is expressed in the *post-bellum* amendments to the national constitution, wherein is indeed accomplished the purpose intended by the framers of the original document — the establishment of equality and justice, the equality of all before the law, justice to all according to the forms of law — the essential principles of liberty.

This liberty is not the license of anarchy, but the wholesome liberty of citizenship. Neither is it the whim of the multitude. "It will be well," says Chief Justice Day, "if the people come to understand the difference between natural and constitutional freedom, before license becomes destructive of liberty."[2]

The municipal law of the United States[3] is not the will of the people as passion or clamor may incline them, not the will of the mob or commune, but their deliberate and rightful judgment, expressed in conformity to the constitution, to which

[1] D. D. Field's Address to Am. Bar Ass'n, 1889, p. 233.

[2] Koehler v. Hill, 60 Iowa, 616.

[3] The student of American law must not confound the civil law or municipal law, as we term it, with law generally. The civil law of a particular people is a different thing from a rule of conduct imposed upon an inferior or conquered people or by an external power. We will have occasion to notice and apply this distinction in the next chapter, wherein we shall treat the government of our territories and colonial possessions acquired by purchase, conquest, discovery or otherwise.

every man yields obedience, nor knows any other allegiance. The protection of the constitution attends every one everywhere, whatever be his position in society, his social or official position, his financial situation or his religious belief. Justice Field says truly: "The constitution is the shield which the arm of our blessed government holds at all times over every one, man, woman and child, in all its broad domain, wherever they may go and in whatever relations they may be placed."[1]

Truly sayeth one: "The old-time omnipotence of the English sovereign, succeeded in our day by the omnipotence of the English parliament, has no place in our political system, no analogue in our political vocabulary."[2]

[1] County of Santa Clara v. Southern R. Co., 18 Fed. Rep. 398.

[2] Const. Hist. in Am. Law, p. 286. The admiration of the patriot for the achievements of our statesmen should not be allowed to blind him to the true method of legal study, viz.: To present to view every pre-existing historical fact which may have had an influence upon the minds and acts of the framers of the constitution.

The example of an early experiment of creating a judicial tribunal with the power to require every magistrate to conform to the constitution was known to prominent members of the convention of 1787.

The remarkable features of government which had obtained in portions of Spain received elaborate treatment at the hands of Dr. Robertson.

This famous Scotch historian, in his history of Charles the Fifth, which appeared in 1769, examined very minutely the principles of the feudal system which obtained upon the continent of Europe.

His masterly treatment of the subject attained great prominence and attracted universal attention among scholars of the world. In 1777 his history of America was completed and published, which his biographer says may be considered a sequel to his Reign of Charles the Fifth. James Wilson, one of the most prominent of the Revolutionary statesmen, and one of the greatest scholars of the period, makes a great many references in his published works to the opinions and statements of Dr. Robertson.

In his opinion in the decision of the case of Chisholm v. Georgia, he makes special reference to the matter to which attention is called in this note.

What, if any, influence this example may have had is left for the reader to judge; but the early experiment, and the fact that the attention of American statesmen was directed to it, should not be passed by unnoticed.

Dr. Robertson says: "The feudal form of government, with all the institutions which characterize it, was thus (in Spain) preserved entire in Castile and Aragon, as well as in all the kingdoms which depended on these crowns. There were certain peculiarities in their political constitutions which distinguished them from those of any other country in Europe.

"*The royal prerogative*, extremely limited in every feudal kingdom, was circumscribed, in Spain, within such

narrow bounds, as reduced the power of the sovereign almost to nothing.

"*The privileges of the nobility* were great in proportion, and extended so far as to border on absolute independence.

"*The immunities of the cities* were likewise greater than in other feudal kingdoms. They possessed considerable influence in the cortes, and they aspired at obtaining more. (143–44.) . . .

"*The form of government* in Aragon was monarchial, but the genius and maxims of it were purely republican. The kings, who were long elective, retained only the shadow of power; the real exercise of it was in the cortes or parliament of the kingdom. This supreme assembly was composed of four different arms or members: The nobility of the first rank; the equestrian order, or nobility of the second class; the representatives of the cities and towns, whose right to place in the cortes, if we may give credit to the historians of Aragon, was coeval with the constitution; the ecclesiastical order, composed of the dignitaries of the church, together with the representatives of the inferior clergy. No law could pass in this assembly without the assent of every single member who had a right to vote. (145–46.) . . .

The Supreme Court or Justiza.— "Not satisfied with having erected such formidable barriers against the encroachments of the royal prerogative, nor willing to commit the sole guardianship of their liberties entirely to the vigilance and authority of an assembly, similar to the diets, states-general and parliaments, in which the other feudal nations have placed so much confidence, the Aragonese had recourse to an institution peculiar to themselves, and elected a *justiza*, or supreme judge. This magistrate, whose office bore some resemblance to that of the *ephori* in ancient Sparta, acted as the protector of the people and the comptroller of the prince. The person of the *justiza* was sacred, his power and jurisdiction almost unbounded. He was the supreme interpreter of the laws. Not only inferior judges, but the kings themselves, were bound to consult him in every doubtful case, and to receive his responses with implicit deference. An appeal lay to him from the royal judges, as well as from those appointed by the barons, within their respective territories. (146–47) . . .

The Nature of Allegiance.— "It is evident, from a bare enumeration of the privileges of the Aragonese cortes as well as of the rights belonging to the *justiza*, that a very small portion of power remained in the hands of the king. The Aragonese seem to have been solicitous that their monarchs should know and feel this state of impotence to which they were reduced. Even in swearing allegiance to their sovereign, an act which ought naturally to be accompanied with professions of submission and respect, they devised an oath in such a form as to remind him of his dependence on his subjects. 'We,' said the *justiza* to the king, in name of his high-spirited barons, 'who are each of us as good and who are altogether more powerful than you, promise obedience to your government, if you maintain our rights and liberties; but if not, not.' Conformably to this oath, they established it as a fundamental article in their constitution that, if the king should violate their rights and privileges, it was lawful for the people to disclaim him as their sovereign, and to elect another, even though a heathen, in his place." (147–48) See 5 Wheat. (App.) p. 31, note 2; Chisholm v. Georgia, 2 Dall. (Justice Wilson's opinion), p. 460.

CHAPTER IX.

THE PUBLIC DOMAIN.

The condition of the people of a territory is to be governed by others; of a state, to govern themselves.— Benton's Ex. Dred Scott Decision, 90.

Sec. 168. *Growth of Colonial Union.*— The problem of achieving independence, and establishing a republican form of government, was successfully worked out in the two decades which fall within the Revolutionary period. The very act of establishing a national union with a government co-extensive with the boundaries of all the states brought with it problems not capable of immediate solution in accordance with the same principles acted upon in building the nation.

The nature of the union existing between the people after the Declaration of Independence and prior to the adoption of the present constitution is not necessarily within the range of our discussion.

There was, however, important action taken during this period and which had an intimate relation to the action taken subsequently and upon important questions which subsequently arose in reference to our public domain. It will perhaps aid us in understanding these questions to make a few observations upon the state of the union prior to and during the Revolutionary period.

Sec. 169. *Epochs of the Evolution of the National Union.*— The time contemplated may be divided into four periods:

First. A period antedating what may be termed the Revolutionary period, or the union of *all* the colonies.

Second. From 1765 to 1776 the struggle was to maintain their constitutional rights as British freemen, not to separate from the British crown.

Third. From 1776 to 1783 the struggle was for independence and a closer unity.

Fourth. From 1781 to 1789 was the period of evolution of the national constitution.

Opinions will naturally differ as to the nature of many of the

acts taken, as to whether they were taken as one people, united under the bonds of society, or whether the nation was taken as thirteen independent colony states. It is safe, however, to assert that during no period of the time had any of the states individually assumed and exercised the attributes of independent states, or assumed the station of an independent nation.

Sec. 170. *Anti-Revolutionary Conventions.*[1] — This same period of time presents various phases of political unity.

Long before any thought of forcible resistance entered the minds of the colonists, and while they were in apparent harmony with the mother country, the colonists united themselves by an additional bond other than that implied by the relation of common subjects of one sovereign. It will be useful in this connection to observe what has been heretofore alluded to, that the selection of a common personal sovereign was not considered upon feudal principles to be a surrender of national integrity. The same may be said of a league or alliance for mutual protection by way of offensive or defensive action.

As early as May in the year 1637, steps were taken towards an alliance between Plymouth and Massachusetts colonies. In August of the same year, another movement was said to have taken place between Connecticut and New Haven. These failed of success, as did others subsequently taken.

In the year 1642, however, a common danger from the French, the Dutch and the Indians had the effect of bringing about the first actual confederation of the united colonies of New England. The same question which defeated former attempts was the chief obstacle in the way of accomplishing the union, namely: the relative voting power of each one in the general assembly; the larger colony of Massachusetts not being satisfied with an equal vote, and the smaller colonies insisting upon an equal voice.

This matter was, however, finally adjusted, and the assembly adopted an organic law, of which the following is the substance:

First. "The colonies of Massachusetts, Plymouth, Connecticut and New Haven do agree and conclude that they will hereafter be called and known as the United Colonies of New England."

[1] This word is here used as agreement.

Second. "The said United Colonies, for themselves and their posterities, do jointly and severally thereby enter into a firm and perpetual league of friendship and amity for offense and defense, mutual advice and succor upon all just occasions for their mutual safety and general welfare."

Third. "Each colony retains its distinct and separate jurisdiction and control *over its domestic and local affairs, institutions and laws.* No colonies are to be joined in one jurisdiction, nor any other colony admitted into the confederacy, without the consent of the whole."

Fourth. "The expense of wars and other general expenses shall be borne in proportion to the number of male inhabitants between sixteen and sixty years of age in each colony."

Fifth. "Upon notice from any colony of an invasion, the other colonies shall immediately furnish aid."

Sixth. "The general assembly is composed of two commissioners from each colony, to meet annually on the first Monday of September." This assembly had jurisdiction to determine all affairs of war and peace, and other matters pertaining to the general welfare, "*but not to intermeddle with* the local affairs of the colonies." A two-thirds vote was sufficient to carry into effect any proposed measure; if less concurred, the majority could submit the measure to the respective governments for decision.

Seventh. Provides for the annual election of the president.

Eighth. "The assembled commissioners are authorized to enact general regulations of a civil nature for preserving the peace and to regulate intercourse with Indian tribes."

Ninth. Provides for the return of runaway servants, etc.

Tenth. Provides against hasty or inconsiderate wars by any colony.

Eleventh. Provides for calling special meetings of the general assembly.

Twelfth. "That the confederacy shall be perpetual. If any of the confederates shall break the articles of confederacy, the matter shall be duly considered and adjudged by the commissioners of the other colonies, 'so that the peace and the confederation shall be entirely preserved without violation.'"

If this document is examined in connection with the principles of feudal polity, it may be affirmed that the fact of the

existence of a common sovereign, while it does not prevent complete national independence, does not permit the union of any two nations or independent societies. If the document is examined in view of the effect of its own provisions upon the character and capacity of the new person or society created by it, or the relation of its parts, it is apparent that it effected a very great change in the relation which before that time existed between the colonies. The exercise of great national affairs is confided to the general assembly, and to a colony is allowed jurisdiction only over local affairs, and the authority over national affairs is expressly taken away.

When, in addition to this, jurisdiction is given to the general assembly to determine whether any colony was guilty of a breach of the articles, it is plain that the colonies which became parties to this contract divested themselves of some of the supreme attributes of independence, and became, in some measure, united under one constitution and one system of government.

We shall not overlook, however, that this early constitution embraced only a small portion of what was afterwards the thirteen united colonies.

Sec. 171. *Extension of the Union.*— In 1754 Virginia and all of the northern colonies assembled at Albany, in New York, and considered a proposition submitted by Dr. Franklin to form a closer union. It was not, however, until 1765 that a convention was projected which should create an American congress, and have for its object *the knitting together of every region as fast as settled.* It was certain that the intention of all concerned was to form an American union. Opinions have always differed and views will always be divergent as to whether, in fact and in truth, there was before the constitution of 1787 a real national union of the states,[1] of such a character as to surrender their sovereignty and independence.

The character of the town meetings, continental congresses and general courts, through which the people expressed their voice prior to the congress of September 7, 1774, speak no certain and unambiguous voice on this matter.

Sec. 172. *Nature of the Union During the Revolution.*— Upon the relation of the states and the character of the union

[1] Opinions differed on this point even after that time.

from this time forth, we have judicial utterances which sufficiently express the sentiment which finally prevailed. Mr. Justice Chase, in *Ware v. Hylton*,[1] says: "It has been inquired what powers congress possessed from the first meeting in *September, 1774*, until the ratification of the articles of confederation on the 1st of March, 1781? It appears to me that the powers of congress, *during the whole period*, were derived from *the people* they represented, expressly given, through the medium of their state convention or state legislatures; *or* that after they were exercised they were impliedly ratified by the acquiescence and obedience of the people. After the confederacy was completed, the powers of congress rested on the authority of the *state legislatures* and the *implied ratification of the people*, and was a *government* over *governments*. The powers of congress originated from necessity, and arose out of, and were only limited by, events; or, in other words, they were *revolutionary* in their very nature. Their extent depended on their exigencies and necessities of public affairs. It was absolutely and indispensably necessary that congress should possess the power of *conducting* the war against Great Britain, and therefore, if not expressly given by all (as it was by some of the states), I do not hesitate to say that congress did rightfully possess such *power*. The authority to make *war*, of necessity implies the power to make *peace*, or the war must be perpetual. I entertain this general idea, that the several states retained all *internal sovereignty*, and that congress properly possessed the great rights of *external sovereignty*.

"The articles of confederation adopted in 1781 contained a clause upon which has been based the contention of the independent sovereignty of the states. It is therein expressly stated that each state retains its sovereignty, freedom and independence.

"The Declaration of Independence has an important bearing upon the construction to be placed upon the articles of confederation. Was it in character the act of a united people, or the act of independent states? The address is: 'We, therefore, the representatives of the United States of America, in general congress assembled.'"[2]

[1] 3 Dall. 232. See Texas v. White, 7 Wall. 724–25.

[2] See Pomeroy's Const., sec. 52; Jameson, Const. Conv., sec. 27.

Sec. 173. *Early Disposition of Unoccupied Territory.*— The action of the states prior to the constitution in reference to their territorial holdings in itself constitutes a strong indication of the manner in which they each regarded the union.

Before the adoption of the articles of confederation, and as indicating their intention in ratifying them or adopting them, several of the states expressly declared that it was unreasonable that the states should hold unlimited territory, but that their boundaries should be fixed, and the land claimed beyond this boundary should become the property of the United States.

In 1779 congress recommended to the state of Virginia to reconsider her late act of opening a land office and selling her unappropriated land. In 1780 New York enacted that the United States in congress assembled should have jurisdiction to fix her western boundaries, and the act proceeds: "Be it further enacted by the authority aforesaid, that the territory which may be ceded or relinquished, by virtue of this act, either with respect to jurisdiction, as well as the right or pre-emption of soil, or the right or pre-emption of soil only, shall be and inure to the use and benefit of such of the United States as shall become members of the federal alliance of the said states, and for no other purpose whatever."

In 1783 Virginia passed an act to authorize the delegates of her states to convey to the United States in congress assembled all the rights of this commonwealth to the territory northwest of the river Ohio, and such a deed of cession was formally executed March 1, 1784, sometime after the treaty of peace between England and the United States.

Upon the ratification of the treaty between England and the United States in 1783, there existed a vast territory claimed as belonging to certain of the states, but which was situated beyond the established boundaries of these states. The ownership and position of such territory was a matter of general public concern and of some local jealousy and distrust between the states.

Sec. 174. *Territory Ceded by the States.*— Pursuant to amicable adjustments, all such territory was very early ceded to the United States by the states owning or claiming to own such territory. In this manner the first territory outside of the limits of the original states was acquired, and the necessary

consequence of acquiring territory was the devising of some means of governing and disposing of it.

This was provided for in the old articles of confederation and in the new constitution of 1787.

Article 4, section 3, embraced this subject. This section is as follows:

"§ 3. *First.* New states may be admitted by the congress of this Union; but no new state shall be formed or erected within the jurisdiction of any other state, nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned, as well as of the congress.

"*Second.* The congress shall have power to dispose of, and make all needful rules and regulations respecting, the territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States, or of any particular state."

Sec. 175. *The Ordinance of 1787.*— The people of the states, ceding to the general government other unoccupied territory, made provision for the establishment of a republican form of government therein. This was accomplished by the celebrated ordinances of 1787.

These ordinances were but a revision and re-adoption of a similar ordinance which had been in force before the present constitution. The ordinances applied to all of the northwest territories; that is, the territory lying north of the Ohio, and extending to the western boundary of the territorial holdings of the Union.[1]

It provided for the preservation of the civil rights of the inhabitants and for the formation of states out of the territory, so soon as the inhabitants had become sufficient in number to be entitled to the position of a state.

The principal feature to be observed at the present time is that this ordinance plainly indicated that the United States was not to treat the inhabitants of this territory as permanent colonies, but they were to be maintained in the condition of territories only during such period of development as was deemed

[1] This ordinance will be found published with the constitution in the statutes of many of the states.

essential to bring them to the dignity and numerical strength necessary for the duties of statehood.

The constitution of the United States did not of its own force and vigor extend to the inhabitants of the territories. The guaranty of their rights and liberties was found only in the ordinance, and they were not parties to or in any manner entitled to the privileges of the constitution of the United States.[1]

[1] Mr. Webster said: "It is of importance that we should seek to have clear ideas and correct notions of the questions which this amendment of the member from Wisconsin has presented to us; and especially that we should seek to get some conception of what is meant by the proposition, in a law, to 'extend the constitution of the United States to the territories.' Why, sir, the thing is utterly impossible. All the legislation in the world, in this general form, could not accomplish it. There is no cause for the operation of the legislative power in such a manner as that. The constitution — what is it? We extend the constitution of the United States by law to territory. What is the constitution of the United States? Is not its very first principle, that all within its influence and comprehension shall be represented in the legislature which it established, with not only a right to debate and a right to vote in both houses of congress, but a right to partake in the choice of the president and vice-president? And can we by law extend these rights, or any of them, to a territory of the United States? Everybody will see that it is altogether impracticable. It comes to this, then, that the constitution is to be extended as far as practicable; but how far that is, is to be decided by the president of the United States, and therefore he is to have absolute and despotic power.

"He is the judge of what is suitable and what is unsuitable; and what he thinks suitable is suitable, and what he thinks unsuitable is unsuitable. He is '*omnis in hoc;*' and what is this but to say, in general terms, that the president of the United States shall govern this territory as he sees fit till congress makes further provision. Now, if the gentleman will be kind enough to tell me what principle of the constitution he supposes suitable, what discrimination he can draw between suitable and unsuitable, which he proposes to follow, I shall be instructed. Let me say that in this general sense there is no such thing as extending the constitution. The constitution is extended over the United States and over nothing else. It cannot be extended over anything except over the old states, and the new states that shall come in hereafter, when they do come in. There is a want of accuracy of ideas in this respect that is quite remarkable among eminent gentlemen, *and especially professional and judicial gentlemen.* It seems to be taken for granted that the right of trial by jury, the *habeas corpus*, and every principle designed to protect personal liberty, is extended by force of the constitution itself over every new territory. That proposition cannot be maintained at all. How do you arrive at it by any reasoning or deduction? It can be only arrived at by the loosest of all possible constructions. It is said that this must be so, else the right of the *habeas corpus* would be lost. Undoubtedly

Importance of the Question.— This matter will be more fully examined as we proceed to discuss the acquisition of territories from sources other than a mutual convention and consent of the original parties to the United States constitution, simply remarking here that the question of the relation of the national constitution to the inhabitants of territories was one of the great national questions which divided the people of the United States and lay at the basis of the struggle over the Missouri compromise — the right to carry slavery into newly-acquired territory.

Sec. 175. *Relation of the Ordinance to the Constitution.*— The ordinance and the constitution were parts of the same system, constructed simultaneously for one general purpose — that of forming a more perfect union between the states and creating a great national system. The ordinance was a natural and proper means of preserving the rights of inhabitants of states who, by a new adjustment of boundaries, were thrown without the limits of the state of which they were citizens. It provided for a republican form of government for the territories. It was necessary to settle the political condition of the territories and guaranty the rights of the inhabitants. The ordinance was their constitution. It framed their governments. The national constitution had nothing to do with the territories.[1]

It has been contended that the clauses of the constitution above referred to did not confer upon congress the right of government over the territories, *because that had been provided for by the ordinance;* but the ordinance was merely a compact restraining and directing the government, while the other constitutional regulations, emanating from the same source, delegated the governing power to congress.[2] The whole people might have placed the governing power elsewhere.

The ordinance was made for the territory of the United States then in possession of the United States or a state. It was not made under the constitution. It was made before it, but in

these rights must be conferred by law before they can be enjoyed in a territory." Benton's Ex., pp. 132–33.

[1] This is denied in the prevailing opinion of the Dred Scott case and constitutes the great fundamental question. The right of a negro to become a citizen is a subordinate one.

[2] See *post*, sec. 197.

connection with it. It was made by right of ownership both of soil and jurisdiction, and by virtue of the compacts with the ceding states.

Sec. 176. *On the Admission of a State the Ordinance Became No Longer in Force as to it.*— It was a question of doubt in many jurisdictions, and for a long time, whether the ordinance was to have perpetual force and continue forever a charter of the rights and liberties of the inhabitants of the Northwest territories.[1]

The question has long since been put to rest. The true conclusion is stated by the supreme court of Illinois in the following luminous manner: "The supreme court of the United States has in numerous cases decided that the ordinance of 1787 has become inoperative. In *Sands v. Manistee River Improvement Co.*, 123 U. S. 288, that court said: 'The ordinance of 1787 was framed a year and some months before the constitution of the United States went into operation. Its framers, and the congress of the confederation which passed it, evi-

[1] "In Illinois River Packet Co. v. Peoria Bridge Co., 88 Ill. 478, Mr. Justice Breese said that 'it was unnecessary to decide the question whether this ordinance is in force or not,' but it was held that, even if admitted to be in force, it was not, in the matter there complained of, violated. In Phœbe v. Jay, 1 Breese, 268, decided in 1828, it was said that the ordinance was 'no doubt still binding consent,' but it was held that the admission of the state into the Union, by act of congress, abrogated, or gave consent to the abrogation of, so much of the ordinance as was in conflict with the state constitution." People v. Thompson, 155 Ill. 473. See also People v. United States, 93 Ill. 30.

Mr. Walker, in his American Law, ventures no opinion on this subject. There are, however, several cases cited discussing the question, p. 42, note.

In the case of Hogg v. Zanesville, 5 Ohio, 410, the court says: "This portion of the ordinance (the 4th article) of 1787 is as much obligatory towards the state of Ohio as our own constitution. In truth it is more so, for the constitution may be altered by the people of the state, while this cannot be altered without the assent both of the people of this state and of the United States through their representatives. It is an article of compact, and until we assume the principle that the sovereign power of the state is not bound by compact, this clause must be considered obligatory."

In the case of La Plaisance v. Monroe, 1 Walker Ch. Rep. (Mich.) 155, the court says: "The ordinance of 1787, in my opinion, is no part of the fundamental law of the state since its admission into the Union. It was then superseded by the state constitution, and such parts of it as are not to be found in the federal or state constitutions were then annulled by mutual consent." Walker, Am. Law, note, pp. 42, 43.

dently considered that the principles and declaration of rights and privileges expressed in its articles would always be of binding obligation upon the people of the territory. The ordinance, in terms, ordains and declares that its articles "shall be considered as articles of compact between the original states and the people and states in said territory, and forever remain unalterable unless by common consent." And for many years after the adoption of the constitution its provisions were treated by various acts of congress as in force, except as modified by such acts. In some of the acts organizing portions of the territory under separate territorial governments it is declared that the rights and privileges granted by the ordinance are secured to the inhabitants of those territories; yet, from the very condition on which the states formed out of that territory were admitted to the Union, the provisions of the ordinance became inoperative, except as adopted by them. All the states thus formed were, in the language of the resolutions or acts of congress, admitted into the Union on an equal footing with the original states, in all *respects* whatsoever.' And in *Escanaba, etc. Co. v. City of Chicago*, 107 U. S. 678, where it was insisted that the ordinance was in force in Illinois, and prevailed over certain municipal regulations under which bridges were maintained across the Chicago river, which, it was claimed, interfered with the free navigation of that river, forever guarantied by said ordinance, the supreme court said that, although the enabling act of 1818, and other acts of congress mentioned, 'refer to the principles of the ordinance according to which the constitution was to be formed, its provisions could not control the authority and power of the state after her admission. Whatever the limitation upon her powers as a government was whilst in a territorial condition, whether from the ordinance of 1787 or the legislation of congress, it ceased to have any operative force, except as voluntarily adopted, after she became a state of the Union. On her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original states.'"[1]

[1] People v. Thompson, 155 Ill. 451, 472. See also Permoli v. First Municipality of New Orleans, 44 U. S. (3 How.) 588; Pollard v. Hagan, 3 How. 212; Van Brocklin v. Tennessee, 117 U. S. 151; Huse v. Gardner,

Sec. 177. *The Acquisition of Foreign Territory.*— The right of the United States to acquire title to foreign territory by any of the modes recognized by the law of nations was one not free from difficulty, and not expressly provided for by the provisions of the national constitution.

The articles of confederation contained a clause which involved in doubt the general powers of the national government. They provided that each state retain its sovereignty, freedom and independence, and every power, jurisdiction and right which is not by the states expressly delegated to the United States in congress assembled.[1]

The same subject is alluded to in the ninth and tenth amendments to the new constitution.[2]

Diverse Views Stated.— The national government being, according to the usual form of expression, one of enumerated powers, it became a question upon which great minds differed as to whether there was any power or authority in the government of the United States to expand the boundaries of the national domain.

President Jefferson, under whose administration the first foreign territory was acquired,[3] was of the opinion that it was necessary that congress should submit to the nation at large an additional amendment to the constitution approving, confirming and ratifying the act of acquiring the territory of Louisiana, which he felt impelled by inexorable necessity to acquire. He said: "The constitution has made no provision for our holding foreign territory, still less for incorporating foreign nations into our union."[4]

On the other hand there were those who hold that the United States as a nation have an inherent right to acquire territory.[5]

No constitutional amendment was ever submitted or adopted enlarging the powers of the United States in this respect, and

119 id. 544; State v. Cunningham, 81 Wis. 440, op. by Pinney, J.; Strader v. Graham, 10 How. 82.

[1] See 1 Wilson's Works, 556.

[2] IX. "The enumeration, in the constitution, of certain rights shall not be construed to deny or disparage others retained by the people." X. "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U. S. Const.

[3] Louisiana.

[4] Jefferson's Works, 499.

[5] Miller's Lect. on Const. 129.

the action subsequently taken and now[1] about to be taken is to be settled on general principles of national law.

Sec. 179. *The Inherent Power of a Nation to Acquire Territory.*— Most, if not all, of the great struggles between political parties in the United States have involved the question of the inherent power of the nation.

On either side of this question have been arrayed the contending parties, the one professing a strict construction, holding that the enumeration of powers excludes the implication of other powers, and the reservation of the states to themselves of all powers not delegated makes more clear the policy of enumeration.

On the other hand, it has been urged that the position and situation of the nation as a great political person necessarily and impliedly allows to that nation the exercise of all sovereign powers which it would be beyond the power and jurisdiction of a state to exercise.

Sec. 180. *The Origin of the Question.*— The suggestion that the United States, under the old confederation, had, *by virtue of its position as a nation*, certain implied powers, was advanced in connection with another proposition, namely: the exercise of the power to charter corporations.[2] In the same connection, however, and as illustrating it, the power to make war and peace and acquire territory was mentioned. All arguments which have followed upon the power to acquire territory, the power to incorporate United States or national banks, and indeed the power which sanctioned the legal tender acts, depend on this same principle.

The Earliest Statement of the Inherent Power to Acquire Territory.— James Wilson, afterwards Mr. Justice Wilson, discussed this question in his famous argument upon the power of the United States to incorporate the Bank of North America. His language, which we here present, should be read and considered along with all of the questions above suggested, but at this point our attention should be directed particularly to the capacity to acquire territory outside of the boundaries of the United States. He says, upon the power to incorporate a bank:

"If, then, any or each of the states possessed, previous to the

[1] 1898.

[2] The same proposition involved in McCullough v. Maryland.

confederation, a power, jurisdiction or right to institute and organize by a charter of incorporation a bank for North America — in other words, commensurate to the United States,— such power, jurisdiction and right, unless expressly delegated to congress, cannot be legally or constitutionally exercised by that body.

"But, we presume, it will not be contended that any or each of the states could exercise any power or act of sovereignty extending over all the other states or any of them; or, in other words, incorporate a bank, commensurate to the United States.

"The consequence is, that this is not an act of sovereignty, or a power, jurisdiction or right which, by the second article of the confederation, must be expressly delegated to congress in order to be possessed by that body.

"If, however, any person shall contend that any or each of the states can exercise such an extensive power or act of sovereignty as that above mentioned, to such person we give this answer: The state of Massachusetts has exercised such power and act; it has incorporated the Bank of North America. But to pursue my argument.

"Though the United States in congress assembled derive *from the particular states* no power, jurisdiction or right which is not expressly delegated by the confederation, it does not thence follow that the United States in congress *have no other* powers, jurisdiction or rights than those delegated by the particular states.

"The United States have general rights, general powers and general obligations, not derived from any particular states, nor from all the particular states taken separately, but resulting from the union of the whole; and therefore it is provided in the fifth article of the confederation, "that, for the more convenient management of the *general interests* of the United States, 'delegates shall be annually appointed to meet in congress.'

"To many purposes the United States[1] are to be considered as one undivided, independent nation, and as possessed of all the rights, and powers, and properties, by the law of nations incident to such.

[1] The old confederacy is here referred to.

The Principle Upon Which Inherent Powers of the General Government Depend.— "Whenever an object occurs, to the direction of which no particular state is competent, the management of it must, of necessity, belong to the United States in congress assembled. There are many objects of this extended nature. The purchase, the sale, the defense, and the government of lands and countries, not within any state, are all included under this description. An institution for circulating paper, and establishing its credit over the whole United States, is naturally ranged in the same class.

"The act of independence was made before the articles of confederation. This act declares that '*these United Colonies*' (not enumerating them separately) 'are free and independent states; and that, as free and independent states, *they* have full power to do *all* acts and things which independent states may, of right, do.'

"The confederation was not intended to weaken or abridge the powers and rights to which the United States were previously entitled. It was not intended to transfer any of those powers or rights to the particular states, or any of them. If, therefore, the power now in question was vested in the United States before the confederation, it continues vested in them still. The confederation clothed the United States with many, though perhaps not with sufficient powers; but of none did it disrobe them.

"It is no new position that rights may be vested in a political body which did not previously reside in any or in all the members of that body. They may be derived solely from the union of those members. 'The case,' says the celebrated Burlamaqui, 'is here very near the same as in that of several voices collected together, which, by their union, produce a harmony that was not to be found separately in each.'"[1]

Sec. 181. *Derivation of Power to Acquire and Govern Territories.*— Chief Justice Marshall presents the view which prevailed prior to the decision of the Dred Scott case in reference to the power to acquire external territory and the principles which obtained in reference to the government of them, as follows:

"The constitution confers absolutely on the government of

[1] 1 Wilson's Works, pp. 557–560, notes.

the Union the powers of making war and of making treaties; consequently, that government possesses the power of acquiring territory either by conquest or by treaty.

"The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfer of territory, it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with the former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same act which transfers their country, transfers the allegiance of those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse, and the general conduct of individuals, remains in force, until altered by the newly-created power of the state."

On the 2d of February, 1819, Spain ceded Florida to the United States. The sixth article of the treaty of cession contains the following provision: "The inhabitants of the territories which his Catholic majesty cedes to the United States by this treaty shall be incorporated in the Union of the United States as soon as may be consistent with the principles of the federal constitution, and admitted to the enjoyment of the privileges, rights and immunities of the citizens of the United States."

Effect of the Treaty.— This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights and immunities of the citizens of the United States. It is unnecessary to inquire whether this is not their condition independent of stipulation. They do not, however, participate in political power; they do not share in the government till Florida shall become a state. In the meantime Florida continues to be a territory of the United States, governed by virtue of that clause in the constitution which empowers congress "to make all needful rules and regulations respecting the territory or other property belonging to the United States."

Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a state, acquired the means of self-government, may result necessarily from the fact that it is not within the jurisdiction of any particular state and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned. In execution of it, congress in 1822 passed "An act for the establishment of a territorial government in Florida," and on the 3d of March, 1823, passed another act to amend the act of 1822. Under this act the territorial legislature enacted the law now under consideration.

The fifth section of the act of 1823 creates a territorial legislature, which shall have legislative powers over all rightful objects of legislation; but no law shall be valid which is inconsistent with the laws and constitution of the United States.

The seventh section enacts, "That the judicial power shall be vested in two superior courts, and in such inferior courts and justices of the peace as the legislative council of the territory may from time to time establish." After prescribing the place of cession and the jurisdictional limits of each court, the act proceeds to say: "Within its limits herein described, each court shall have jurisdiction in all criminal cases and exclusive jurisdiction in all capital offenses; and original jurisdiction in all civil cases of the value of one hundred dollars, arising under and cognizable by the laws of the territory now in force therein, or which may at any time be enacted by the legislative council thereof."

The eighth section enacts, "That each of the said superior courts shall moreover have and exercise the same jurisdiction within its limits, in all cases arising under the laws and constitution of the United States, which, by an act to establish the judicial courts of the United States, approved the 24th of September, 1789, and an act in addition to the act entitled an act to establish the judicial courts of the United States, approved the 2d of March, 1793, was vested in the court of Kentucky district."

"The powers of the territorial legislature extend to all rightful objects of legislation, subject to the restriction that their

laws shall not be 'inconsistent with the laws and constitution of the United States.'"[1]

Sec. 182. *Title by Purchase.*— By far the greatest area of territory has been acquired by processes other than the voluntary cession by the original states and the general convention of the people of the United States, and this, as we have seen in the last section, raises new and difficult questions.

Our first and greatest acquisition was by the purchase of the Louisiana territory in 1803. It comprised a territory extending from the Gulf of Mexico on the south to the northern boundary of the United States, and lay on the west bank of the Mississippi, excepting at the extreme south, where it extended to the eastward of the Mississippi, and embraced both banks and the mouth of that river, thus cutting off communication with the ocean.

The northwestern extent of this territory was always a matter of controversy until settled by the treaty between England and the United States in 1846.[2]

The claim to the Oregon territory, comprising the states of Washington and Oregon, was not allowed to rest alone upon the Louisiana purchase, but was also based on discovery and occupancy.

The Florida purchase was made in 1819, and in this manner our territory was extended from the southern boundary of Georgia on the Atlantic coast, southward to the Gulf of Mexico, and westward until it joined the Louisiana purchase.

All of California, Nevada, Utah, a portion of Wyoming, Colorado, New Mexico and the territory of Arizona were acquired from Mexico by the cession of 1848. This was another peaceful acquisition following close after the defeat of the ceding party in the Mexican war.

Five years later the Gadsden purchase of 1853 added the second Mexican territory, now included within the territories of Arizona and New Mexico. The purchase from Alaska in 1867 was, like the acquisition of Louisiana, a purchase pure and simple, and is the last of the territory acquired in this manner.

Cession of Territory by Texas in 1850.— The state of Texas ceded a large tract of land, which now constitutes a portion

[1] Am. & Ocean Ins. Co. v. Bales of Cotton, 1 Pet. 541–43.

[2] 2 Whart. Int. Law Dig. 173.

of the states of Kansas, Colorado and the territory of New Mexico.

Sec. 183. *Annexation of Independent Countries.*— When Texas had acquired her independence from Mexico, she took her place as a sovereign nation, and, upon the close of hostilities with Mexico, Texas became actually an independent nation. The annexation of Texas as a state, with all the powers and capacities of statehood, presented a new question, different from any other which had before been passed upon by congress, that is, the capacity of the nation to combine with other nations without the consent of the states.[1]

Sec. 184. *Acquisition of Disconnected Territory.*— The acquisition of disconnected territory not contiguous to some portion of the public domain cannot always be justified upon the same ground which satisfied those who doubted the constitutional power to extend the original limits of the United States.

President Jefferson and the other close constructionists could very justly say that the nation was bound by the law of self-preservation to remove the dangerous ownership of any contiguous territory, but these arguments would not justify the addition to the United States of distant provinces not naturally or actually contiguous to our territory, and the ownership and control of which, in other hands, could not be said to constitute present or probable menace to our safety or prosperity.[2]

[1] No question has ever been raised as to the power; it clearly falls within the same principles invoked in acquiring Louisiana and Florida.

[2] As we have shown, such a power was believed to exist by one of the most influential of the members of the convention, James Wilson. He expressly mentions it in his argument in 1782 (1 Works, 559), as an attribute of national existence. The question then is, was the power excluded by the terms of the constitution, not was it granted. Judge Story continues: "Under the form of a cession, we may become united to a more powerful neighbor or rival, and be involved in European or other foreign interests and contests to an interminable extent. And if there may be a stipulation for the admission of foreign states into the Union, the whole balance of the constitution may be destroyed, and the old states sunk into utter insignificance. It is incredible that it should have been contemplated that any such overwhelming authority should be confided to the national government with the consent of the people of the old states. If it exists at all, it is unforeseen, and the result of a sovereignty intended to be limited, and yet not sufficiently guarded. . . . The treaty-making power must be construed as confined *to objects* within the scope of the constitution. And, although congress have authority to admit new states into the firm, yet it is demonstrable that this clause had sole reference to the territory then belonging to the United States,

The purchase of the territory of Alaska must be justified on other grounds than those of the exercise of necessary or proper means to effect an end within the objects enumerated in the constitution.

Judge Story, in his Commentaries, says: "There is no pretense that the purchase or cession of any foreign territory is within any of the powers expressly enumerated in the constitution. It is nowhere in that instrument said that congress, or any other department of the national government, shall have a right to purchase or accept of any cession of foreign territory. The power itself (it has been said) could scarcely have been in the contemplation of the framers of it. It is, in its own nature, as dangerous to liberty, as susceptible of abuse in its actual application, and as likely as any which could be imagined, to lead to a dissolution of the Union. If congress have the power, it may unite any territory whatsoever to our own, however distant, however populous, and however powerful."[1]

It can scarcely be contended that such a power falls within the argument of Judge Marshall, formulated in his great decision in *McCulloch v. Maryland*,[2] that, within the *objects* contemplated by the constitution, every means proper to their accomplishment might be used, whether enumerated or not. His famous expression is: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consistent with the letter and spirit of the constitution, are constitutional."[3]

and was designed for the admission of the states which, under the ordinance of 1787, were contemplated to be formed within its old boundaries. . . . If it be said that it will be 'for the *common defense* and general welfare' to purchase the territory, how is this reconcilable with the strict construction of the constitution? . . . Such were the objections which were urged against the cession and the appropriations made to carry the treaty into effect. The friends of the measure were driven to the adoption of the doctrine that the right to acquire territory *was incident to national sovereignty;* that it was a resulting power, growing necessarily out of the aggregate powers confided by the federal constitution; that the appropriation might justly be vindicated upon this ground, and also upon the ground that it was for the common defense and general welfare. In short, there is no possibility of defending the constitutionality of this measure but upon the principles of the liberal construction which has been, upon other occasions, so earnestly resisted." Story on Const., sec. 1280.

[1] Story's Com., sec. 1280.

[2] 4 Wheat. 316.

[3] Bryce's Am. Com. 370.

To justify the acquisition of such territory requires a still further stretch of power, and no argument can stop short of the one advanced by Judge Wilson, as heretofore pointed out,[1] maintaining that there is an inherent power in the nation, including all objects legitimately within the national jurisdiction which have not been reserved to the states.[2]

Sec. 185. *The Governmental Establishment of Louisiana.*— "In the acquisition of Louisiana came the first new territory to the United States.

"Louisiana was acquired in the spring of 1803; an extra session of congress was called to ratify the treaty of acquisition, and to provide for the occupation and government of the new possession.[3]

"It was provided 'that until the expiration of the present

[1] *Ante*, sec. 180.

[2] Bryce's Am. Com. 368–374. "The history of the United States is in a large measure a history of the arguments which sought to enlarge or restrict the import of the constitution. One school of statesmen urged that a lax construction would practically leave the United States at the mercy of the national government, and remove those checks on the latter which the constitution was designed to create; while the very fact that some powers were specifically granted must be taken to import that those not specified were withheld, according to the old maxim *expressio unius exclusio alterius*, which Lord Bacon concisely explains by saying, 'as exception strengthens the force of a law in cases not excepted, so enumeration weakens it in cases not enumerated.' It was replied by the opposite school that to limit the powers of the government to those expressly set forth in the constitution would render that instrument unfit to serve the purposes of a growing and changing nation, and would, by leaving men no legal means of attaining necessary but originally uncontemplated aims, provoke revolution and work destruction of the constitution itself. . . . This latter contention derives much support from the fact that there were certain powers that had not been mentioned in the constitution, but which were so obviously incident to a national government that they must be deemed to be raised by implication. For instance, the only offenses which congress is expressly empowered to punish are treason, the counterfeiting of the coin or securities of the government, and piracies and other offenses against the law of nations. But it was very early held that the power to declare other acts to be offenses against the United States, and punish them as such, existed as a necessary appendage to various general powers. So the power to regulate commerce covered the power to punish offenses obstructing commerce; the power to manage the postoffice included the right to fix penalties on the theft of letters; and in fact a whole mass of criminal law grew up as a sanction to the civil laws which congress had been directed to pass." Bryce's Am. Com. 370.

[3] The method of ruling this territory furnishes the best illustration of the power which the United States possesses in such cases.

session of congress, unless provision for the temporary government of the said territories be sooner made by congress, all the military, civil and judicial powers exercised by the officers of *the existing government*[1] (the French) of the same shall be vested in such persons, and shall be *exercised* in *such a manner*, as the president of the United States shall direct, for maintaining and protecting the inhabitants of Louisiana in the free enjoyment of their liberty, property and religion.'"

This bill emanated from a select committee, of which Mr. John Randolph was chairman; "but," says Senator Benton, "those who are familiar with the inside working of the legis-

[1] "Louisiana, being a French colony, was originally governed by the custom of Paris and such royal ordinances as were applicable. In August, 1769, when Louisiana passed under the dominion of Spain, the Spanish governor, O'Reilly, published a collection, or rather an abstract, of the administrative regulations adopted in the Spanish colonies and a few leading principles contained in the Spanish laws, referring for further elucidations to the text of Partidas, the Recopolacion of the Indies, etc., but at the same time retaining in full force, until further orders (which have never been given), the French laws, such as they were at the time Spain took possession of the country. In the meantime, the administration of justice being chiefly in the hands of Frenchmen (except in the city of New Orleans), they continued to be governed altogether by the French laws, save only in cases where the few rules contained *verbatim* in O'Reilly's ordinance positively applied. Things remained in this situation until the government of the United States took possession of the province in 1803, when the increasing commerce of New Orleans brought into action the whole body of the Spanish laws, and especially the laws of Toro and the ordinance of Bilboa, which last is regarded as the text in commercial matters. Everything in the ancient laws repugnant to the constitution of the United States was taken away, and all other subsisting laws were confirmed by the act of congress of the 26th of March, 1804, chapter 391, which also gave the right of trial by jury in all criminal cases of a capital nature, and in all civil and criminal cases, if required by either party. In 1808 the civil code was adopted, which is principally a transcript of the Code Napoleon or civil code of France. Where that is silent, its omissions are supplied by a resort to principles derived from the Roman law and the codes founded on it, including the laws of Spain, France, and the commentaries upon them. The works of elementary writers and the English and American Reporters are cited in the courts, not as binding authority, but as the opinions of learned men entitled to respect and attention. A regular series of reports of the decisions of the supreme court of the state is published by Mr. Martin, one of the judges. A civil suit is commenced by a petition or libel, setting forth briefly the nature of the demand, to which the defendant answers, and the cause is set down for hearing without any special or dilatory pleadings. The trial is by jury only when required by either of the parties." 3 Wheat. 202, note 1. See also 5 Wheat. (App.), p. 31.

lative machinery know very well that the bill came from the department of state, supervised by the president himself." In this instance the special message of the president brought the subject before congress and asked for "temporary provision" for the government of the territory.

The bill was well calculated to startle a people who regarded any form of government except a republican one as despotic or anarchial.

It continued in force the same form of government, with the identical magistrates, which had been established by the Spanish and French government[1] — putting the president in the place of the king of Spain, putting all the territorial officers in the place of the king's officers, and placing the appointment of all these officers in the president alone, without reference to the senate. Nothing could apparently be more incompatible with our institutions than such a government — a mere continuation of the Spanish-Franco administration, in which all powers, civil and military, legislative, executive and judicial, were in the intendant-general representing the president, who occupied the place of king.[2]

The inhabitants of the ceded territory, far from possessing political rights, were punishable arbitrarily for presuming to meddle with political subjects.

Not only was the nature of the government thus continued wholly incompatible with our constitution, but its machinery and appointment of officers was equally so. They were to be appointed by the president without the advice and consent of the senate.

The American governor who was to replace the Spanish intendant-general in that important province, and the judges who were to replace the royal cabildo in the city of New Orleans, were not the "inferior officers" whose appointment, by the constitution, would vest in the president alone.

In no territory organized under the ordinance of 1787 were these officers so considered. There was a complete incompatibility with our constitution and the spirit of our constitution — *first*, in the governmental establishment; *secondly*, in the ap-

[1] For the Spanish laws, see *ante*, p. 226, note 1.

[2] The position is almost ludicrous. The great father of democracy actually exercising the functions of a king!

pointment of the officers to administer it; *thirdly*, the departure from the model territorial regulations of the ordinance of 1787. Such a bill, so startling in its provisions and so novel in a republic of Anglo-Saxon origin, could not pass without opposition from that jealous *republican party*,[1] which had just come into power, and come in on the cry of saving the constitution from extension by loose construction.

On the acquisition of Florida sixteen years later the same course was pursued. The Louisiana act of October, 1803, was copied for Florida in March, 1819. All powers exercised there by the king's officers were to be exercised, until the end of the session of the next congress, by such persons as the president should direct. That act was approved by President Monroe, without a dissenting voice from any member of his cabinet.[2]

The ordinance of 1787 was taken as the basis of the territorial government established by the act of 1823, with modifications which assimilated it to the act for the government of the Orleans territory. It is clear from this action by two presi-

[1] The students should bear in mind that the ancient "Republican party" was in doctrine the opposite of the present party of that name. The old Republican party was the party of Jefferson, the "Democratic Republican" party. Its opponent was the Federal party, or, as we would say, the Nationalists.

Mr. James Elliott, of Vermont (Republican), seconded the motion of Mr. Griswold, saying: "He would never consent to delegate, for a single moment, such extensive powers to the president, even over a territory; such a delegation of power was unconstitutional." Mr. Dana, of Connecticut (Federal), expressed himself thus: "The president may, under this authority, establish the whole code of Spanish laws, however contrary to our own, appoint whomsoever he pleases as governors and judges, and remove them according to his pleasure; thus uniting in himself all power — legislative, judicial and executive."

The reply to these objections reminded the objectors that this was a territory — not a state; and that the constitution had nothing to do with it. Thus, Mr. Rodney (Cesar Augustus), of Delaware (Republican): "There is a wide distinction between states and territories, and the constitution appears clearly to indicate it. In the territories of the United States, under the ordinance of congress, the governor and judges have a right to make laws. Could this be done in a state? I presume not. It shows that congress have a power in the territories which they cannot exercise in the states, and that the limitations of power, found in the constitution, are applicable to states and not to territories." Benton's Ex. Dred Scott Dec., p. 56.

[2] It was a strongly southern cabinet. Benton says: "General Jackson, the governor, took care that power should be no 'barren sceptre' in his hands." Ex. Dred Scott Dec., p. 72.

dents and three congresses that no opinion was entertained that the benign provisions of the national constitution had any force or efficacy in the territories.[1]

Sec. 186. *Effect of Change of Government on Political and Private Law and Civil Rights.*— It is a general rule of public law, recognized and acted upon by the United States throughout all periods, that whenever political jurisdiction and legislative power over any territory, or the allegiance of its inhabitants, are transferred from one nation or sovereign to another, that the society itself is not disbanded or disorganized, nor are the municipal laws of the community — that is, laws which are intended for the protection of private rights — abrogated or changed by the creation or selection of the new government or sovereign.[2] By the change, lawful public property passes from one government to the other, but private property remains as before, and with it those municipal laws which are designed to secure its peaceful use and enjoyment.

All laws, ordinances and regulations in conflict with the political character, institutions and constitution of the new government are abrogated unless expressly continued in force.

Upon the cession of foreign territory to the United States, the laws of the country in support of an established religion, or abridging the freedom of the press, or authorizing cruel and unusual punishments, and the like, would at once cease to be

[1] *Cf.* Von Holst's Const. Law, 183. The learned doctor does not distinguish between the constitutional rights of the inhabitants and their political rights.

[2] This is the ground upon which Justice Chase holds that the state of Texas was not dissolved by the act of secession and the creation of an unlawful government. "It is not difficult to see that in all these senses the primary conception (of the state) is that the people, in whatever territory dwelling, either temporarily or permanently, and whether organized under a regular government, or united by looser and less definite relations, constitute the state.

"This is undoubtedly the fundamental idea upon which the republican institutions of our country are established. It was stated very clearly by an eminent judge (Mr. Justice Paterson, in Penhallow v. Doane's Adm'rs, 3 Dall. 93) in one of the earliest cases adjudicated by this court, and we are not aware of anything in any subsequent decision of a different tenor." "Our conclusion, therefore, is, that Texas continued to be a state of the Union, notwithstanding the transactions to which we have referred — the abdication of the government and the treason of the citizen." Texas v. White, 7 Wall. 700, 726. These acts being void were of no effect, and so long as the United States was endeavoring to guarantee a republican form of government, it could not admit that the state was dissolved.

of obligatory force without any declaration to that effect; and the laws of the country on other subjects would necessarily be superseded by existing laws of the new government upon the same matters. But with respect to laws affecting private rights, the possession, use and transfer of property, and designed to secure good order and peace in the community, and promote its health and prosperity, which are strictly of a municipal character, the rule is general, that a change of government leaves them in force until, by direct action of the new government, they are altered and repealed.[1]

Sec. 187. *Civil Rights Secure — Political Rights There Are None.*— The people of the United States, as sovereign owners of the national territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion they are represented by the government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the constitution, or are necessarily implied in its terms, or in the purposes and objects of the power itself; for it may well be admitted in respect to this, as to every power of society over its members, that it is not absolute and unlimited. But in ordaining government for the territories and the people who inhabit them, all the discretion which belongs to legislative power is vested in congress; and that extends, beyond all controversy, to determining by law, from time to time, the form of the local government in a particular territory, and the qualifications of those who shall administer it.

It rests with congress to say whether, in a given case, any of the people resident in the territory shall participate in the election of its officers or the making of its laws; and it may therefore take from them any right of suffrage it may have previously conferred, or at any time modify or abridge it, as it may deem expedient.

The right of local self-government, as known to our system as a constitutional franchise, belongs, under the constitution, to the states and to the people thereof, by whom that constitution was ordained, and to whom, by its terms, all power not conferred by it upon the government of the United States was

[1] Chicago & Pac. Ry. Co. McGlinn, 114 U. S. 546, 547. See also American Ins. Co. v. Canter, 1 Pet. 542; Halleck, Int. Law, ch. 34, sec. 14.

expressly reserved. The personal and civil rights of the inhabitants of the territories are secured to them, as to other citizens, by the principles of constitutional liberty, which restrain all the agencies of government, state and national; their political rights are franchises which they hold as privileges in the legislative discretion of the congress of the United States. This doctrine was fully and forcibly declared by the chief justice delivering the opinion of the court in *National Bank v. County of Yankton.*[1]

Sec. 188. *Colonial Dependencies May be Continued — No Territorial Government Need be Erected.*— As we have seen, the government has sovereign power over the territorial possessions which it acquires unless restricted by some stipulation contained in the treaty of cession and which becomes by the provision of the statute a part of the supreme law of the land.

Such territory does not become entitled to self-government. It is not incumbent upon the United States to establish a territorial form of government, but congress may provide for the government of the territory in such manner as it deems best.

The United States has been in possession of and has exercised such sovereignty over a large extent of country, either unoccupied or occupied only by Indian tribes, with whom were mingled a few white settlers.[2]

The fact of such occupancy by the Indian tribes does not prevent the exercise of the jurisdiction by the United States.[3]

Sec. 189. *Effect of Admission of a State on Private Titles to Land in the Territory.*— "In the debate in the senate in June, 1850, on the act for the admission of California, a motion to amend the act by requiring California, before her admission, to pass in convention an ordinance providing, among other things, 'that she relinquishes all title or claim to tax, dispose of, or in any way to interfere with the primary disposal by the United States of the public domain within her limits,' was opposed by Mr. Douglas and Mr. Webster as unnecessary, and was defeated

[1] 101 U. S. 129; Murphy v. Ramsay, 114 U. S. 44. See also American Ins. Co. v. Canter, 1 Pet. 511; United States v. Gratiot, 14 Pet. 526; Cross v. Harrison. 16 How. 164; Dred Scott v. Sanford, 19 How. 393.

[2] First Nat. Bank v. Yankton Co., 101 U. S. 129; In re Lane, 135 U. S. 443.

[3] Langford v. Monteith, 102 U. S. 145. See also Mormon Church v. United States, 136 U. S. 1; Ex parte Bollman, 4 Cranch, 75.

by a vote of thirty-six to nineteen. In the course of the debate, Mr. Douglas, after showing that the United States acquired title to the public lands, not by virtue of their sovereignty, or by deeds of cession from the old states, or by treaty of cession from France, Spain or Mexico, and referring to the provision of the constitution authorizing congress 'to dispose of and make all needful rules and regulations concerning the territory or other property of the United States,' said: 'This provision authorizes the United States to be and become a land-owner, and prescribes the mode in which the lands may be disposed of and the title conveyed to the purchaser. Congress is to make the needful rules and regulations upon this subject. The title of the United States can be divested by no other power, by no other means, in no other mode, than that which congress shall sanction and prescribe. It cannot be done by the action of the people or legislature of a territory or state.' And he supported this conclusion by a review of all the acts of congress under which states had theretofore been admitted. Mr. Webster said that these precedents demonstrated that 'the general idea has been, in the creation of a state, that its admission as a state has no effect at all on the property of the United States lying within its limits,' and that it was settled by the judgment of this court in *Pollard v. Hagan*,[1] 'that the authority of the United States does so far extend as, by force of itself, *proprio vigore*, to exempt the public lands from taxation, when new states are created in the territory in which the lands lie.'"[2]

"In *Gibson v. Chouteau*, 13 Wall. 92, 99, Mr. Justice Field, delivering the judgment of this court, said: 'With respect to the public domain, the constitution vests in congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. No state legislature can interfere with this right or embarrass its exercise; and, to prevent the possibility of any attempted interference with it, a provision has been usually inserted in the com-

[1] 3 How. 212, 224.

[2] Van Brocklin v. Tennessee, 117 U. S. 164, 165. See also Cong. Globe, 31st Cong., 1st sess., vol. 21, p. 1314; vol. 22, p. 848, and secs. 960, 989, 1004; 5 Webster's Works, 395, 396, 405.

pacts by which new states have been admitted into the Union, that such interference with the primary disposal of the soil of the United States shall never be made.'"[1]

Sec. 190. *The Partition of Jurisdiction by Admission.*—Upon the admission of a state into the Union, the state doubtless acquires general jurisdiction, civil and criminal, for the preservation of public order, and the protection of persons and property, throughout its limits, except where it has ceded exclusive jurisdiction to the United States. The rights of local sovereignty, including the title to lands held in trust for municipal uses, and in the shores of navigable waters below high-water mark, vest in the state and not in the United States.[2]

Sec. 191. *Effect of Transfer of Title on Permanent Immovable Structures.*—Where the inhabitants or residents of a domain belonging to a nation erect buildings and structures of a permanent character upon soil to which they have no title, such structures become a part of the land and pass with the deed of cession, unless there is some reservation in the treaty with the ceding country. In the same manner all permanent forts and appurtenances thereto pass with the ground of the territory.[3]

Limitations of Subjects Here Treated.—The doctrine which obtained in relation to the ownership of lands and mineral lands, the rights of riparian owners living upon the banks of streams, or owning land bordering on running streams, the ownership and jurisdiction over forts, arsenals and districts possessed by the United States, the littoral rights of owners

[1] The mode of acquiring private ownership must be treated with the subject of "Property." See 2 Wilson's Works, 496, note.

Public and unoccupied lands to which the United States have acquired title, either by deeds of cession from other states, or by treaty with a foreign country, congress, under the power conferred upon it by the constitution "to dispose of and make all needful rules and regulations respecting the territory or other property of the United States," has the exclusive right to control and dispose of it, as it has with regard to other property of the United States; and no state can interfere with this right, or embarrass its exercise. Van Brocklin v. Tennessee, 117 U. S. 167, 168. See also United States v. Gratiot, 14 Pet. 526; Pollard v. Hagan, 3 How. 212; Irvine v. Marshall, 20 How. 558, 563; Thompson v. Utah, 16 Sup. Ct. R. 620.

[2] Van Brocklin v. Tennessee, 117 U. S. 167. See also New Orleans v. United States, 10 How. 662, 737; Pollard v. Hagan, 3 How. 212; Goodtitle v. Kibbe, 9 How. 471; Doe v. Beebe, 13 How. 25; Barney v. Keokuk, 94 U. S. 324.

[3] Kincaid v. United States, 150 U. S. 483.

upon the shores of lakes and seas, the disposition of the public land by survey and sale, are not properly a part of this chapter, and will be treated under their proper subjects in subsequent pages of the work.

Sec. 192. *Status of Indian Tribes.*—"From the beginning of the government to the present time, they[1] have been treated as 'wards of the nation,' 'in a state of pupilage,' 'dependent political communities,' holding such relations to the general government that they and their country, as declared by Chief Justice Marshall in *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 'are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory and an act of hostility.' It is true, as declared in *Worcester v. Georgia*, 6 Pet. 515, 557, 569, that the treaties and laws of the United States contemplate the Indian Territory as completely separated from the states, and the Cherokee nations as a distinct community, and (in the language of Mr. Justice McLean in the same case, p. 583) that 'in the executive, legislative and judicial branches of our government we have submitted, by the most solemn sanction, the existence of the Indians as a separate and distinct people, and as being vested with rights which constitute them a state or separate community.'

"In *United States v. Kagama*, 118 U. S. 375, 379, the court, after observing that the Indians were within the geographical limits of the United States, said: 'The soil and the people within these limits are under the political control of the government of the United States, or of the states of the Union. There exists within the broad domain of sovereignty but these two. They were and always have been regarded as having a semi-independent position when they preserved their tribal relations, not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the state within whose limits they resided. The power of the general

[1] The reference is to the tribes, not the individual. Their *status* will be examined with other private persons, citizens, aliens, denizens, etc.

government over those remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell.'"[1]

SEC. 193. *Mineral Lands — Acquisition and Disposition by the Government.*— The English law holding that the right to all mines was in the Crown has little bearing upon the policy of the United States in relation to its mineral lands.

Upon the same principle that a title once possessed by the general government can be divested only by the grant of that government,[2] it follows that the title to mineral lands can only be obtained from it under the provisions of acts of congress in relation thereto.

The supreme court has indicated sufficiently the present state of the law in that regard, and it is plain from their statement of the legislation of congress that "no title from the United

[1] Cherokee Nation v. Kansas Ry. Co., 135 U. S. 654.

"It is true that it is occupied by the tribe of Cherokee Indians. But it has been assigned to them by the United States as a place of domicile for the tribe, and they hold and occupy it with the assent of the United States, and under their authority. We think it too firmly and clearly established to admit of dispute that the Indian tribes residing within the territorial limits of the United States are subject to their authority." Cherokee Nation v. Kansas Ry. Co., 135 U. S. 654.

How Regarded by the States.—The supreme court of New York says: "The act proceeds to pardon *Tommy Jemmy*, otherwise called *Soo-non-gize*, an *Indian* of the *Seneca* tribe, for the murder of an Indian woman, alleged to have been committed within the *Seneca* reservation. This statute not only asserts the exclusive jurisdiction of this state over all crimes or offenses committed within the Indian reservations, but it expressly negates any jurisdiction to the Indian tribes to take cognizance of offenses committed therein, even by those of their own tribes. If then, our jurisdiction exclusively reaches them, if they have no right to punish offenses, if they receive protection from our government, are subject to our legislation, being born within the state, they must owe to this government a permanent allegiance, and they cannot be aliens. It does not affect the question or make them less citizens that we do not tax them or require military or other services from them. This is a mere indulgence arising from their peculiar situation. For a long succession of years, we have exercised an entire supremacy over all the tribes within the state and have regulated by law their internal concerns, their contracts and their property. In one sense only they may be considered as having the semblance of national rights, as regards their right to retain to their own use, or to dispose, under the regulations of our government, of their lands. In every other sense they are as completely the subjects of our laws as any other citizens; and we must conclude that they are citizens." Jackson v. Goodell, 20 Johns. 187–92.

[2] 2 Wilson's Works, 496–98; Jackson v. Frost, 5 Cow. 346; 3 Kent, Com.*378.

States to land *known at the time* of the sale to be valuable for its minerals of gold, silver, cinnabar or copper can be obtained under the pre-emption or homestead laws or the town-site laws, or in any other way than as prescribed by the laws specially authorizing the sale of such lands, except in the states of Michigan, Wisconsin, Minnesota, Missouri and Kansas. We say 'land *known* at the time to be *valuable* for its minerals,' as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them. It is not to such lands that the term 'mineral,' in the sense of the statute, is applicable. In the first section of the act of 1866 no designation is given of the character of mineral lands which are free and open to exploration. But in the act of 1872, which repealed that section and re-enacted one of broader import, it is '*valuable* mineral deposits' which are declared to be free and open to exploration and purchase. The same term is carried into the Revised Statutes. It is there enacted that 'lands *valuable* for minerals' shall be reserved from sale, except as otherwise expressly directed, and that '*valuable* mineral deposits' in lands belonging to the United States shall be free and open to exploration and purchase. We also say lands *known* at the time of their sale to be thus valuable, in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land, in which, years afterwards, rich deposits of mineral may be discovered. It is quite possible that lands settled upon as suitable only for agricultural purposes, entered by the settler and patented by the government under the pre-emption laws, may be found, years after the patent has been issued, to contain valuable minerals. Indeed, this has often happened.

"We therefore use the term '*known* to be valuable at the time of sale,' to prevent any doubt being cast upon titles to lands afterwards found to be different in their mineral character from what was supposed when the entry of them was made and the patent issued."[1]

Sec. 194. *Dependent Colonial Possessions.*— Just at this time a question presents itself to the people of the United States

[1] Deffeback v. Hawke, 115 U. S. 392. See also Col. C. & I. Co. v. United States, 123 U. S. 307; Davis v. Weibbold, 139 U. S. 507.

which has never been definitely acted upon and determined, but which it seems imperative shall now receive a definite solution at the hand of the competent tribunal. The recent war with Spain has rendered it probable that the United States shall enter into relations with the Spanish colonies occupying the adjacent West India Islands and the distant islands in the Phillipian group.

Sec. 195. *Nature of the Question and Ancient Policy — President Jefferson's View.*— The word "colony" always signifies a body of cultivators transplanted by the government to a distant possession, and governed and protected there by the mother country, of which it is to be always the dependent — never the equal. The term has never been applied to our territories, and cannot be without a total change in their nature. Distance, governmental transplantation, *perpetual inferiority*, is their (the colonies) inexorable characteristic.

As such the question of colonies is purely and simply *a political question*, for the determination of the political power; and as such was determined some fifty-odd years ago by our government.

No Distinct Colonies.—The determination was that the United States would have no colony which required a navy to guard it and to keep open communication with it.

Cuba an Exception.— And that determination, by its import and express terms, admitted Cuba as an exception — that island being near enough to our coast to be safely reached without the convoy of a fleet, and strong enough in its natural and artificial defenses to be protected by land forces. But while this exception of Cuba was made, all designs upon it inconsistent with fair purchase or honorable conquest in just war were sternly repudiated. The doctrine of the old school was that, geographically, Cuba belonged to the New World, and to the North American part of it, and to the United States as the chief power of North America; and politically to Spain; and that while Spain declined to sell and gave us no just cause for war, she was to be undisturbed in the possession of that island — as much so as in the island of Cadiz. But no other power was allowed to get it from Spain, either by purchase or conquest.[1]

[1] It is not the purpose to mention, much less discuss, doctrines of mere political policy (*e. g.*, the Monroe doctrine, which grew out of the idea

If it was to be sold, the United States had the pre-emption right of purchase; if it is to be conquered, we, the conqueror. But all this open and above board — no pretext, wars, no false claims, no fictitious quarrels, no annoying, no bullying, no forced sale.[1]

Sec. 196. *The Political Status of Colonies.*— Blackstone says of colonial establishments: "Plantations or colonies, in distant countries, are either such where the lands are *claimed by right of occupancy only*, by finding them desert and uncultivated, and peopling them from the mother country; or where, when already cultivated, they have been either *gained by conquest*, or *ceded to us by treaties.* And both these rights are founded upon the law of nature, or at least upon that of nations. But there is a difference between these two species of colonies with respect to the laws by which they are bound. For it hath been held that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force. But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to their own situation and

here noticed). This section is justifiable only as illustrating the scope of the constitutional question involved, and to make clear the difference between acquiring contiguous territory to be ultimately admitted to statehood and the acquisition of permanent colonial establishments.

[1] Jefferson's Letters, quoted in Benton's Ex., pp. 24, 25, note. Notwithstanding the protestation against a desire or intention to expand, the United States has never declined to acquire territory. Senator Benton paints the picture quite graphically. "Arizona has been acquired; fifty millions were offered to Mexico for her northern half, to include Monterey and Saltillo; a vast sum is now offered for Sonora and Sinaloa, down to Guaymas; Tehuantepec, Nicaragua, Panama, Darien, the Spanish part of San Domingo, Cuba, with islands on both sides of the tropical continent. Nor do we stop at the two Americas, their coasts and islands, extensive as they are; but circumvolving the terraqueous globe, we look wistfully at the Sandwich Islands, and on some gem in the Polynesian group, and, plunging to the antipodes, pounce down upon Formosa in the Chinese sea. Such were the schemes of the last administration, and must continue, if its policy should continue. Over all these provinces, isthmuses, islands, and ports, now free, our constitution must spread (if we acquire them, and the decision of the supreme court stands), overriding and overruling all anti-slavery in its place, beyond the power of congress or the people there to prevent it." (1857) Benton's Ex. Dred Scott Dec., p. 29.

the condition of an infant colony; such, for instance, as the general rules of inheritance, and of protection from personal injuries." . . .

"What shall be admitted and what rejected, at what times and under what restrictions, must, in case of dispute, be decided in the first instance by their own provincial judicature, subject to the revision and control of the king in council; the whole of their constitution being also liable to be new-modeled and reformed by the general superintending power of the legislature in the mother country. But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the ancient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country.

"Our American plantations are principally of this latter sort, being obtained in the last century either by right of conquest and driving out the natives (with what natural justice I shall not at present inquire), or by treaties; and therefore the common law of England, as such, has no allowance or authority there, they being no part of the mother country, but distinct though independent dominions.[1] They are subject, however, to the control of the parliament, though (like Ireland, Man, and the rest) not bound by any acts of parliament unless particularly named."[2]

[1] As we have seen, this view was not admitted in the colonies.

[2] 1 Cooley's Blk. (3d ed.) 106–108. Judge Cooley says: "This is substantially the condition in which the new settlements within the territory belonging to the United States are commonly placed by the legislation of congress until the time arrives when their population has become so considerable as to justify their being received into the Union as states." 1 Cooley's Blk. (3d ed.) 107, note 6. See the latest utterances on the subject of the territories. Thompson v. Utah, 18 Sup. Ct. Rep. 620. As to civil right in Alaska. Endleman v. United States, 86 Fed. Rep. 456.

CHAPTER X.

THE SOURCES AND SYSTEMS OF LAW.

"It is well to inquire into the real nature of law, the source from which it proceeds, and the real elements which impart its power and efficacy. . . . How can the definition of Blackstone be reconciled with the fact that the sovereign is subject to law?" — Jas. C. Carter, Am. Bar Ass'n, 1890.

SEC. 197. *Government of Law.*— In noticing the development of American jurisprudence and the establishment of the American constitution, occasion has been taken to notice the principle, often repeated, that in America is established a government of law and not of men.[1]

What is intended in American jurisprudence by the constant repetition of this form of expression "a government of laws, not of men?"

Probably as good an answer to the inquiry as can be made is that all law emanates from the people.

It is the will of the people that their public affairs as well as the rights and interests of individuals shall be guided, controlled and moulded in accordance with the laws which are established by them.

It has been well said that "as a state has claimed precedence to the people, so in the same inverted course of things, the government has often claimed precedence of the state. The ministers, dignified very properly by the application of *magistrates*, have wished, and succeeded in their wish, to be considered as the rulers of the state."[2]

The individuals who occupy the positions of trust desig-

[1] See *ante*, secs. 142–166. Chief Justice Marshall says: "The government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right. . . . It behooves us then to inquire whether there be in its [the government] composition any ingredient which shall exempt it [the government] from legal investigation, or exclude the injured party from legal redress." Marbury v. Madison, 1 Cranch, 137.

[2] Chisholm v. Georgia, 2 Dall. 455.

nated as public officers in every case exercise merely an agency or a trust. All of their acts are in the name of the law. "The law commands," or "in the name of this commonwealth, I demand," is the language of the official, and the warrant for his action must be in every case the law of the land.

SEC. 198. *The Sources of Law.*— It is frequently said that it is the province of the legislative department of government to make the law, the judiciary to expound it, and the executive to carry it into effect; and in the outward manifestation of this separation of the powers of government, the actual fact that the legislative department is not the only law-making power is frequently lost sight of.

As it has been frequently shown that the parliament of England is not the only law-making power of England, and that, as a matter of fact, the largest body of English law is not statutory law,[1] so it may be shown that a great portion of our law, perhaps the most important part of it, does not emanate from the legislative department, and that in fact *changes of the law* may take place in which the legislature has no hand.[2]

SEC. 199. *The Supreme Law of the Land.*— Article VI, section 2, of the United States constitution says: "This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."[3]

In this section of the constitution it will be seen that a most important body of laws which control and affect the rights of the nation, the state and the individual emanate from sources other than the legislative department, either of the Union or of the states.

The United States was the first among the governments to provide that treaties duly entered into were a part of the supreme law of the land.[4]

This provision was undoubtedly inserted because of the existence of thirteen separate jurisdictions, each having and exercising governmental powers.

[1] 1 Wilson's Works, p. 171 *et seq.*
[2] See *post*, secs. 208, 209.
[3] See *ante*, sec. 152.
[4] Ware v. Hilton, 3 Dall. 199.

The Legislative Branch May be Obliged to Act.— It is well understood that there may be secret articles in a treaty which it is not wise to make public, and of a character which only a legislative power can carry out. It follows that a treaty stipulation for anything of this nature is to be given effect by legislative authority, and the legislature is authorized, and under public obligation, to give effect to the treaty.[1]

A treaty may divest rights which have accrued under an existing law, and the nation may be obliged to give effect to this treaty divesting the individual rights.[2]

Sec. 200. *The Common Law* is a term which has, with us, a double significance. In the United States, when we speak of the common law, the mind of the lawyer naturally reverts to the system of English jurisprudence, an indefinite and undescribed portion of which was said to be the birthright of the colonists, and has been adopted in most of the states as a portion of our jurisprudence. By the common law a great many of our most important transactions are governed.

In view of the common law every statute enacted by a state legislature is construed, and every statute is said to be in derogation of the common law or declaratory of it, unless the subject is one that was uncertain at common law. The common law, when predicated of the English system by an Englishman, has a meaning somewhat different from that just spoken of. In that connection it would have the same meaning in any country.

The common law of England meant all of those universal rules, not the enactment of parliament, which governed the English people.

Long established usages or customs, especially the custom of merchants, became a part of the common law, and so after the Conquest, and during the period of the struggle for English liberty, there is a constant insistence upon the ancient customs of the realm.

Of English municipal law, says Wilson, "the greatest and best proportion was never made by the parliament at all."[3]

A statute of 25 Henry VIII., chapter 21, section 1, declared

[1] Ware v. Hilton, 3 Dall. 272.

[2] United States v. Schooner Peggy, 1 Cranch, 103. See also Tennessee v. Davis, 100 U. S. 266; Martin v. Hunter, 1 Wheat. 373.

[3] 1 Wilson's Works, p. 170.

that "this realm is free from subjection to any man's laws, but only to such as have been devised, made and obtained within this realm, for the wealth of the same, or to such as, by sufferance of your grace and your progenitors, the people of this your realm have taken at their free liberty, with their own consent to be used amongst them, and have bound themselves by long usage and custom."[1]

Sec. 201. *The Law Merchant.*— The names of Holt and Mansfield must always stand among those of the great jurists of the world. Their fame rests almost entirely upon their labors in incorporating into the English law the maritime or mercantile law of nations.[2] Mansfield is justly entitled to the credit of the development of the modern common law of England. A vast portion of the law merchant, as approved by Mansfield and by him made a part of the common law of England, is derived from the civil law. The whole current of authorities from all time establishes the doctrine that the custom of merchants has always been regarded as a part of the common law; but it was not until the time of Mansfield that the law merchant can be said to have exercised a great and controlling influence upon the jurisprudence of England.

The equitable action of *assumpsit* was to a large measure the medium through which Lord Mansfield applied these principles.[3]

[1] "Custom: a species of legislation by the people themselves, which in this country and England is the foundation of the common law itself, or, in other words, *general customs* obtaining by common consent." Gibson, J., in Lyle v. Richards, 9 S. & R. 323–39.

[2] See a very valuable note on the law merchant in 1 Cranch, App., note *a*, *368.

Of Lord Holt, Smith says: "I have no hesitation in saying that Lord Holt alone accomplished more for English mercantile law than the whole body of the English judges prior to his elevation. The present law with regard to bills of lading seems to have originated with Lord Holt. See Evans v. Marlett, 1 Ld. Raymond, 261. Those who desire to estimate his powers of mind and mode of dealing with important legal questions will do well to peruse his celebrated judgment in Coggs v. Bernard, Lord Raymond, 909, in which, availing himself of his acquaintance with the civil law, he settled the law relative to bailments on its present footing." Smith's Mercantile Law, p. 27.

[3] "It is under the action of *assumpsit* that the modern law merchant has been incorporated into the common law. In the time of Edward III. we discover that, in the ordinary transactions amongst merchants, that is, members of the trading community, *a distinct law prevailed*, of a more liberal nature than the general law, and that it was more summarily and expeditiously exercised.

Mr. Justice Caton, in an opinion in the supreme court of Illinois, says of the common law, and its connection with the customary law and the law merchant: "Were we able to explore the past with certainty, we should probably find that every essential principle of the common law, before it was adopted by the decision of any court, could be found in some precedent custom among the people, and which, by its convenience and justice, so commended itself to the courts that they recognized and adopted it as a part of the law of the land.[1] We are, however, able to thus trace to its source but little of the common law, except that which was adopted from the custom of merchants. That was so broad in its principles and so comprehensive in its objects, there was so much of it relating to one great subject, that it acquired a name to itself, and for dignity and importance struggled even with the great body of the

This was called the *lex mercatoria*. It had, in all probability, silently prevailed in London and other commercial towns, in some shape, throughout the whole of the Anglo-Saxon times. By the statute 27 Edward III. (Stat. 2), in each town where the staple was ordained, a mayor was to be chosen, skilled in the law merchant, to do right to every man according to that law. The *lex mercatoria* is expressly mentioned by Fortescue. In common societies of merchants and in mutual contracts, says Selden, equity and good conscience, rather than strict law, is required; and he mentions a case in the time of Edward II., where, following up this principle, the defendant in an action of debt brought, *secundum legem mercatoriam*, for some corn sold, was not permitted to wage his law, though he might have done so in an ordinary action of debt. It would seem, too, that merchants had always been specially favored by having a more summary process in the king's court." Spence's Eq. Juris., 247.

Of this action it is said: "In *one word*, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the *ties of natural justice* and equity to *refund* the money." 2 Burr. 1012.

[1] "The mercantile law of England is, in point of fact, an edifice erected by the merchant, with comparatively little assistance either from the courts or the legislature. The former have, in very many instances, only impressed with a judicial sanction, or deduced proper and reasonable consequences from, those regulations which the experience of the trader, whether borrowing from foreigners or inventing himself, had already adopted as the most convenient. When trade began to flourish in this country, those occupied about it soon discovered that the law had provided but few rules for the guidance of their transactions, and that it was, therefore, necessary that they should themselves adopt some regulations for their own government. Thus they, in early times, erected a sort of mercantile republic, the observance of whose code was insured less by the law of the land than by *force of opinion* and the dread of censure." Smith's Mercantile Law, pp. 29, 31.

common law; hence its name is remembered while its separate existence has ceased to be. Were we now to strike from the common law all it has borrowed from, and which once constituted a distinctive portion of, the law merchant, we should find it unfitted for the most rural districts of this country; for agriculture has become so intimately connected and associated with commerce that the rules which govern one must seriously affect the other. With all its avenues of intercommunication, commerce now extends itself to the granaries and pasture fields of the remotest frontiers. Thus dismembered, the common law would only be a fit code for the government of a fox-hunting gentry and their dependent serfs.

"While elementary writers and the judges of courts have been in the habit of speaking of the *lex mercatoria* distinctively, they have for a very long time spoken of it and treated it as a part of the common law."[1]

Sec. 202. *Unwritten or Customary Law.*— The dignity and importance of customs was made apparent when we mentioned that the constitution of one of the states, Connecticut, was, for many years after the adoption of the federal constitution, held to be in the customs of the people.[2]

The common law is said to be an unwritten law. It was classed by Blackstone as the *lex non scripta*, and by him said to include not only general customs, or the common law properly so called, but also the particular customs of certain parts of the kingdom, and likewise those particular laws that are by custom observed in certain districts.[3]

[1] Cook v. Renick, 19 Ill. 601. David Dudley Field says of the common law as it existed at the time of the American Revolution, that it was of two kinds — public and private. The public law was good. The private portion, that which related to land and private relations, was but little advanced beyond the region of semi-barbarism. Most of the good which it had, and of which it has since accumulated, was the contribution of the Romans, that magnificent people which once ruled the world by the sword, and have since held a half dominion by the silent empire of law. Ad. Am. Bar Ass'n, 1889, p. 233.

[2] Calder v. Bull, 3 Dall. 386.

[3] 1 Cooley (3d ed.), 63. General and particular customs must be distinguished. Judge Story says: "Those usages which, from their general prevalence and long-continued recognition among merchants, have been received and incorporated into the law as the custom of merchants, must not be confounded with the particular usages of trade. The custom of merchants is applied to that collection of rules and principles of

One need but turn to the examination of the common law given by the learned commentator to appreciate that by far the largest portion in bulk of the English law consisted in this unwritten or common law of the realm.[1]

The evidence of the unwritten law may sometimes, in the first instance, be obtained by the testimony of witnesses, or, as was formerly the case, by the examination of the merchants of a particular locality or guild.[2]

The final evidence, however, of the common law, which can be said of all the law, is mainly to be found in the decisions of the courts of England, or the particular country of which the common law is said to be a part.

Those decisions, for the first time adopting and announcing a rule, were said to be a species of judicial legislation, but they are distinguishable from those judicial edicts which change established rules.[3]

Thus, Spence says, in his Equitable Jurisprudence, the "*jus civil* is distinguished from *jus prætorium*, which, in Bracton's sense, is the law formed by the decisions of the judges. This *jus prætorium* has been continually enlarged by the common-law judges, so as to form a very considerable portion of the common law of England."[4]

Sec. 203. *Development of the Common Law.*— The manner in which the common law has developed is simple and easily

law which the courts received originally from the merchants, but of which they now take notice judicially, and which are binding throughout the realm. These customs, having been judicially established, are no longer in the power of the merchants, and can no more be altered or superseded by the acts or agreements of parties than the other rules of law. But wherever, in any course of business, a particular usage obtains, which is general, uniform, notorious, reasonable, and consistent with the rules of law, such usage will be presumed to have entered into the contemplation of all parties contracting in reference to the subject-matter as to which it prevails, unless the contrary is shown. This principle, although most frequently applied in mercantile transactions, is not restricted to them, but extends to contracts in all departments of business, mechanical, agricultural and professional, upon the principle that, wherever the knowledge of any usage or custom is necessary to the right understanding of an agreement, it would be unreasonable to deny to the reader the light enjoyed by the writer." Rogers v. Mech. Ins. Co., 1 Story (U. S. Ct.), 608.

[1] 1 Cooley (3d ed.), 67, 68, and notes.

[2] Whitehead v. Walker, 9 M. & W. 514; Renner v. Bank, 9 Wheat. 582.

[3] See *post*, Judge-made Law, sec. 209.

[4] 1 Eq. Juris. *124.

understood. Take, for example, a case arising for the first time in a jurisdiction. In the absence of precedent, reason and justice are said to be the sole spirit of the law, and in all civil actions between individuals in reference to property rights and injuries, some decision must be reached.

What is the reason and justice of a thing is very often the question with the court.

In a comparatively recent case the New York court of appeals was called upon to determine the right of the owner of logs which had been cast by a flood upon the land of a lower proprietor of the soil, bordering upon the stream. In seeking for the reason and justice of the matter, resort was had to other systems of law; and in this case the source resorted to was the civil law, and the rule of the civil law was expressly adopted by quoting, as their controlling reason and rule, the language of the civil law, as expressed by Domat.[1]

We have before referred to a similar instance in reference to the law of bailments. In this case, not simply a single rule or a single principle was adopted, but one may truly say that the whole English law of bailments was framed and formulated by the adoption of the Roman law by the judge deciding the case.[2]

Sec. 204. *The Maritime Law*, of which the law merchant constitutes a branch, is an essential part of the law of nations,[3] but it is as much a part of the municipal law of England and of the United States as it was of the civil law of Rome, because its customs were a part of the customs of the English people.

[1] Sheldon v. Sherman, 42 N. Y. 484; 1 Am. Rep. 569.

[2] Lord Holt in Coggs v. Bernard, Ld. Raym. 909; 1 Sm. L. C. 369.

[3] Mr. Smith, in the introduction to his Mercantile Law, says: "In ascertaining the legal rights arising out of commercial transactions, it frequently becomes necessary to have recourse to the volumes of international law, frequently to the contemporaneous laws of nations. So far as it affects title to lands, it depends upon those feudal institutions from which the rules in our country governing such property originate. It is deducible in great part from the imperial code of Rome, in great part from the different maritime codes of ancient Europe; and all these, its components, while they are interspersed and qualified by a multiplicity of statutory enactments, are explained, blended and applied, and the cases for which they have omitted to provide are solved, by the decisions of our English courts of law and equity." See Personal Property. Smith's Mercantile Law, 18.

Lord Mansfield says: "The maritime law is not the law of a particular country, but the general law of nations. *Non erit alia Romæ, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes et omni temporo una eademque lex oblinebit.*" [1]

It is observable that the law merchant and the maritime law are not generally distinguished from each other, but are frequently used indiscriminately. Mr. Justice Story applies the same principle to a commercial case [2] brought upon a negotiable instrument, observing: "The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield in *Luke v. Lyle* (2 Burr. R. 883–887), to be in a great measure not the law of a single country only, but of the commercial world."

In this case,[3] notwithstanding the thirty-fourth section of the judiciary act, which provides that the laws of the several states, except where the constitution, treaties or statutes shall otherwise provide, shall be regarded as rules of decision, binding upon the federal courts, and the highest court of the state of New York had established a rule upon the question, the federal court decided contrary to that rule, upon the broad principle of commercial or maritime law indicated.

Upon the same principle the same court, in a still later case upon the subject of insurance, held that the federal court was bound by the general commercial law, independent of the law of any particular state.

"The questions under our consideration are questions of general commercial law, and depend upon the construction of a contract of insurance, which is by no means local in its character, or regulated by any local policy or customs.

"Whatever respect, therefore, the decisions of state tribunals may have on such a subject, and they certainly are entitled to a great respect, they cannot conclude the judgment of this court.

"On the contrary we are bound to interpret this instrument according to our opinion of its true intent and object, aided by all the lights which can be obtained from all external sources whatsoever, and if the result to which we have arrived differs

[1] See 1 Wilson's Works, 337; 1 Blk. Com. 273.

[2] Swift v. Tyson, 16 Pet. 19.

[3] Ibid.

from that of these learned state courts, we may regret it, but it cannot be permitted to alter our judgment."[1]

The United States courts have uniformly adhered to this position.[2]

Anomalous result is that the different parties to the same series of commercial paper or a commercial transaction may have different rights and liabilities in reference thereto, according to the law of the land, depending upon the place of residence of the parties and not upon the contract or agreement. Some of the states have adopted the policy of the decisions of the federal court in such matters.[3]

Sec. 205. *Express Adoption of the Common Law.*— The common law of the various states differs very materially. In some of the states, the common law of England as it existed prior to the fourth year of King James I. is expressly adopted by statutes, and it results as a matter of course that the decisions of the courts of England subsequent to 1607, the date of the charter of Virginia, under which the colony was established, are not considered as binding.[4]

Other states fix the date of the common law so as to include the common law and all of the statutes in aid thereof prior to the Declaration of Independence, or prior to some arbitrary date during the Revolutionary period, so that the student may easily ascertain the fact in a particular jurisdiction by consulting the statutory or constitutional provision. If no express rules are fixed, the Declaration of Independence necessarily limits the period when the common law of England was a part of the law of the colonies.[5]

[1] Carpenter v. Providence-Washington Ins. Co., 16 Pet. 494–511.

[2] Railway Co. v. National Bank, 102 U. S. 14.

[3] Trehon v. Brown, 14 Ohio, 486. As early as 1823 Mr. Dane said: "A serious evil we are fast running into in most of our states. This inundation of books made in different states and nations will increase until we can shake off more of our local notions. Our true course is plain; that is, by degrees to make our laws more uniform and natural, especially when there is nothing to make them otherwise but local feeling and prejudices. We have, in the common and federal law, the materials of national uniformity in many cases. We have a national judiciary promoting this uniformity, and we have lawyers learned, industrious, and able to second the judiciary. We only want a general *efficient* plan supported with energy and national feelings." 1 Wilson's Works, 335, note. See sec. 206.

[4] Kallenbach v. Dickinson, 100 Ill. 427.

[5] 1 Wash. Real Prop. 64; Minor's Inst. 67, 81. "It is insisted that our

Sec. 206. *The National Common Law.*— In considering the existence of a common law of the nation, sufficient has been said to indicate that by natural growth a common law consisting of customs and usages must necessarily develop;[1] but the student and the lawyer inquire how far the common law in the narrower sense has become adopted, if at all, into the federal system, and becomes operative in the federal courts.

The question presents itself in two phases:

First, as a source of jurisdiction. In the first case, when the question arose, there was a sharp conflict of opinion. In that case it was sought to punish the defendant criminally as to a matter not made a crime by any act of congress.

The judges were divided on the question of jurisdiction, but it seems that the court adjudged a punishment.[2]

It is now well settled, however, that the federal courts have no jurisdiction of subjects of litigation except as conferred by the constitution or the law.[3]

The second phase in which questions as to the common law of the United States arise is as to whether rights are to be affected and adjudged according to the principles of the common law, irrespective of or contrary to the decisions of the state courts; and it would seem that even in cases which do not fall strictly within the domain of maritime and commercial law, the federal courts may and do resort to and apply the common law of England as such, even though their view of what that law is differs from the decisions of the state courts.[4]

ancestors, when they migrated to this country, brought with them the English common law as a part of their heritage. That this was the case, to a limited extent, is admitted. No one will contend that the common law, as it existed in England, has ever been in force in all its provisions in any state in this Union. It was adopted so far as its principles were suited to the condition of the colonies; and from this circumstance we see what is common law in one state is not so considered in another. The judicial decisions, the usages and customs of the respective states, must determine how far the common law has been introduced and sanctioned in each." Wheaton et al. v. Peters et al., 8 Pet. 659.

[1] Smith v. Alabama, 124 U. S. 478.

[2] United States v. Worrall, 2 Dall. 384; Cooley's Const. Lim., pp. 30, 526.

[3] See In re Burrus, 136 U. S. 586, and note on the case, Id. 597–605.

[4] In a case involving the doctrine of fellow-servants as to a rule created by the English case of Priestly v. Fowler in 1837, 3 Mees. & W. 1; B. & O. Ry. Co. v. Baugh, 149 U. S. 367. This is a very interesting case upon what subjects the court considers of general or local jurisprudence. The court says: "In Hough v. Railway Co., 100 U. S. 213, 226, was presented the liability of a company to its serv-

It is not the intention to here discuss the question as to how far the national courts will follow the state courts as to what the law of a state is, but the discussion here will be limited to the common law of the nation.

Sec. 207. *National Common Law — Where the Question Does Not Involve a State Law.*— In the case of *Murray's Lessee v. Hoboken Land and Improvement Co.*, the process in question by which the plaintiff's title was divested was a warrant issued by federal officers in pursuance to federal law, and involved no question of state law or jurisdiction. The question was whether such process authorized by an act of congress was due process of law. Mr. Justice Curtis says: "We must look to those settled usages and modes of proceeding existing in the common law and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. We apprehend there has been no period, since the establishment of the English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts due to the crown, and especially those due from receivers of the revenues. It is difficult, at this day, to trace with precision all of the proceedings had for these purposes in the earliest ages of the common law.

ant for injuries caused by negligence, and Mr. Justice Harlan thus expressed the views of the entire court: 'Our attention has been called to two cases determined in the supreme court of Texas, and which, it is urged, sustain the principles announced in the court below. After a careful consideration of those cases, we are of the opinion that they do not necessarily conflict with the conclusions we have reached. Be this as it may, the question before us, in the absence of statutory regulations by the state in which the cause of action arose, depend on principles of general law, and in their determination we are not required to follow the decisions of the state courts.'" The court, however, wipes away all doubt on the matter of what law in the following language: "But passing beyond the matter of authorities, the question is essentially one of general law. It does not depend on any statute; it does not spring from any general usage or custom; there is in it no rule of property, but it rests on those considerations of right and justice which have been gathered into the great body of the rules and principles known as the 'common law.' There is no question as to the power of the states to legislate and change the rules of the common law in this respect as in others; but, in the absence of such legislation, the question is one determinable only by the general principles of law. Further than that, it is a question in which the nation as a whole is interested." B. & O. R. R. Co. v. Baugh, 149 U. S. 368. See Methorn v. S. I. L. Co., 66 Fed. Rep. 113.

That they were summary and severe, and had been used for purposes of oppression, is inferable from the fact that one chapter of Magna Charta treats of their restraint. It declares: 'We or our bailiffs shall not seize any land or rent for any debt as long as the present goods and chattels of the debtor do suffice to pay the debt, and the debtor himself be ready to satisfy therefor. Neither shall the pledges of the debtor be distrained as long as the principal debtor is sufficient for the payment of the debt, and if the principal debtor fail in payment of the debt, having nothing wherewith to pay, or will not pay where he is able, the pledges shall answer for the debt. And if they will, they shall have the lands and rents of the debtor until they be satisfied of the debt which they before paid for him, except that the principal debtor can show himself to be acquitted against the said sureties.'

"By the common law the body, lands and goods of the king's debtor were liable to be levied on to obtain payment. In conformity with the above provision of Magna Charta, a conditional writ was framed, commanding the sheriff to inquire of the goods and chattels of the debtor, and, if they were insufficient, then to extend on the lands. 3 Co. 12*b;* Com. Dig., Debt, G. 2; 2 Inst. 19. But it is said that since the statute 33 Hen. VIII., chapter 39, the practice has been to issue the writ in an absolute form, without requiring any previous inquisition as to the goods. Gilbert's Exch. 127."[1]

Sec. 208. *Constitutional Interpretations by the Common Law.* Mr. Justice Matthews, in *Smith v. Alabama*, says: "There is, however, one clear exception to the statement that there is no national common law. The interpretation of the constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English law, and are to be read in the light of its history. The code of constitutional and statutory construction which, therefore, is gradually formed by the judgments of this court, in the application of the constitution and the laws and treaties made in pursuance thereof, has for its basis so much of the common law as may be implied in the subject, and constitutes a common law resting on national authority. *Moore v. United States*, 91 U. S. 270."[2]

[1] Murray's Lessee v. Hoboken L. & Imp. Co., 18 How. 227.

[2] Smith v. Alabama, 124 U. S. 478.

Sec. 209. *Judge-Made Law.*— Very frequently the expression "judge-made law" is used in condemnation of all utterances from the bench recognizing and applying rules of law which have never before been announced in the jurisdiction within which the court is sitting.

Sufficient has been said in reference to the common law and the law merchant to indicate that there is a field of judicial reasoning and a function of the judiciary to give sanction in specific cases to the rules of reason and universal customs which obtain among men.

In that sense, and within the limits indicated, judge-made law is not only justifiable, but it is the imperative duty of the court to announce it.

An eminent member of the New York bar very truly says: "Especially is this so under our Anglo-American system of common law. The law is what the court of last resort declares it to be. What the court declares the law to be is frequently determined by the reasoning of counsel. This is particularly the case where a novel question is presented — what we call a case of 'first impression.'" He says: "Of course the legislature does exercise its law-making powers from time to time, but generally in a way to make us thankful that it does not exercise these powers more frequently."[1]

Most of the judicial utterances in the domain of the common law, embracing the law merchant, maritime and admiralty law and equity, would fall within the condemnation of judge-made law were there no distinction made between what is properly termed judge-made law and the application of the rules of reason and justice to cases which must continually be submitted to the courts for their decision.

Sec. 210. *Improper Judicial Legislation.*— When by this process of judicial reasoning rules of conduct have been once thoroughly established in the jurisprudence of a state or a nation, the function of the judiciary is performed, and these rules become a part of the law of the land.

Another case, arising after such rules were so established, is not a new case or a case of novel impression. Especially is this the case where the question involved is a question of property rights or a question of general importance, like a question

[1] Address of Hon. Wm. L. Hornblower.

of commercial law, rules of damages, liabilities of master and servant, liabilities of carriers, and the like.

The true rule has frequently been announced. Thus, Judge Cooley says: "When a rule has once been deliberately adopted and declared, it ought not to be disturbed unless by a court of appeal or review, and never by the same court, unless for very urgent reasons and upon a clear manifestation of error; and if the practice were otherwise, it would be leaving us in a perplexing uncertainty as to the law."[1] "A precedent flatly unreasonable and unjust may be followed if it has been for a long period acquiesced in, or if it has become a rule of property, so that titles have been acquired in reliance upon it, and vested rights will be disturbed by overruling it. In such a case it will be proper to leave the correction of the error to the legislature, which can so shape its action as to make it prospective only, and thus prevent the injurious consequences that must follow from judicially declaring the previous decision unfounded."[2]

Sec. 211. *Illustrations.— Priestly v. Fowler.*[3] In 1837 the English court deduced the rule, *based upon public policy*, that where fellow-servants were habitually working together, there should be no recovery for an injury by one servant to the other, when the proximate cause of the injury was the negligence of the fellow-servant. In this manner originated the fellow-servant doctrine, with its many refinements and exceptions.

When the court was called upon to hear and determine this case they had no announced rule to guide them, and in that case they very properly formulated the rule which seemed most reasonable and just.

Had a case arisen soon afterwards, the court might have been free to hear arguments questioning the justness of the rule, and might very properly have reversed their decision, without being charged with offensive judicial legislation; but after a uniform course of applying the rule for many years, the more proper

[1] 1 Cooley's Blk. 69, note 4, citing 1 Kent, 475. See Nelson v. Allen, 1 Yerg. 376; Emerson v. Atwater, 7 Mich. 12; Sparrow v. Kingman, 1 N. Y. 260; Palmer v. Lawrence, 5 N. Y. 389; Boon v. Bowers, 30 Miss. 246.

[2] Emerson v. Atwater, 7 Mich. 12; Pratt v. Brown, 3 Wis. 603; Day v Munson, 14 Ohio St. 488; Taylor v. French, 19 Vt. 49; Bellows v. Parsons, 13 N. H. 256; Hannel v. Smith, 15 Ohio, 134; Sparrow v. Kingman, 1 N. Y. 260; Ram on Legal Judgment, ch. 14; 7 Robinson's Practice, 1 *et seq.*

[3] 3 Mees. & W. 1.

course would be to recommend the legislature to change the rule.

The Comparative Degrees of Negligence Rule in Illinois.— In the celebrated case of *Coggs v. Bernard*,[1] which was a case involving the law of bailments, Lord Holt had recourse to the Roman law in his reasoning upon the subject of negligence, and in that case he formulated the degrees of negligence, *slight*, *ordinary*, and *gross*. From this decision, in connection with reason and logic, there grew up a practice of comparing the negligence of the plaintiff with that of the defendant, and if plaintiff's negligence was slight as compared with the negligence of the defendant, which was gross, then the plaintiff might recover, notwithstanding his own negligence contributed to his injury.

The justness of the rule was frequently doubted and its application denied in some jurisdictions, as we will have occasion to fully notice in the proper place,[2] being here concerned only in the use of this subject as an illustration of what is termed improper judicial legislation.

The rule of comparative negligence was adopted for the first time in Illinois many years ago,[3] and the rule was very frequently applied during a long series of years,[4] and became the settled rule of law.

Notwithstanding it is within the province of the courts of Illinois to recommend legislation to the general assembly, and indicate wherein the law might be improved by change, the court of Illinois finally announced its intention to depart from this long established rule.[5]

The rule involved in these Illinois cases is not a rule of property, neither was the right which was established in one case necessarily the basis for a claim of a right arising *ex delicto* in another instance, and so these cases may be claimed not to fall within the condemnation before spoken of; but the rule was quite as much a rule of general and universal interest as that

[1] Lord Raym. 909; 1 Sm. L. C. 369.

[2] See Index, title Negligence.

[3] G. & C. U. Ry. Co. v. Jacobs, 20 Ill. 478.

[4] C., B. & Q. Ry. Co. v. Hazzard, 26 Ill. 373; C. & A. R. R. v. Gretzner, 46 Ill. 75; C., B. & Q. Ry. Co. v. Johnson, 103 Ill. 512; W. S. Elev. Ry. Co. v. Stickney, 150 Ill. 362.

[5] City of Lanark v. Dougherty, 153 Ill. 163.

spoken of in *B. & O. R. R. Co. v. Baugh*, above referred to. If important rules, long established and universally applied, are to be changed and departed from according to the notion of policy and justice which may obtain among the members of the bench at a particular time, there can be no stability in the law. A much better method would be for the judges, in such cases, to recommend that the legislature change the rule, instead of indulging in what may justly be termed judicial legislation. A rule thus announced differs in no way from the praetor's edict in the Roman law.

Chancery Courts' Great Development of Law.— Equity has been from the earliest times a part of the common law, and the separation of the courts into two branches, *i. e.*, law and chancery, does not affect the question. It will be necessary in another place to examine the nature of equity and the rise of chancery, and it will suffice here merely to mention that the chancery courts have been constantly creating a formal system of law in the manner above pointed out.[1]

Sec. 212. *Martial Law.*— Another system of law which may prevail over the whole extent of country embraced within the national domain, or which may by proper authority be extended over only a portion of that domain, is what is called martial law.

Martial law displaces the civil law and places the territory embraced within the declaration of martial law under the rules of military government, which, in effect, amount to but little less than the arbitrary rules of the officers administering the government.

Martial law must, as a matter of course, be a last extremity. It should be the *dernier resort* of the government to protect and preserve the constitution.

Instances of its application in the United States have arisen, and a careful investigation of the litigated and adjudicated cases which have grown out of the exercise of the power of declaring martial law shows the dangerous nature of its application; and it must be admitted that during the time of our recent civil war, citizens were subjected to a deprivation of their liberty and unwarranted injustice and outrage under the guise of martial law. This, however, only illustrates that there

[1] See 2 Wilson's Works, 134–36.

is a proper and improper use of all and any of the instruments of government.[1]

Sec. 213. *Military Law* differs essentially from martial law, with which the student is apt to confuse it. Military law consists of the rules and articles of war, statutory provisions and customs which govern those engaged in the military and naval service. It obtains equally in time of peace and time of war.[2]

Courts-martial are held by virtue of military law, and, within their jurisdiction, the findings and judgments of such courts are a part of the law of the land, and are not subject to review in civil courts.[3]

Such rules and regulations governing the army and the navy, and all the members and officers thereof, are a part of our jurisprudence, and as such a part of the government of the land.[4]

Sec. 214. *Ecclesiastical and Canon Law.*[5]— While the canon law is no part of American municipal law, it may be affirmed that in the same way that the customs of merchants were recognized and respected by the civil courts of England, so the customs and rules of the church will govern in matters purely spiritual;[6] while as to civil matters and property rights growing out of membership of the church, the civil courts maintain jurisdiction to protect and preserve the rights of members.[7]

These systems are not generally regarded as suitable to this country, and for that reason are not held to be a part of the common law adopted by the states.[8]

[1] Ex parte Milligan, 4 Wall. 2–143. See also Luther v. Borden, 7 How. 1, and notes. Johnson v. Jones, 44 Ill. 142, is one of the most instructive cases upon this subject. In that case Johnson, a resident of a district not engaged in the rebellion, and which had not been declared to be subjected to martial law, was arrested, transported from his home to various prisons, denied the right of trial or hearing, and given no means of communication with home or friends. Finally, after being released without arraignment or hearing, he vindicated his right in the civil courts of justice. The case is one not widely known, but is extremely interesting and instructive on the subject of martial law.

[2] Lawyers' Co-operative Edition of U. S. Sup. Ct. Rep.; Luther v. Borden, 7 How. 1, and notes.

[3] Johnson v. Sayre, 158 U. S. 109.

[4] Closson v. Armes (Ct. of Appeal, Dist. of Columbia), 53 Alb. Law Jour. 40.

[5] See Middleton v. Crofts, 2 Atk. 650.

[6] Watson v. Jones, 3 Wall. 679.

[7] Chase v. Cheney, 58 Ill. 509; 11 Am. Rep. 95; Note by Hon. Melville M. Fuller in 10 Am. Law Reg. 314.

[8] Jones v. Jones, 90 Hun, 414; Burtes v. Burtes, Hopk. Ch. 557.

CHAPTER XI.

THE NATIONAL GOVERNMENT.

"In Europe the sovereignty is generally ascribed to the prince; here, it rests with the people; there, the sovereign actually administers the government; here, never in a single instance. Our governors are the agents of the people, and at the most stand in the same relation to their sovereign in which regents in Europe stand to their sovereigns. Their princes have personal powers, dignities and pre-eminences, our rulers have none but official; nor do they partake in the sovereignty otherwise, or in any other capacity, than as private citizens."— Jay, Chief Justice, 2 Dall. 472.

Sec. 215. *The Creation of Government.*— We have heretofore noticed the distinction between the people and the government, and that society may antedate indefinitely any established, recognized rules governing the political affairs, or what we call a constitution.

Government, or the government, is the term by which we designate the aggregate agencies or officers in whose hands the administration of public affairs is intrusted.[1] In many, if not

[1] "The sovereignty or supreme power in every state resides ultimately in the body of the people. Blackstone supposes the *jura summi imperii*, or the right of sovereignty, to reside in those hands in which the exercise of the power of making laws is placed. Our simple and more reasonable idea is, that the government is a mere agency established by the people for the exercise of those powers which reside in them. The powers of government are *not*, in strictness, *granted*, but *delegated* powers. As all delegated powers are, they are trust powers, and may be revoked. It results that no portion of sovereignty resides in government. A man makes no grant of his estate when he constitutes an attorney to manage it. The sovereignty — the *jura summi imperii* — resides in the body of the state or nation by whose consent, expressed or implied, a form of government was at one time established as the organ to make known its sovereign will. This sovereignty is indivisible, and can be lost only in one way — by a voluntary or forced subjection to, or merger with, some other state or people." "The constitutions of our American republics have always been written. The charters which prescribe the forms of government were so. Those adopted by the several states at the period of the Revolution were all so. [This is an error.— *Ed.*] They not only organized the several departments,— the legislative, executive, and judicial,— but by various bills of rights, as well as express restrictions, prescribed limitations to the power of the government." Sharswood's Blk. Com., vol. 1, p. *49, note 12.

most, of the nations, the political organization of society is a slow growth, and evidence of many of the most important and fundamental rules rests only in tradition or immemorial custom; but however the organization is brought about, the result is the same, although not the same in its outward manifestation or form.

Government is organized and established by a constitution. Society is not formed in the same way. Society establishes the constitution; it creates the government.[1]

The form and relation to each other of the parts of a government, and the rules which regulate the various administrative officers, is called a constitution.

Constitutions come into existence by the mutual convention or agreement of the people. The legislation conducted by constitutional conventions is called political legislation, to distinguish it from the ordinary legislation of the general assemblies of the states or congress of the United States.

A constitution is a law differing from other parts of the municipal law only in its objects and the manner of its adoption.

Those fundamental regulations which determine the manner in which public authority is to be executed, however, constitute the constitution of the state or nation.[2] In it is seen the

[1] "Organization implies a relation on the part of each constituent group (or component element of the community) with every other group and with the whole, as an integral body. This relation is of such a nature that each group contributes to the efficiency of every other group and of the whole; and the whole, strengthened by such general contribution, increases the efficiency of every separate group. Government implies the conscious superintendence of the fortunes of the community, both present and future, and involves the manipulation of the physical strength latent in all parts of the community, for the purposes both of controlling recalcitrant members of the community and of protecting the commnity from assailants from without. The main instrumentality by which government operates is law, or bodies of general rules declaring the acts which members of the community are to do and not to do in order to facilitate the accomplishment of the general purposes for which the government exists." Amos' Sci. of Law, p. 122.

[2] "By the constitution of a commonwealth is meant primarily its make-up as a political organism, that special adjustment of instrumentalities, powers and functions by which its form and operation are determined.

"This is a constitution considered as the outcome of social and political forces in history, as an organic growth, or, as I shall sometimes describe it, as a fact.

"Besides this, the term 'consti-

manner in which the nation acts as a body politic; what provision the people make for the administration of the law; the rights and duties of magistrates.

Vattel says: "This constitution is in fact nothing more than the establishment of the order in which a nation proposes to labor in common for obtaining those advantages with a view to which the political society was established."[1]

Sec. 216. *What a Constitution Embraces.*— The existence of written constitutions which obtrude themselves upon the view of the students of our legal system tends to engender the idea that the constitution of a state or nation consists entirely of this written act which emanates from the people through a constitutional convention — that it is the whole of the constitution.

This view should not be allowed to exclude an important portion of the constitution of a people, which, however silently it may transpire, or how infrequently it may obtrude itself upon the public view, is nevertheless an essential part of the constitution and the law,[2]— for example, the English constitution. While there are many purely constitutional documents

tution' has a secondary meaning, which is perhaps more common than the one given, involving equally the conception of a system of political instrumentalities, powers and functions, specially adjusted for the purposes of government, but conceived of not as an organic growth, but as a systematic description of such a growth, in the shape of formulæ, addressed to the understanding. In other words, a constitution in a secondary sense is the result of an attempt to represent in technical language some particular constitution existing as an organic growth. This is a constitution considered as an instrument of evidence. The constitution of the United States is twofold — written and unwritten,— the constitution of the people, and the constitution of the government.

"*The written constitution* is simply a law ordained by the nation or people instituting and organizing the government.

"*The unwritten constitution* is the real or actual constitution of the people as a state or sovereign community, and constituting them such or such a state. It is providential; not made by the nation, but born with it. The written constitution is made and ordained by the sovereign power, and presupposes that power as already existing and constituted." The American Republic, p. 218; Jameson on Const. Conv., p. 67.

[1] Vat., Law of Nat., ch. 3, sec. 27.

[2] Judge Cooley says: "In a much qualified and very imperfect sense every state may be said to possess a constitution; that is to say, some leading principle has prevailed in the administration of its government until it has become an understood part of its system, to which obedience is expected and habitually yielded." 1 Bouv. Inst. 9; Duer, Const. Juris. 26. "By the constitution of a state, I mean the body of those written or unwritten funda-

affecting and regulating the affairs of the English nation, a large part of the constitution of England consists in immemorial customs or general usages of the British people.

Nor are we wanting in examples of the same kind in the United States, even after the establishment of the present constitution. "The constitution of Connecticut," says Justice Paterson (speaking in 1798), "is made up of *usages*, and it appears that its legislatures have from the beginning exercised the power of granting new trials." Again he says: "For if the power thus exercised comes more properly within the description of a judicial than a legislative power, and if by usage or the constitution, which in Connecticut are synonymous terms, the legislature of that state acted in both capacities, then, in the case now before us, it would be fair to consider the awarding of a new trial as an act emanating from the judiciary side of the department."[1]

Mr. Justice Iredell, in the same case, says: "From the best information to be collected relative to the constitution of Connecticut, it appears that the legislature of that state has been in the uniform, uninterrupted habit of exercising a general superintending power over its courts of law by granting new trials."[2]

Sec. 217. *The Delegation of Official Power.*— The only means by which power can be delegated from the people to officers or agencies must be through the means of their anciently established customs or in their written constitutions.

Thus, Mr. Justice Paterson says, in a very early case: "What is a constitution? It is the form of government delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the legislature, and can be revoked or altered only by the authority that made it. The life-giving principle and the death-doing stroke must proceed from the same hand. What

mental laws which regulate the most important rights of the higher magistrates and the most essential privileges of the subjects." Mackintosh on the Study of the Law of Nature and Nations, quoted in Cooley's Const. Lim., p. 4.

[1] Calder v. Bull, 3 Dall. 386.

[2] Ibid.

are legislatures? Creatures of the constitution; they owe their existence to the constitution; they derive their powers from the constitution. It is their commission; and therefore all their acts must be conformable to it, or else they will be void. The constitution is the work or the will of the people themselves in their original, sovereign and unlimited capacity. Law is the work or will of the legislature in their derivative and subordinate capacity. The one is the work of the creator, and the other the work of the creature. The constitution fixes limits to the exercise of legislative authority, and prescribes the orbit within which it must move. In short, gentlemen, the constitution is the sun of the political system, around which all legislative, executive and judicial bodies must revolve."[1]

Sec. 218. *Constitution Does Not Create Rights of the People.* The constitution is not the source of the liberty of the people, although it constitutes the measure and safeguard of it.[2] It however constitutes the only limitation upon the power of the people and the method of exercising it,[3] and is the only warrant of attorney or authority by which any person can justify the exercise of governmental power.[4]

The Government Personified.— In the popular speech, government, or the government, is personified. The habit is to speak of the government as having done this or accomplished that, and in a certain way it may be said that *the government acts*, especially should a case occur where the co-operation of all departments is invoked. This, however, can seldom be the case. Ordinarily speaking, the government acts by or through one department at a time.

Sec. 219. *Personality of Magistrates.*— The habit of thus personifying the government would correspond with the actual fact in a nation where the sovereignty actually resided in the prince, but with us the only outward manifestation of government is through the acts and declarations of magistrates.

[1] Van Horne v. Dorrance, 2 Dall. 308.

[2] People v. Hurlbut, 24 Mich. 87.

[3] In re Duncan, 139 U. S. 449.

[4] "The government of the United States can claim no powers which are not granted to it by the constitution." Story, J., in Martin v. Hunter's Lessee, 1 Wheat. 326. Again he says: "The' powers *actually given* must be such as are *expressly* given, or given by necessary implication." Id. See Ex parte Yarborough, 110 U. S. 651-658.

Throughout the course of the preceding portions of the work magistrates have been spoken of as persons. The lay reader or the novice will give ready assent to the proposition that all public officers are persons; but in many, if not most, instances, this assent will be based upon the conception of the natural capacity of the incumbent rather than an appreciation of the legal fact that the officer, in contemplation of law, is what we term an artificial person.

One who had perused and become familiar with the first book of Blackstone's Commentaries would be led naturally to inquire whether these magistrates were then regarded as artificial persons, bodies politic or corporations, for the reason that Blackstone treats all artificial persons as corporations. He treats the king as a great corporation sole, and treats parliament, composed of the king, lords and commons, as the great body politic or corporate of the nation.

It requires but a little reflection to perceive that the magistracy which is inherent in a person or body differs from the magistracy which is delegated, and that there is a difference between the idea of public office in the United States and the conception of the same magistrates, under the former conception at least of magistracy in England, as expressed by Blackstone in his Commentaries.

Sec. 220. *Creation of Magistrates is Political Legislation.*— Those authors who advocate the distribution of the *corpus juris* into two great bodies, the one designated public law and the other private law, treat the relation of magistrate and people as falling under this distinct branch of the law designated public.

For reasons which have heretofore been given, the form of this treatise is not dominated by any such classification or division.

Of this distinction Austin says: "Briefly stated, the distinction between *public* and *private* law is this: The former regards persons as bearing political characters. The latter regards persons who have no political characters, and persons also who have them as bearing different characters. In a word, public law is the law of political *status;* and, instead of standing opposed to the body of the law, is a branch of one of its depart-

ments, namely, of the law of persons, in which light it was justly considered by Hale, and after Hale, by Blackstone."[1]

In explaining the legal significance of the word "person" it appeared that one man in legal contemplation might be invested by the law, or by virtue of his own acts in conjunction with the law, with several different capacities or aspects, and perform several functions differing in their character,[2] and in that connection was invoked the expression taken from the *corpus juris*, "*unus homo sustinet plures personas.*"

Sec. 221. *Magistracy Distinguished from Corporate Capacity.*— English jurists generally agree in treating magistrates with the law of persons, but they also seem to be universally agreed upon distinguishing between the body corporate and politic, even though it be a single individual exercising public function or office, and a corporation, strictly so called. Thus, Sir Frederick Pollock says: "The greatest of artificial persons, politically speaking, is the state. But it depends on the legal institutions and forms of every commonwealth whether and how far the state or its titular head is officially treated as an artificial person. In England we now say the crown is a corporation; it was certainly not so when the king's peace died with him, and 'every man that could forthwith robbed another.'"[3]

The peculiar thing about the treatment of magistrates by Sir William Blackstone is in classifying them as *natural persons*, thus losing sight of the idea which should pervade and be made prominent in every treatment of the law, namely, the derivative character of the magistracy as contrasted with the personal right which men have in those things which are the subject of ownership.

Blackstone's view was not altogether unjustifiable according to his views of sovereignty in English law, and resulted from the legal notion which obtained in English jurisprudence, that in a great many instances magistracy was a personal right vested in a natural person;[4] but the arrangement of the law, as indicated by Blackstone's analysis, could only result from losing

[1] 1 Austin's Jur. 416.
[2] *Ante*, sec. 85.
[3] First Book Jur. 113.
[4] Notably the right of suffrage and the sovereignty and prerogative of the king. Ashby v. White, Ld. Ray. 938.

sight of the distinction between the individual man and the artificial attribute (*personam*) with which the law clothes him.

Chief among these artificial capacities conferred by law is the capacity or duty of magistracy, which we, in American law, commonly speak of as public officers.[1]

Official capacity is always, in our law at least, artificial.

The office is always created by the people for their convenience in the administration of public affairs and for the protection of private rights. The powers of officers are always derivative, and partake of the nature of an agency, trust or employment.[2] The personality which appears in the exercise of official power is always artificial; that is, it exists apart from the individual and continues in perpetual succession.[3]

The similarity between the public office and a corporation is much closer than the student of our law would be led to be-

[1] See Mechem, Pub. Off., § 1.

[2] Mechem, Pub. Off., § 4.

[3] There was no uncertainty in the civil-law treatment of the matter. The idea is very concisely explained by Ortolon, from whom we have before quoted: "*The people* (*populus*), the republic (*republica*), the emperor, not in an individual but in a public character, were abstract persons, which only existed by the creation of the law, but which might, as much as an individual, be the active or passive subject of the law. So, also, were *the magistrates*, the *municipia*, the *curiæ* of the different towns, the *ærarium* or exchequer of the people, to which was afterwards added that of the prince, the *fiscus*, which ended by absorbing the *ærarium*, the *hæreditas jacens*, that is, the vacant inheritance before it had been entered on by the heir, and which, among the Romans up to the time when it was realized, sustained the *persona* of the deceased (*personan defuncti sustinet*); the *peculium*, which, according to the expression of Papirius Fronto, resembled a man; the temples and the different colleges of pagan pontiffs; the churches and various orders of the Christian clergy which supplanted them; the convents, the hospitals and the religious endowments; in a word, all the communities, universities, colleges, corporations (*universitas, corpus, collegium*) formed so many abstract *personæ*, whose existence was purely legal, but who, like physical persons, might be the active or passive subjects of rights.

"The foundation of universities, colleges and corporations in Roman law was strictly to the *jus publicum;* no such body could be formed or dissolved at the mere will of the parties constituting it. No corporation could of its own free will establish itself and acquire a *persona* in the state. Every corporation had to be specially authorized by a *lex*, by a *senatusconsultum*, or by an imperial constitution. They required, besides, the conjoint action of three persons at least for their institution, but not for their continuation. The members were called *sodales.*

"The legal *status* of the *fiscus* was a subject to which the jurists devoted much attention." Ortolon's History of R. L. 605–6.

lieve by a perusal of any of the elementary works obtainable.[1] Public officers or magistracy and corporations are almost never treated in such works in the same connection, or in such a way as to contrast their dissimilarities and to show their resemblances.[2]

Sec. 222. *Attributes of Corporations.*— The first attribute of a corporation is the attribute of artificial personality, whereby a legal entity is given to a body of men. The second capacity, or attribute, is that of perpetual succession, by which, notwithstanding the change in individuals, the corporation itself continues its existence, and all of the rights are held in perpetual succession, irrespective of the names or individuals who may compose the corporation.

Illustrations.— Thus, in an early case in Massachusetts, the court held that when a minister of a town or parish is seized of lands in the right of the town, which is the case in all parsonage lands granted for use of the ministry, the minister for this purpose is a sole corporation, and holds the same to himself and his successors.[3]

[1] Walker treats them as public persons, but does not indicate whether as natural or artificial. Page 59.

[2] Blackstone treats the king as a body politic, and also the parliament, but the subject of corporations, as such, is not mentioned by him until he takes it up under the title "Private Corporations." The whole of what we call Public Corporations is treated by him under the title of "Private Persons Standing in Public Relations."

Mr. Thompson, in his very comprehensive commentaries on corporations, however, notices the very close analogy between public officers and corporations sole. He says: "The conception of a corporation composed of a single person seems to be passing out of the American law. A minister seised of parsonage lands in the right of the parish has been regarded as a corporation sole for the purpose of holding such lands so that his title should pass to his successors in office; and he notices that a supervisor of a town is *sub modo* a sole corporation. In England this character has been ascribed to the king, 'to prevent, in general, the possibility of an *interregnum*, or vacancy of the throne, and to preserve the possession of the crown entire. On a similar conception this quality has been ascribed to the governor of a state. *But it is not perceived why the same quality might not, upon equal grounds, be ascribed to any public official.*" 1 Thompson's Com., p. 8. In this he is quite correct, and the distinction between a pure corporation, public or private, must be based on other grounds than the idea of perpetual succession.

[3] "By the provincial statute of 28 Geo. II., c. 9, the ministers of the several Protestant churches were made corporations, capable of taking in succession any parsonage lands granted to the minister and his successors, or to the use of the ministry. And no

In case of a vacancy in office, the town or parish is entitled to custody of the same, and for that purpose may enter and take the profits. The minister by law holds to him and his successor all the estates and rights which he holds as minister.[1]

The supreme court of New York had occasion to examine the question in reference to a municipal officer,[2] and in that case they distinguished between officers who could not take or hold in perpetual succession and officers who could so hold, and in this manner obviated the objection made by Kyd in his work on corporations and in Blackstone's Commentaries, that such persons were not corporations because they did not hold in succession. In the case under consideration (it was a suit upon a bond given to one officer by name and sued upon in the name of his successor), it was contended by the defense that this could not be allowed. The court says: "It will be admitted that this action cannot be sustained in the name of the plaintiff unless the statute has expressly conferred the right, or the power to sue is incident to the office, on the principle that, *pro tanto*, he is endued with a corporate capacity. The former is not pretended; the latter, I think, is supported by the decisions of this court. The supervisor of a town is elected annually and

alienation made by a minister of any parsonage lands, holden by succession, shall be valid any longer than he shall continue minister; unless, being a minister of some particular town, district or precinct, such alienation be made with the consent of such town, district or precinct; or, being a minister of some Episcopal church, the alienation be made with the consent of the vestry.

"The provisions of this statute, on this subject, are re-enacted by the statute of February 20, 1786, on which rests the right of ministers to hold parsonage lands in succession as sole corporations, and also the restriction of the alienation of their parsonages.

"Ministers being thus made sole corporations, their rights and remedies are clearly defined by the common law. They stand on the same foundation, as to their parsonages, with all other sole corporations holding lands in succession at common law.

"The minister holding parsonage lands in fee-simple holds them in right of his parish or church, and therefore, on his resignation, deprivation or death, the fee is in abeyance until there be a successor.

"During the vacancy the parish or church have the custody and are entitled to the profits of the parsonage." Weston v. Hunt, 2 Mass. 500.

[1] First Parish v. Dunning, 7 Mass. 445. Compare this with 1 Blackstone, 377. It will be seen that the fact that the minister *did not hold in succession* is the reason why Blackstone denies to him the quality and capacity of a corporation.

[2] The Massachusetts case is of an *ecclesiastical* municipal officer. There is no real distinction *in principle*.

holds his office until a successor is appointed. He has various duties to perform as the representative of the town; he has other duties relating to the county when acting as one of the board of supervisors. In *Jackson v. Hartwell*, 8 Johns. 425, the court considered the supervisors of a county a corporation for special purposes and with special powers only, and consequently, in those particulars, having the capacities incident to a corporation. The same principle applies to the supervisor of a town in the discharge of the duties of his office. He acts not in his natural capacity, but in his public official character; and may be considered a corporation, and having the capacity of suing and being sued, in right of the office he holds, so far as his trust is concerned. . . . They were considered as the public agents and trustees of the town in respect to their poor. It was held that they must necessarily, without express authority from the legislature, possess a capacity to sue commensurate with their public trusts and duties; that when a public office is instituted by the legislature, an implied authority is conferred on the officer to bring all suits, as incident to his office, which the proper and faithful discharge of its duties require. It was also held that although the statute gives the right to sue in certain cases, it by no means proves that the power would not have existed independently of the statute. Instances of *quasi*-corporations are stated by Kyd (pp. 9–19) which have a strong analogy to the present case. In *Denton v. Jackson*, 2 Johns. Ch. 325, the chancellor considered that persons may have corporate powers *sub modo*, and for certain specified purposes only; and that the several towns in this state are legal communities or bodies politic for certain purposes. . . . I am aware that questions, perhaps, of difficulty may arise on many points relating to the extent and exercise of powers by persons who are only *sub modo* a corporation. The remedy is the same as that given to a corporate body."[1]

Savage, C. J., in this case states that the true reason for the distinction between the case of the bishop of the church and the chamberlain of the city of London is not the custom from which the one derives his capacity as a corporation, but from

[1] Jansen v. Ostrander, 1 Cow. (N. Y.) 678.

the fact that the former takes obligations in his private capacity and the latter in his corporate capacity.[1]

Sec. 223. *The Public Corporation Sole is a Public Officer.*— It will be observed that in most if not all of the cases, all the instances of corporations sole mentioned, the corporation is in reality exercising a public function, or at least a *quasi*-public function, notably in cases of ecclesiastical office like the bishop, although it is said that the bishop holds in his private capacity. In the Massachusetts case above mentioned the church officer was held not to hold in a private capacity, and consequently to hold in perpetual succession.

These corporations sole are not obsolete in the United States, and it will not do to ignore them simply because they are not frequently met with.

In *Westcott v. Fargo*, a case arising in New York, and decided in 1875, a public corporation sole was recognized to exist.[2]

If there was not some very essential distinction between individuals exercising the artificial attributes of magistracy and an individual exercising the franchises of a pure corporation, there would be no legal distinction between a public magistrate

[1] "It is, however, objected on the part of the defendants that the supervisor, if endued with corporate powers, is a corporation sole, which cannot take goods and chattels in succession; that they do not on his death go to the successor, but the personal representatives; and they cite Kyd on Corporations, Intro., p. 31; Co. Litt. 46*b*, where it is said: 'If a lease for years be made to a bishop and his successors, yet his executors and administrators shall have it *in auter droit;* for, regularly, no chattel shall go in succession, in case of a sole corporation, no more than, if a lease be made to a man and his heirs, it can go to his heirs.' The same doctrine is laid down in Fulwood's Case (4 Co. 65), where, however, the court held a recognizance good to the chamberlain of London and his successors, upon custom; for he was a corporation by custom; and the same custom which created him made him a corporation in succession to this special purpose; but that a bishop, parson, etc., can only take an obligation in their private, and not in their corporate, capacity.

"Corporations sole are of two kinds: the one when the person has a corporate capacity *for his own benefit;* the other when he acts as trustee for the benefit of others. Of the former kind, Kyd instances the king, bishops, parsons, etc.; of the other, the most familiar instance, says the same author, is the chamberlain of the city of London, who may take a recognizance to himself and successors, in trust for the orphans." Jansen v. Ostrander, 1 Cow. (N. Y.) 684–685*a*. See also Governor v. Allen, 8 Humph. 176.

[2] Westcott v. Fargo, 61 N. Y. 542. See also Boston v. B. & A. Ry. Co., 128 Mass. 446.

and a corporation proper, excepting in the nature of *the franchise* and the orbit in which the powers were exercised. One would be a public corporation and the other private.

Sec. 224. *The Real Distinction Between Corporations and Magistrates.*— The real distinction between corporations, properly so called, and public officers, whether consisting of a single individual or of an aggregate body, consists in the nature of the right to possess an artificial capacity, or, in other words, there exists in one case *a franchise*, properly so termed, while in the other there is a mere agency or trusteeship, in no manner resembling property or a vested right. It is a capacity *in auter droit*, as the legal phrase goes.[1]

One of the essential attributes of corporate capacity is the possession of the franchise, and this franchise belongs to the person to whom it is given *in his own right* as a vested property right. Thus, we say a corporation is itself a franchise belonging to the members of the corporation.

This franchise is obtained by a charter. It can be obtained in no other way. In America this charter is held to be a contract and the franchise vested property rights.

The nature of this franchise and the distinction between the franchises which belong to the members and the corporate franchise of the corporation will be treated under the subject of corporations. We here merely mention it for the purpose of distinguishing between and making prominent the distinguishing feature between public magistracy and corporate franchises.

The elective franchise, so called, is quite different in its nature and is not of the same character with the right of suffrage under the English law, and the use of the expression need not confuse the student in the matter of the distinction just drawn.

The reason for the dearth of corporations sole, properly so termed, is quite obvious. The franchise to be a corporation is a special privilege, carrying with it certain capacities and immunities from liability not possessed by other individuals.

There is no legal disability, probably, in the legislature to invest one person with the same capacity for doing business which might be conferred upon three; but in the matter of public policy and utility there exist obvious objections to con-

[1] Jansen v. Ostrander, 1 Cow. (N. Y.) 670–678.

ferring upon a single individual in his private personal capacity the peculiar privilege of having perpetual succession and other special franchises.[1]

It might even come within the inhibition of peculiar privileges to clothe him with a franchise or exemption which others, his neighbors, were not generally given;[2] and, if a general law were passed which enabled all persons to become corporations in the eye of the law, it would not be any longer a privilege.

So far as a public officer is concerned, it is a useless form to designate a public officer a corporation when his title as officer protects him in the performance of his public acts and agency, and furnishes him immunity against liability in his private individual capacity.[3]

[1] Home Ins. Co. v. New York, 134 U. S. 594. "By the term 'corporate franchise or business,' as here used, we understand is meant (not referring to corporations sole, which are not usually created for commercial business) the right or privilege given by the state to two or more persons of being a corporation, that is, of doing business in a corporate capacity, and not the privilege or franchise which, when incorporated, the company may exercise. The right or privilege to be a corporation, or to do business as such body, is one generally deemed of value to the corporators or it would not be sought in such numbers as at present. It is a right or privilege by which several individuals may unite themselves under a common name and act as a single person, with a succession of members, without dissolution or suspension of business and with a limited individual liability."

[2] See Cooley, Const. Lim. (6th ed.), 484.

[3] Mississippi v. Johnson, 4 Wall. 475.

CHAPTER XII.

PARTITION OF THE POWERS OF GOVERNMENT.

Sec. 225. *General Principles.*— The principles underlying the distribution of public functions between different bodies did not originate in the United States, nor is it a modern invention. Its practical application, however, began in England and reached its present approximate perfection for the first time in the United States.

A great fundamental difference between the constitution of Great Britain and that of the United States renders this separation, co-ordination and interdependence of the several branches of government more naturally and easily accomplished in the United States than in England.

Professor Bryce says: "The British parliament had always been, was then (time of the American Revolution), and remains now, a sovereign and *constituent* assembly. It can make and unmake any and every law, change the form of government or the succession to the crown, interfere with the course of justice, extinguish the most sacred private rights of the citizens. Between it and the people at large there is no legal distinction, because the whole plenitude of the people's rights and powers resides in it, just as if the whole nation were present within the chamber where it sits. In point of legal theory it is the nation, being the historical successor of the Folk Moot of our Teutonic forefathers. Both practically and legally it is to-day the only and the sufficient depository of the authority of the nation, and is therefore, within the sphere of law, irresponsible and omnipotent. . . .

"In the American system there exists no such body. Not merely congress alone, but also congress and the president conjoined, are subject to the constitution, and cannot move a step outside the circle which the constitution has drawn around them. . . . The only power which is ultimately sovereign, as the British parliament is always and directly sovereign, is the people of the states, acting in the manner prescribed by the

constitution, and capable in that manner of passing any law whatever in the form of a constitutional amendment."[1]

In the United States the people are the only constituent body, whether this is spoken of the states or of the general government. The people are the constituents; the departments of government are but the agencies in whose hands the exercise of duties of a certain well-defined character are intrusted.[2]

Notwithstanding the distinction which is commonly and justly made between the nature of the federal constitution and the state constitutions, in that the former is a grant of power, while the latter are limitations upon the powers of the legislative departments,[3] there is in respect to the matter now under consideration no essential difference between the two — the departments of each system are exercising delegated and not original authority.[4]

Each department is limited by the very process of separation

[1] Bryce's Am. Com. 32. It was at one time supposed that there was a law of parliament differing from the common law, by which the rights and personal liberties of individuals might be affected, without any power in the civil courts to investigate and protect them. This idea has been discarded. Stockdale v. Hansard, 9 Ad. & El. 1; Howard v. Gossell, 10 Ad. & El. 386; 59 E. C. L. 358.

[2] Jones v. Perry, 10 Yerg. 59. See also Hawkins v. Governor, 1 Ark. 570; Emerick v. Harris, 1 Binn. 420; Newhall v. Marsh, 19 Ill. 382.

[3] Cooley, Const. Lim. 11; Ohio Life Ins. Co. v. Debolt, 16 How. 416. The reader must not fail to observe that state constitutions are grants to the judicial and executive departments of the state. People v. O'Toole, 164 Ill. 344; People v. Hutchinson, 172 id. 486.

[4] Mr. Justice Story says: "That government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming that the power to violate and disregard them — a power so repugnant to the common principles of justice and civil liberty — lurked under any *general grant of legislative authority*, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well-being without very strong and direct expressions of such an intention. In Terrett v. Taylor (9 Cranch, 43), it was held by this court that a grant or title to lands once made by the legislature to any person or corporation is irrevocable, and cannot be reassumed by any subsequent legislative act; and that a different doctrine is utterly inconsistent with the great and fundamental principle of a republican government and with the right of the citizens to the free enjoyment of their property lawfully acquired." Wilkinson v. Leland et al., 2 Pet. 628–657.

to acts of the kind and quality which appertain to its department.

The converse is equally true, that each system of government and each department of each system has, without any express grant, the inherent right to accomplish all *objects naturally within the orbit of that department*, not expressly limited by the fact of the existence of a similar power elsewhere or the express limitations in the constitution.[1]

The great principle of constitutional law, which may be again reiterated, and which no student of our system should at this time overlook, is that the very principle of partition of power embraced in the constitutional requirement that the powers of government shall be divided between the legislative, executive, and judicial departments, contains in itself a limitation upon the power of each department just as efficacious as though in all of them there was the express inhibition against any one exercising powers of a nature belonging to the other department.[2]

[1] This principle lies at the basis of the great controversies which have heretofore been carried on between the so-called strict constructionists, the sharpest and most subtle distinctions being made in the so-called Legal Tender Cases. In the final disposition of these cases Justice Bradley says: "To many purposes the United States are to be considered as one undivided, independent nation, and as possessed of all the rights, and powers, and properties, by the law of nations incident to such. Whenever an *object* occurs, to the direction of which no particular state is competent, the management of it must, of necessity, belong to the United States in congress assembled. There are many objects of this extended nature." Legal Tender Cases, 12 Wall. 458; Boyd's Cases, 156. See 1 Wilson's Works, 556–558 and notes.

[2] Clough v. Curtis, 134 U. S. 361; In re Swan, 150 U. S. 367.

Judge Cooley says: "If, therefore, no restraints are imposed upon legislative discretion beyond those specifically stated, the township and county government of any portion of the state might be abolished, and the people be subjected to the rule of commissions appointed at the capital. The people of such portion might thus be kept in a state of pupilage and dependence to any extent and for any period of time the state might choose.

"The doctrine that within any general grant of legislative power by the constitution there can be found authority thus to take from the people the management of their local concerns, and the choice, directly or indirectly, of their local officers, if practically asserted, would be somewhat startling to our people, and would be likely to lead hereafter to a more careful scrutiny of the charters of government framed by them, lest sometime, by an inadvertent use of words, they might be found to have conferred upon some agency of their own the legal authority to take

Sec. 226. *Reasons for Separation.*—In the theory of government which is called republican, the first principle, as has before been announced, is the principle of representation, in which all departments act as agents of the great body of the people; but the first principle of government is that those departments of government between which there exists a natural distinction shall be separated.

We shall have occasion to examine more minutely the powers of each of the separate departments, and it will only be necessary here to notice the grounds and reasons for the separation of the departments of government.

The general principles which underlie this partition of power, together with the historical matter connected with it, are so thoroughly examined by the supreme court of New Hampshire that a repetition of their language will perhaps constitute the clearest and most authoritative exposition of this subject: [1]

"It is well known and considered that 'in the distinct and separate existence of the judicial power consists one main preservative of the public liberty;'[2] that indeed 'there is no liberty if the power of judging be not separated from the legislative and executive powers.'[3] In other words, that 'the union of these two powers is tyranny;'[4] or, as Mr. Madison observes, 'may justly be pronounced the very definition of tyranny;'[5] or, in the language of Mr. Jefferson, 'is precisely the definition of despotic government.'[6]

away their liberties altogether. If we look into the several state constitutions to see what verbal restrictions have heretofore been placed upon legislative authority in this regard, we shall find them very few and simple. We have taken great pains to surround the life, liberty and property of the individual with guaranties, but we have not, as a general thing, guarded local government with similar protections. We must assume either an intention that the legislative control should be constant and absolute, or, on the other hand, that there are certain fundamental principles in our general framework of government which are within the contemplation of the people when they agree upon the written charter, subject to which the *delegations* of authority to the several departments of government have been made. *That this last is the case, appears to me too plain for serious controversy.*" People ex rel. v. Hurlbut, 24 Mich. 44.

[1] Merrill v. Sherburne, 1 N. H. 199; 8 Am. Dec. 57. This case is very widely cited.

[2] 1 Blk. Com. 269.

[3] Montesquieu, B. 11, Co. 6.

[4] Dash v. Van Kleek, 7 Johns. 508.

[5] Fed. No. 47.

[6] Notes on Virginia, 195.

Sec. 227. *The Principle Extended in Our Constitutions — In the United States the Judicial is Separated from the Executive.* — "Not a single constitution, therefore, exists in the whole Union which does not adopt this principle of separation as a part of its basis.[1] We are aware that in Connecticut, till lately, and still in New York, a part of their legislature exercises some judicial authority.[2] This is probably a relic of the rude and monarchical governments of the Eastern world, in some of which no division of powers existed in theory, and very little in practice. Even in England the executive and judicial departments were once united.[3] And when our ancestors emigrated hither, they, from imitation, smallness of numbers and attachment to popular forms, vested often in one department not only distinct, but sometimes universal, powers.[4]

"The practice of their assemblies to perform judicial acts[5] has contributed to produce an impression that our legislatures can also perform them. But it should be remembered that those

Fed. No. 81; Blk. Com. (App., Tucker's Ed.) 126; Niles' Reg. 2; 4 id. 400.

[2] 4 Niles' Reg. 443.

[3] 1 Blk. Com. 267; 2 Hutch. Hist. 107.

"The legislative, executive and judiciary are all creatures of the constitution, each confined in its action to the circumscribed sphere assigned it, and cannot rightfully exercise any power which is repugnant to that instrument or not within their respective sphere of action.

'"The province of the legislative department of the government is to make laws, confining itself within the limits prescribed by the constitution. It cannot usurp the powers confided to either of the other departments without violating the declaration in the bill of rights that they shall be forever separate and distinct from each other, which would be a subversion of the principles that lie at the foundation of the government. For, if the legislature could, without control, exercise judicial as well as legislative powers, the tenure of everything dear and valuable to the citizen would be the unrestricted will of that body, to guard against which the provision was introduced for a division of the powers of the government. . . . And in Berret v. Oliver, 7 Gill & J. 191, an act of the legislature declaring certain deeds and decrees to be void, and divesting certain persons named of real and personal property held under them and vesting it in W. E. Berret, was pronounced to be in violation of the provision in the bill of rights, 'that the legislative, executive and judicial powers of government ought to be forever separate and distinct from each other,' and of the constitution of the United States, that 'no state shall pass any law impairing the obligation of contracts,' and utterly null and void." Regents v. Williams, 9 Gill & J. 365; 31 Am. Dec. 72.

[4] Wilson's Works (last ed.), p. 365; 1 Minot's Hist. 27; 1 Hutch. Hist. 30; 2 id. 250, 414.

[5] Calder v. Bull, 3 Dall. 386.

assemblies were restrained by no constitutions, and the evils of this practice,[1] united with the increase of political science, have produced the very changes and prohibitions before mentioned. The exceptions in Connecticut and New York do not affect the argument, because those exceptions are not implied, but detailed in specific terms in their charters; and this power also, as in the house of lords in England, is in those states to be exercised in the form of judgments, and not of laws, and by one branch and not by all of the legislature.[2] 'The entire legislature can perform no judiciary act.'[3] It is questionable whether at this day such an act by all the branches of the British parliament, though in theory omnipotent, could be enforced.[4] 'There is a statute made in the fourth year of King Henry IV., chapter 22, whereby it is enacted that judgment given by the king's courts shall not be examined in the chancery, parliament, nor elsewhere.'[5]

Sec. 228. *The Separation is Itself a Limitation on Power.*— "Be this, however, as it may in that country, one great object of constitutions here[6] was to limit the powers of all departments of government;[7] and our constitution contains many express provisions in relation to them which are wholly irreconcilable with the exercise of judicial powers by the legislature, as a branch of the judiciary. That clause which confers

[1] Fed. No. 44.

[2] 4 Niles' Reg. 444.

[3] Fed. No. 47.

[4] 1 Blk. Com. 44; 2 id. 344. See Stockdale v. Hansard, 9 Ad. & El. 1; Regents v. Williams, 9 Gill & J. 365.

[5] Doctor and Student, dialogue 1, ch. 8.

[6] Fed. No. 81.

[7] Bill of Rights, arts. 1, 7, 8, 38. "'The legislature, being sovereign, possesses all powers over the subject not taken from it by the constitution, and, when the legislature acts, a court must see its way clear before they will pronounce its acts void for transcending its powers.' The sovereignty of the legislature is, however, not without its limitations, else of what avail are written constitutions, on whose provisions the legislative power may trample whenever it may think fit? Of what value are the most important franchises, involving great public interests, even when protected by the solemn guaranties of the constitution, if they may be invaded and disregarded whenever the increase of population or business, as argued in this case, may seem to render it expedient? The mischievous effects of the principle contended for by the plaintiff in error have been already felt in reference to such interests, and it becomes essential to their security that our judicial tribunals should interpose their authority to guard against this wanton abuse of power." Warner v. The People, 2 Den. 272; 43 Am. Dec. 740. See Williams v. Leland, 2 Pet. 657.

upon the 'general court' the authority 'to make laws,' provides, at the same time, that they must not be 'repugnant or contrary to the constitution.' One prominent reason for creating the judicial distinct from the other legislative department was that the former might determine when laws were thus 'repugnant,' and so operate as a check upon the latter, and as a safeguard to the people against its mistakes or encroachments. But the judiciary would in every respect cease to be a check on the legislature, if the legislature could at pleasure revise or alter any of the judgments of the judiciary. The legislature, too, would thus become the court of last resort, 'the superior court,' or 'supreme judicial' tribunal of the state; and those expressions, so often applied to this court in the constitution,[1] would become gross misnomers. If our legislators, too, possessed such high judicial powers, much consistency cannot exist in the provision that, 'upon important questions of law and upon solemn occasions,' they may be advised by the justices of this court, which, on the above principle, is inferior and subordinate. Nor is this all. 'Every reason which recommends the tenure of good behavior for judicial officers militates against placing the judiciary power in the last resort in a body composed of men chosen for a limited period; men, too, not selected for their knowledge of the laws, nor with a view to those other qualifications which fit men to be judges.[2] Nor are our legislators commissioned and sworn in any manner as judicial officers are required to be. Nor can they, like judges, for malconduct, be removed by address or impeachment, because the houses themselves are the tribunal to try impeachments; and both united are the bodies authorized to present addresses for removals.[3] Nor can it easily be conceived that the judiciary are independent of the legislature to any extent, however small, if the legislature itself compose a part of that judiciary."[4]

Sec. 229. *The Separation is Not Complete.*— It is not within the plan of government that each department should be entirely separate, distinct and independent. On the contrary, they are co-ordinate[5] and mutually dependent members of one system,

[1] Const., 7, 9, 22, 20.
[2] Hamilton's Works, 255.
[3] Const., 13.
[4] Merrill v. Sherburne, 1 N. H. 199. See Dennett's Petitions, 32 Me. 508; 54 Am. Dec. 604.
[5] De Chastellux v. Fairchild, 15 Pa. St. 18.

intended to aid and control each other. Thus, the veto power of the chief executive, and the supervisory power of the judiciary, are examples of the system of checks and balances which pervades the whole plan, and prevents the supremacy of any department.[1]

It was not uncommon formerly, as pointed out above, for the general court or the general assembly, which was the legislative body of the state, to be intrusted with some portion of the judicial power. For instance, by the thirty-second article of the constitution of the state of New York, a court for the correction of errors and trial of impeachments was composed of the president of the senate for the time being, and the senators, the chancellor and the judges of the supreme court, or a majority of them, and, when an impeachment was prosecuted against any member of the court, his functions as an officer were temporarily suspended. In cases of an appeal in equity cases the chancellor was required to state the reason of his decree, but he had no voice in the final sentence.

It was also required that in writs of error the judges of the court of errors must assign their reasons for such judgment, but they could have no voice in the decision.[2]

[1] Duer's Outlines, 35; Marbury v. Madison, 1 Cranch, 137. Wilson says: "We are now led to discover that between these three great powers of government there ought to be a mutual dependency, as well as a mutual independency. We have described their independency; let us now describe their dependency. It consists in this: that the proceedings of each, when they come forth into action and are ready to affect the whole, are liable to be examined and controlled by one or both of the others." 1 Wilson's Works, 367.

[2] See for important case adjudicated under this system, Beebe v. Bank of New York, 1 Johns. 529. Judge Story, in his work on the Constitution, says: "But when we speak of a separation of the three great departments of government, and maintain that their separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly separate and distinct and have no common link of connection or dependence, one upon the other, in the slightest degree. The true meaning is, that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments, and that such exercise of the whole would subvert the principles of a free constitution." (1 Story on Const. (5th ed.), sec. 525.) "Notwithstanding the memorable terms in which this maxim of a division of powers is incorporated into the bills of rights of many of our state constitutions, the same mixture will be found provided for, and indeed required, in the same solemn

Certain functions of a judicial nature are still exercised in all the states by the legislature. The legislatures of the states have, by immemorial custom reaching back to parliamentary times, exercised a summary jurisdiction over officers of the state intrusted with the collection and care of the revenue. These legislative bodies, or delegated officers empowered by them, have been allowed summary jurisdiction to examine into the accounts and adjudicate the amount which was due, and upon such judgments process has been issued and the estate of the party sold thereunder.[1]

Sec. 230. *Quasi-judicial Powers of Executive and Administrative Officers.*— In the administration of the general affairs of the state it is not uncommon to invest local boards (*e. g.*, of

instruments of government. . . . Indeed, there is not a single constitution of any state in the Union which does not practically embrace some acknowledgment of the maxim and at the same time some admixture of powers constituting an exception to it." Ibid., sec. 527, p. 395; People ex rel. v. Simons, Ill. Sup. Ct., October, 1898.

[1] Murray's Lessee v. Hoboken L. & Imp. Co., 18 How. 272. See also County of Santa Clara v. Pacific R. Co., 18 Fed. Rep. 420.

"It has pleased Pennsylvania in her constitution to make what most jurists would pronounce an imperfect separation of those powers — she has not thought it necessary to make any imperative provision for incorporating the equity jurisdiction in its full latitude into her jurisprudence, and the consequence is, as it ever will be, that so far as her common-law courts are incapable of assuming and exercising that branch of jurisdiction, her legislature must often be called upon to pass laws which bear a close affinity to decrees in equity. . . . A like specimen of this will be found in the early legislation of the state of South Carolina, in which, before the establishment of a court of equity, laws are frequently found authorizing administrators or others to sell lands for the payment of debts and for similar purposes. And it has been admitted in argument that similar laws are of frequent occurrence in Pennsylvania." Livingston v. Moore, 7 Pet. 469.

This ancient practice is now entirely discarded in Pennsylvania, and no courts are more insistent upon the observance of the principles of separation than are the courts of that state. In Commonwealth v. Warwick, 172 Pa. St. 140, Mr. Justice Sterrett said: "It was unavoidable, in their earlier administration, that conflict should have arisen between the legislative and judicial branches of our government. The form of government was new, and the exact limitations of duty and power were imperfectly understood. Even their co-ordination of power was doubted by some (Ekain v. Raub, 12 Serg. & R. 330), and the feeble resistance offered by the judiciary naturally encouraged encroachments by the legislature. The mischief which resulted became so great that this court was compelled, in Dorman v. Heist, 5 Watts & S. 171, and Bolton v. Johns, 5 Pa. St. 145, to take a stand in assertion of the power which the constitution had conferred."

equalization) or individuals with power *quasi*-judicial, at least in its nature, but ordinarily such officers are not invested with final jurisdiction, and are compelled to give the parties notice and certify their findings to some regular judicial tribunal. Such an instance is to be found in the provisions of article 9 of the constitution of the state of Illinois.[1]

So, also, supervisors of the counties, commissioners of highways, township officers, etc., exercise mixed powers, and these are justified upon long-established usage, derived from the common law. Such bodies, existing before the constitution took effect, are held by the courts to have been tacitly recognized by them as existing essential parts of the system.[2]

In a case for the collection of the revenue, Judge Cooley made the following application of these principles:

"In this case there has been no prosecution or suit; the county treasurer has adjudged the case without a hearing, and issued final process to seize property in enforcement of his conclusion. Such summary process, it is said, which gives the party whose property is seized no opportunity to contest the claim set up against him, cannot be due process of law.

"There is nothing in these words, however, that necessarily implies that due process of law must be judicial process. Much of the process by means of which the government is carried on and the order of society maintained is purely executive or administrative. Temporary deprivations of liberty or property must often take place through the action of ministerial or executive officers or functionaries, or even of private parties, where it has never been supposed that the common law would afford redress. One in whose presence a felony is committed is in duty bound to restrain the offender of his liberty without waiting for the issue of a magistrate's warrant;[3] and the traveler who finds the public way founderous crosses the adjacent field without fear of legal consequences.[4] Our laws for the exercise of the right of eminent domain protect parties in going upon private grounds for the preliminary examinations

[1] Owners v. People, 113 Ill. 310. See also Ames v. Port Huron, 11 Mich. 147; Weimer v. Bunbury, 30 Mich. 201.

[2] Houghton v. Austin, 47 Cal. 654. See also People v. Board Met. Police, 48 Barb. 524.

[3] 4 Blk. Com. 292, 293.

[4] Holmes v. Seeley, 19 Wend. 507. See also Campbell v. Race, 7 Cush.

and surveys. It may be said that in none of these cases is the deprivation final or permanent, but that is immaterial. The construction is as clearly violated when the citizen is unlawfully deprived of his liberty or property for a single hour as when it is taken away altogether. Estrays were at the common law taken up and disposed of without judicial proceedings,[1] and our statutes have always made provisions under which, if they were complied with, the owner of stray beasts might be deprived of his ownership by *ex parte* proceedings not of a judicial character. Where an individual creates with his property a public or private nuisance, the common law permits the citizen who suffers from it to become 'his own avenger, or to minister redress to himself,'[2] and he may even destroy the property if necessary to the removal of the nuisance.[3] The destruction by the act of the party is as lawful as if it had been preceded by a judgment of a competent court, the only difference being that the party, when called upon to justify the act, must in the one case prove the facts warranting it, while in the other he would be protected by the judgment. No one probably would dispute the levy of distress by a private individual being due process of law in the cases in which the law permits it.[4] It is true that the party whose property has been distrained may contest the proceedings by suit in the common-law courts, but he fails if they prove to have been regular. The military law affords abundant illustration on this point. The principles on which it is administered have but little in common with those which control judicial investigations, and the process under which men are restrained of their liberty under it is sometimes very summary and even arbitrary. But this law is just as much subject to the constitutional inhibitions as is the code of civil remedies.[5] But the proceedings for the levy and collection of the public revenue afford still better illustration. Almost universally these are conducted without judicial forms and without the intervention of the judicial authority; the few cases in which statutes have required the action of courts being exceptional. Where such action is not required,

[1] 1 Blk. Com. 297.

[2] 3 Blk. Com. 5, 6.

[3] Rung v. Shoneberger, 2 Watts, 23; Inhabitants of Arundel v. McCulloch, 10 Mass. 70; Wetmore v. Tracy, 14 Wend. 250.

[4] 3 Blk. Com. 6.

[5] Ex parte Milligan, 4 Wall. 2.

the proceedings are regarded as purely administrative, and any hearing allowed to parties in their progress has not been in the nature of a trial, but as a means of enlightening the revenue officers upon the facts which should govern their action. This has been so from time immemorial, and it has never been supposed that a tax-payer had a constitutional right to resist the tax because he had never had any judgment against him on a judicial hearing to fix its amount."[1]

[1] Weimer v. Bunbury, 30 Mich. 200–210. Judge Cooley in the same case said: "We are, therefore, of necessity driven to an examination of the previous condition of things, if we would understand the meaning of due process of law, as the constitution employs the term. Nothing previously in use, regarded as necessary in government and sanctioned by usage, can be looked upon as condemned by it. Administrative process of the customary sort is as much due process of law as judicial process. We should meet a great many unexpected and very serious embarrassments in government if this were otherwise. The words, it has very justly been said, 'were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.' Per Johnson, J., in Bank of Columbia v. Okely, 4 Wheat. 235. It has been said, with special reference to process for the collection of taxes, that 'any legal process which was originally founded in necessity, has been consecrated by time, and approved and acquiesced in by universal consent, must be embraced in the alternative "law of the land."' State v. Allen, 2 McCord, 56. In High v. Shoemaker, 22 Cal. 363, the same doctrine was held in a revenue case. In Rockwell v. Nearing, 35 N. Y. 308, which is quoted for defendant in error as sustaining his position, the opposite view is very distinctly taken. 'There are,' says Porter, J., 'many examples of summary proceedings which were recognized as due process of law at the date of the constitution, *and to these the prohibition has* no application.'" Weimer v. Bunbury, 30 Mich. 200–214.

CHAPTER XIII.

UNITED STATES CONGRESS.

Sec. 231. *Source of Information — Lack of Method.* — In treating of the powers and duties of magistrates of the national government, one has the option to begin with either department, and the closer the investigation the more it will be apparent that in the matter of order and arrangement little aid is to be found in the sources from which the material must be gathered.[1]

The primary source of this information is necessarily in the constitution of the United States; but secondary to this, and no less important, are the laws passed in pursuance thereof, and the judicial construction which is placed on the constitution and these laws.[1]

Of no small degree of importance, in the same respect, are the usage and customs of the various departments of government.

It is a fact which has occasioned remark that American lawyers have paid but scant regard to the manner of arrangement in making constitutions and in the arrangement of statute law.[2]

A source of considerable confusion is found in the fact that in political legislation, through the medium of constitutional

[1] There are several very elaborate discussions of the powers of national magistrates, all, however, under the title of constitutional law; the most elaborate probably being that of "Story's Commentaries on the Constitution," which follows the constitution provision by provision. Another elaborate treatment of the greatest value to the practicing lawyer is the great work of the late Thomas M. Cooley, under the title of "Constitutional Limitations." This work, however, is wholly unfit for an introductory work. The same author has produced a manual upon the same subject, much better constituted to the needs of the student, and justly popular for that use. The most orderly presentation of the subject is the elaborate one of Chancellor Kent.

[2] "The Americans, like the English, have no love for scientific arrangement. Although the constitutions have been drafted by lawyers, and sometimes by the best lawyers of each state, logical classification and discrimination have not been sought after." Bryce's Am. Com. 427.

conventions, the people very frequently make provision for matters of trifling importance, and by no means necessary or proper for the consideration of such bodies.[1]

It is then to the sources which have just been noticed that we must turn for our treatment of the national magistrates.

As a preliminary to the separate treatment of the governmental departments, we devoted the last chapter to a view of the grounds and effect of the separation of governmental agencies into three branches, and the necessity of requiring each to confine its operations to the prescribed orbit.

Sec. 232. *System of Checks and Balances.*— In treating the departments separately, another phase of the same principle operating under a distinct name, and yet being but a corollary of the principle of separation, is the policy everywhere present of limiting mere personal discretion and substituting a legal one, and destroying individual whim, caprice and bias, and in this manner insure equality and uniformity. The English law was insistent on marking strict limits to judicial power, but it took longer to limit the discretion of parliament.[2]

This is done in the United States by what is called a system

[1] "The people found the enactment of a new constitution a convenient opportunity for enunciating doctrines they valued and carrying through reforms they desired. It was a simpler and quicker method than waiting for legislative action. So, when there was a popular demand for the establishment of an institution, or for some legal change, this was shoveled into the new constitution and enacted accordingly." Bryce's Am. Com. 427.

A notable exception to these observations is found in the arrangement of the law under the modern codes, wherever the opportunity has been present to revise and recompile the whole law of the particular state, as for example the state of California.

[2] *The Judicial Power in England.*— Broom gives as one of his maxims: "That system of law is best which confides as little as possible to the discretion of the judge — that judge is best who relies as little as possible on his own opinion.

"For it must be remembered that the judges are appointed to administer and not to make the law, and that the jurisdiction with which they are intrusted has been defined and marked out by the common law or acts of parliament.

"It is moreover a principle consonant to the spirit of our constitution, and which may constantly be traced as pervading the whole body of our jurisprudence, that *optima est lex quare minimum relinquit arbitrario judicis optimus judex qui minimum sibe.* (Bacon's Aph. 46—2; Dwarris, Stat. 782; Collins v. Blantern, 2 Wils. Rep. 341; Master v. Miller, 4 Tenn. 344; 2 H. Blk. 141; 6 Scott, N. R. 180.)" Broom's Max. (8th

of checks and balances. By this the separate departments are shown to be not entirely independent.[1]

The policy of division of powers and the destruction of individual discretion by a system of checks and balances is carried to an extent in the constitution of the United States and of the several states greater than ever before practiced.

The example which seemed most striking and audacious to the jurists of the early period of the United States was the power of the judiciary to annul an act of the legislature.

Swift, in his System of Laws, pronounces the contention an absurdity, and even so late as 1825 a noted jurist of Pennsylvania doubted the power.[2]

But at the present time the most striking example is found in the jurisdiction now generally admitted to exist, and occasionally exercised by the courts, over the discretion which is vested in the legislative body of the state, even in matters political, for example, the power to apportion the state into political districts for purposes of election.[3]

ed.), p. 84. See Mansfield, J., in Reg. v. Wilkis, 2 Burr. 25–29.

The Legislative Power in England. The ancient idea that the legislative department could do anything it pleased in any manner it liked has given way to the idea that there are limits as to what and how it may act. Thus, saith Judge Coleridge: "It is enough to say that the law is supreme over the house of commons, as over the crown itself. If the limits of the law be passed by either for the most satisfactory reasons, they are indeed themselves responsible; but the law will require a strict account of *the act* in the persons of their agents, and these, according to the nature of the illegality, will be answerable, civilly or criminally." Howard v. Gossett, 10 Ad. & El. 359; 59 E. C. L. 358; Stockdale v. Hansard, 9 Ad. & El. 1; 36 E. C. L. 118.

[1] *Ante*, sec. 229.

[2] This topic will be treated in detail under Judicial Power, but it may be useful here to notice these striking instances. Swift, System of Laws, p. 52 (1795). The question was put at rest by the decision of Marbury v. Madison, 1 Cranch, 137 (1803), in which Marshall, C. J., only followed many other decisions. It is remarkable that so great a judge as Gibson should so late as 1825 question the power. See Eakin v. Raub, 12 S. & R. 320.

[3] Mr. Justice Grant, of the Michigan supreme court, says: "It (the law) requires the exercise on the part of the legislature of an honest and fair discretion in apportioning the districts so as to preserve as near as may be the equality of representation. This constitutional discretion was not exercised in the apportionment act of 1891. The facts themselves demonstrate this beyond any controversy, and no language can make the demonstration plainer. There is no difficulty in making an apportionment that shall satisfy the de-

The appellate jurisdiction habitually exercised by judicial tribunals is a check upon the trial courts, and restrains the abuse of the discretion of the judge or the prejudice and passion of the jury.[1]

Attempts are frequently made to enumerate these checks and balances, but it will be seen that they consist in nothing more or less than an enumeration of what powers one department may exercise alone and entirely independent of any assistance from any other department, or without any power in any other department to stay, change or annul it. *Or*, on the other hand, are those instances where two departments must combine in an act, or one may exercise a restraining or annulling power over the other.

mand of the constitution. It is not the purpose or province of this court to inquire into the motives of the legislative bodies except as they appear in the public acts or journals of such bodies. The validity of an act does not depend upon the motive for its passage. The duty of the court begins with the inquiry into the constitutionality of the law, and ends with a determination of that question." Giddings v. Blacker, Sec. of State, 93 Mich. 1.

In the case of People v. Rice, 135 N. Y. 473, the court recognizes the discretionary power of the legislature, but finds no abuse of such power in that case. In reference thereto Justice Peckham says: "We start, then, with the proposition that to the legislature is intrusted some discretion in the matter of apportionment. Is the court to interfere with such power whenever it thinks that the legislature might possibly have come nearer to an equality? We do not believe in the propriety or necessity of any such rule. On the contrary, we think that the courts have no power in such case to review the exercise of a discretion intrusted to the legislature by the constitution, *unless it is plainly and grossly abused.* The expression '*as nearly as may be*,' when used in the constitution with reference to this subject, does not mean as nearly as a mathematical process can be followed. It is a direction addressed to the legislature in the way of a general statement of the principles upon which the apportionment shall be made. The legislative purpose should be made to make a district of an equal number of inhabitants as nearly as may be, and how far that may be carried out in actual practice must depend generally upon the integrity of the legislature. *We do not intimate that in no case could the action of the legislature be reviewed by the courts.* Cases may easily be imagined where the action of that body would be so gross a violation of the constitution that it could be seen that it had been entirely lost sight of, and an intentional disregard of its commands, both in the letter and in the spirit, had been indulged in." See People v. Thompson, 155 Ill. 451.

[1] Discretion of the chancellor is a legal one. Highley v. Deane, 168 Ill. 266.

Illustration.— In matters purely political the judiciary has no supervision over the legislature,[1] while the executive may restrain by his veto, but not entirely control;[2] here is what may be called a balance.

In matters of legislation the judiciary has a power to declare an act void if it is contrary to the constitution either as against an express provision or as transgressing the rule of separation; this is a check.[3]

Sec. 233. *Plan of Treatment.*— It is apparent, then, that under this head of "checks and balances" all the powers of the departments might be examined, and in fact nearly all of constitutional law; but the same result is accomplished in a more orderly manner by pursuing the course adopted of treating each department in its order.

In pursuance of this plan the congress of the nation is the next subject which engages the attention.

We then examine its constituent elements, choice of members, their terms of office, their privileges, and the powers of each department separately and jointly — the relation and dependence upon other departments, or what is called their concurrent powers.

Sec. 234. *Congress is Not Modeled After Parliament.*— It is very frequently stated that the English parliament is a model for the American congress, and that the separation of that body into the three estates explains the presence in this body of the vice-president as president of the senate, standing as the shadow of the executive; and the house of representatives, which is supposed to be analogous to the house of commons; and the senate, which is said to hold a like relation to the house of lords.

This view no doubt is a result of the prominence given to the treatment of these subjects in Blackstone's Commentaries, and the habit of slavish adherence to the principles therein stated, and the supposition that the subject of checks and balances, as therein treated, is in fact practically exhausted.

The resemblance, however, to the parliament of Great Britain

[1] See White v. Hart, 13 Wall. 646, and citation.

[2] The veto of the crown is absolute; here it is qualified by right to pass the act by a larger vote.

[3] Marbury v. Madison, 1 Cranch, 137.

as it existed at the time of the American Revolution is very slight.[1]

The house of lords was not a representative body at all, while the senate represents the states,— the idea being to give to the states in that body equality of representation.

The members of congress, on the other hand, represent local districts in the United States, the principle being to give to the people of every locality equal representation according to numbers, distributing the burdens of the government in accordance with the voice in its councils.

In truth, little analogy exists between the manner of derivation and the powers and rights of the British parliament and the American congress. On the contrary, they are almost opposite in nature and degree.

This idea is well expressed by Mr. Justice Harlan in a recent case in the United States supreme court. He said: "In view of the essential differences between the American and English governments in respect of the source and depositaries of power, the decisions of the English courts on this subject (the right of a citizen to sue a state) are entitled to but little weight."[2]

The powers exercised by parliament are not in all cases derivative, neither are they in theory circumscribed, either as to objects or extent, although in practice there are barriers which it may not pass.

Sec. 235. *Origin of Congress.*— Congress as it now exists came into being and continues by virtue of section 1, article 1, of the constitution of the United States, which provides that

[1] "The nearest parallels to such a federal union as that formed in 1789 were then to be found in the Achaen and Lycian leagues, which, however, were not mere leagues, but federated nations. Both are referred to by the authors of the Federalist, but their knowledge was evidently scanty. The acuteness of James Wilson had perceived that the two famous confederations of modern Europe did not supply a model for America. He observed in the Pennsylvania convention of 1788: 'The Swiss cantons are connected only by alliances. The United Netherlands are indeed an assemblage of societies; but this assemblage constitutes no new one, and therefore it does not correspond with the full definition of a confederate republic.' Elliot's Debates, vol. 2, p. 422. The Swiss confederation has now become a republic at once federal and national, coming in most respects very near to its American model." Bryce's Am. Com. 20, note 2.

[2] Tindal v. Wesley, 167 U. S. 204–214.

"all legislative power *herein granted* shall be vested in a congress of the United States, which shall consist of a senate and house of representatives."

In this provision it is seen that the legislative power of congress is a *granted* power, and in it is observed the separation of the legislative power into two branches, heretofore noticed.[1]

Sec. 236. *Distinction Between National and State Constitutions.*—In all investigations as to the extent of legislative power and the construction of legislative acts, the distinction between the constitution of the United States and the constitutions of the states as regards the nature of the powers and the mode by which the body is invested with them should be borne in mind.

When a law of congress is under consideration, we must inquire whether the power is granted; for the national constitution is a grant of power to the legislative body as well as to all other departments.

On the contrary, when a state law is under consideration it should be borne in mind that the constitution of a state is not a grant of power to the legislative department. Subject to certain natural limitations, founded in principles of justice and the written constitution, which have been heretofore noticed, the state legislature has all legislative power which is not denied it by the constitution.

In the same connection we may properly observe that while the constitution of a state is not a grant of power to the legis-

[1] "We look in the constitution of the United States for *grants* of legislative power, but in the constitution of the state to ascertain if any *limitations* have been imposed upon the complete power with which the legislative department of the state was vested in its creation. Congress can pass no laws but such as the constitution authorizes either expressly or by clear implication, while the state legislature has jurisdiction of all subjects on which its legislation is not prohibited. 'The law-making power of the state,' it is said in one case (Sill v. Corning, 15 N. Y. 297, 303), 'recognizes no restraints, and is bound by none, except such as are imposed by the constitution. That instrument has been aptly termed a legislative act by the people themselves in their sovereign capacity, and is therefore the paramount law. Its object is not to grant legislative power, but to confine and restrain it. Without the constitutional limitations, the power to make laws would be absolute. These limitations are created and imposed by express words, or arise by necessary implication.'" Cooley's Const. Lim. 206.

lature, it is to be regarded as a grant of power to the judiciary and executive departments.

Using this word "constitution" in its broadest sense, as embracing all usages, neither the executive nor the judiciary has any power, jurisdiction or authority except what is granted them.

It will be observed that the executive and judicial departments occupy a similar position as a depositary of delegated powers which are occupied by the same departments in English law. There their authority of jurisdiction flowed from the crown; here it descends from the people.[1]

Sec. 237. *The House of Representatives* is the most numerous branch of the legislature and is the direct representative of the people. Its membership, their qualifications, mode of election, term of office, as well as all of their powers, are derived from and enumerated in the constitution; but the qualification of electors who choose them are fixed by those whom they represent.

Article 1 of that document prescribes that the house shall be composed of members chosen every second year by the people of the several states.

In this manner this most popular branch is elected directly by the people of the several states.

The qualification for membership is that the individual must have reached the age of twenty-five years and have been for several years a citizen of the United States, and he must be an inhabitant of the state from which he shall be chosen.

The number of representatives is fixed by the constitution so that representation and *direct* taxation should be apportioned equally to the people.

Each state is allowed at least one representative, irrespective of the number of inhabitants, and the number of representa-

[1] Field v. People, 2 Scam. 79; People v. O'Toole, 164 Ill. 344; People v. Hutchinson, 172 Ill. 486. "It is to be recollected that constitutional provisions, so far as they relate to the power of a state legislature, are not grants of power, but limitations of power, and that the rule in such case is that such provisions shall be strictly construed. Fletcher v. Peck, 6 Cranch, 88; Golden v. Price, 3 Wash. C. C. 313; People v. St. R. R. R. Co., 15 Wend. 133; Field v. People, 2 Scam. 79; Sawyer v. City of Alton, 3 Scam. 127." People v. Wilson, 15 Ill. 388–91.

tives was originally assigned arbitrarily to each of the states until an enumeration or census might be taken.

In this provision Delaware and Rhode Island were entitled to one, New Hampshire and Georgia to three, New Jersey to four, North Carolina, South Carolina and Connecticut to five, Maryland and New York to six, Massachusetts and Pennsylvania to eight, and Virginia to ten.

In the same provision it was declared that, after the enumeration should have been taken, no state could have more than one representative for every thirty thousand inhabitants.

This latter provision has been changed from time to time, until by act of congress a fixed number of representatives was assigned to each state by the act of 1891. The house is to be composed of three hundred and fifty-six members, divided according to the act, which assigned a fixed number to each state, and provided that, in addition to the three hundred and fifty-six members, there should be added the members allowed to the new states which should thereafter be admitted.[1]

It is also provided that no representative shall hold, during the time for which he is elected, any civil office, under the authority of the United States, which shall have been created or the emoluments whereof shall have been increased during the time; and no person holding any office under the United States shall be a member of either house during his continuance in office.[2]

[1] U. S. Stat., tit. II, ch. II, given in full in McCrary on Elections (4th ed.), 541.

[2] The states have no power to affect these qualifications by adding to or modifying them. McCrary on Elections (4th ed.), § 322 *et seq.* In this work, which is recent (1897), will be found a thorough treatment of the qualification, election and mode of contesting the election of officers, federal and state.

"The constitution of Illinois of 1848 provides: 'The judges of the supreme and circuit courts shall not be eligible to any other office or public trust of profit in this state *or the United States* during the term for which they are elected, nor for one year thereafter. All votes for either of them for any elective office (except that of judge of the supreme or circuit courts) given by the general assembly or the people shall be void.'

"The house of representatives held that this clause of the constitution of Illinois, so far as it related to the election of members of congress, was void, because in conflict with the federal constitution, and also because it was an unauthorized attempt on the part of the state of Illinois to fix or to change the qualifications of representatives in congress. Mr. Marshall and Mr. Trumbull of Illinois were elected representatives in the Thirty-fourth congress. They had previously been elected, respectively, judge of the supreme and circuit court of that state for terms which

In case of vacancy occurring by death, resignation or otherwise, the governor of the state is authorized and empowered to issue writs of election to fill such vacancies.

The choice of the members of the house is by election at specified times, to be fixed either by state legislatures or fixed and regulated by act of congress.[1]

The states have exclusive jurisdiction of the qualification of voters for members of congress, except that electors who may vote for members of the house of representatives must have the same qualifications requisite for those who are allowed by the state to vote for the more numerous branch of the state legislature. It follows that the qualifications may vary in the different states.[2]

The fourteenth amendment of the constitution does not attempt to require that the states shall make equal and uniform distribution of the right of suffrage to persons of different color, rank, condition, education, property, etc., but it provides that when the right to vote at any election for the choice of electors for president and vice-president of the United States or representative in congress, the executive and judicial officers of the state, or members of the legislature thereof, is denied to any male inhabitant above the age of twenty-one years and a citizen of the United States, or his rights are in any way abridged for rebellion or crime, the basis of representation of that state shall be reduced in proportion which the number of such male citizens shall bear to the whole number of male citizens of twenty-one years of age in such state. The fifteenth amendment limits the power of the states, and in other respects the power is not unlimited.[3]

The Organization of the House of Representatives is by the choice of a speaker, who shall be one of their number, and other officers chosen from the members.

had not expired. This was held to be no objection to their holding the office of representative in congress. The United States senate adopted the same rule in Trumbull's case." McCrary on Elec. 246.

[1] Congress has implied power to regulate and protect elections of officers of the United States. Ex parte Yarbrough, 110 U. S. 651. See Habeas Corpus Cases, 100 U. S. — (Strauder v. West Virginia, 303; Virginia v. Rives, 313; Ex parte Siebold, 371; Ex parte Clark, 399).

[2] Dred Scott v. Sanford, 19 How. 393; Spragins v. Houghton, 2 Scam. 377–395; Huber v. Reily, 53 Pa. St. 115.

[3] Cummings v. Missouri, 4 Wall. 277.

Exclusive Powers of the House.— The house is the sole judge of the election, return and qualification of its members;[1] a majority constitutes a quorum to do business, but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members.

Another Exclusive Power of the house is the power of impeachment of all federal officers subject to that mode of accusation, which, as we shall understand, is the power to prefer accusations against other officers of the United States.

Another important power, which resides exclusively in the house, is the power or right, or jurisdiction, to originate bills for raising revenue; but this does not extend to the power to pass such laws. They must be passed and concurred in by the senate and have the sanction of the president, as in the case of ordinary bills.

Sec. 238. *The Senate.*— The same article of the constitution creates the senate, which must always consist of two senators from each state.

Sec. 239. *Qualification.*— To be a senator one must have attained the age of thirty years, and have been nine years a citizen of the United States, and must be an inhabitant of the state by which he is chosen.

Sec. 240. *Manner of Election.*— The senators are chosen by the joint action of both branches of the state legislatures.[2]

Their term of office is six years, and if a vacancy happen during the recess of the legislature of any state, the executive thereof may appoint a senator to hold until the next meeting of the legislature, when it shall be the duty of the legislature to choose a permanent senator.

The same restriction as to holding civil and elective offices obtains against senators as against the members of the house, and the power of the states in reference thereto is limited to the same degree.[3]

The Organization of the Senate differs somewhat from that of the house, in that the senate is presided over by the vice-

[1] In this capacity it has the power to declare a state law or a state constitution void. McCrary on Elec., § 326.

[2] R. S. U. S., tit. II, ch. 1; McCrary on Elec. (4th ed.), 540.

[3] Query, Does the appointment of senators on commissions violate the rule.

president of the United States, who has a vote only where the senate is equally divided, when he may cast the deciding ballot.

The senate chooses all their officers, and they also elect a president *pro tempore*, who may act in the absence of the vice-president, or who shall be president of the senate in case the vice-president is called upon to exercise the office of president of the United States.

Sec. 241. *The Senate as a Court.*— The senate has the sole power to try impeachments in all cases, excepting when the president of the United States is tried. When the president of the United States is impeached and his trial is to be held before the senate, the chief justice of the United States presides over the trial.[1]

It requires the concurrence of two-thirds of the members present to convict.

The constitution declares that the president, vice-president and all civil officers of the United States are liable to this process of removal and punishment.

This leaves open for construction the meaning of the words "civil officers."

All officers who hold their office under the national government, irrespective of the department, it would seem, would fall within this designation.[2]

But it rests with the senate, as a court of last resort, to decide who are included within this designation, and in the case of Blount it was by the senate decided that senators were not within the designation of civil officers.[3]

Army and navy officers are not within the purview of the law.

There is some conflict of opinion as to whether the act for which a party may be impeached, tried and punished must be a criminal act, made so by the law of the United States. These matters must rest in opinion until settled by the proper tribunal.[4]

[1] But once has a president been impeached, and in that instance, on the trial of the impeachment, he was acquitted by one vote. See Trial of Andrew Johnson.

[2] Story on Const. 792.

[3] Mechem on Pub. Off., sec. 471, citing also State v. Gilmore, 20 Kan. 551, 27 Am. Rep. 189.

[4] See these opinions stated in Mechem on Pub. Off., sec. 472.

As expressly provided in the constitution, the punishment by impeachment is no bar to public prosecution.[1]

Extent of Punishment is to remove the offender from office, and disqualify him from holding any other office of profit or trust under the United States; but the trial and conviction or acquittal does not relieve the party from the effects of any crime he may have committed in connection with the transaction upon which he has been impeached.

Concurrent Powers.— Aside from the cases of ordinary legislation, wherein the executive and both houses of congress may participate, the senate has certain powers in concurrence with the executive. These are the treaty-making power, and the appointment of ambassadors, consuls, judges, and all officers not by the constitution required to be appointed by the president.

Sec. 242. *Organization of Congress.*— The same article of the constitution requires that congress shall assemble on the first Monday in December of every year, unless they shall appoint some other day for meeting.

Neither house, during the session of congress, has the right, without the consent of the other, to adjourn for more than three days, nor to any other place than the regular halls of congress.

Each house must keep a journal of its proceedings, and must publish this journal, excepting as to matters requiring secrecy, and every member of either house may be required to vote yea or nay upon every measure before the house or senate.

The mode of passing laws is specifically pointed out by section 7 of article 1 of the constitution, the full text of which is found in the Appendix.

[1] Mechem on Pub. Off., sec. 473. See also Von Holst's Const. Law, sec. 158.

CHAPTER XIV.

POWERS OF CONGRESS.

Sec. 243. *Scope of the Subject.*— The powers of the legislative department of government may now be investigated. The subject must be distinguished from the powers of the general government, that is to say, the aggregate powers of the United States, with which it is sometimes confounded. The practical utility of this caution is to prevent expressions of jurists, made in reference to the powers of a department, being applied to the broader subject of the powers of the general government.

Arguments against the powers of congress sometimes confine themselves to an investigation of the powers expressly granted to the congress, throwing out of view those which depend upon general powers of congress to carry out by appropriate legislation all of the powers of the government and of each department. Many of these powers are not self-executing, but require legislation to effectuate.[1]

Under the general designation of constitutional law or constitutional limitations, the subject is most frequently treated.

While the subject is so broad in its extent and the material so abundant and voluminous that its treatment might be expanded into several volumes, the scope of this work limits the treatment here to the most concise and clearest presentation of the fundamental principles of the subject.

The opinion may, however, be ventured that if the analysis is just and the distinctions clear, and the whole is pervaded by logical and regular method, a broader conception of the subject may be obtained than by an exhaustive presentation of all that has been said and decided upon the subject not controlled by these features.

It is doubtful whether so clear a conception of the constitution in its outline and general principles can be attained in this way as by approaching it by the method which is intended to pervade this treatise in all its departments, namely, the analyt-

[1] United States v. Worrell, 2 Dall. 384.

ical method of separating the genus into its species, and in that manner causing the process of separation and differentiation to present the principles of each subject.

The principles are comparatively few; their application to specific cases innumerable and beyond the power of man to perceive and retain.

It is obvious that constitutional law includes all the rules that directly or indirectly affect the distribution or exercise of the powers of the United States, the states and all of the departments of the government, as well as all the guaranties of individual liberty. It is confined to no department of law. Its functions are exercised in the law of procedure quite as much and as frequently as in any other department. None are privileged from its inhibitions; no one beyond the pale of its protection.[1]

The remarks of Professor Dicey, in reference to this subject as applied to the English law, may be, with slight changes, applied to the state of the science in our jurisprudence. He says: "The true law of the constitution is to be gathered from the sources whence we collect the laws of the United States in respect to any other topic, and forms as interesting and as distinct, though not as well explored, a field for legal study or legal exposition as any which can be found. The subject is one which has not yet been fully mapped out. Teachers and pupils alike, therefore, suffer from the inconvenience as they enjoy the interest of exploring a province of law which has not yet been reduced to order."[2]

This observation is perhaps true to a less extent so far as the treatment and exploration of American constitutional law is concerned, but in the matter of order there yet remains much to be desired.[3]

Sec. 244. *Development of Constitutional Interpretation.*— The source of information on the subject of constitutional law in America is not simply the constitution in itself, but the constitution as applied to the daily affairs and transactions of life

[1] Dicey on the Const. 22.

[2] Id.

[3] The treatment of Chancellor Kent, while better adapted to a comprehensive view of the whole system and the parts, is still open to grave criticism as to order, in this: that by him the subject is separated from the municipal law, whereas it is obviously and essentially a part of it. He also gives greater prominence to instances than to principles.

since its adoption, and the treatment and comment thereon by our jurists.

The constitution of the United States has been in a large sense a developed constitution. It is frequently remarked that a written constitution differs from an unwritten one in the fact that the written constitution is the same tangible, enduring thing from the beginning throughout all periods of its existence; but this is true only in a qualified sense.

The constitution *per se*, in itself, is the same, but the constitution which we see, *i. e.*, the conception and understanding of the constitution which influences our daily life and affects our rights and liberties, is the written words of the constitution, interpreted, construed and applied by the proper tribunals.

The subject directly under treatment is the powers of the national congress.

If ever there was a subject marked by struggle and evolved out of conflict, the subject of American constitutional law is such an one.

Sec. 245. *Antagonistic Method of Interpretation.*— The manner in which the questions relating to the power of congress arise in actual practice is as a question of interpretation or construction of the constitution in relation to some act or right.

Professor Bryce remarks that the history of the United States is in a large measure a history of arguments which sought to enlarge or restrict the import of the constitution.[1]

That is to say, the contention by one school has been to restrict the powers of the national government by an interpretation of the constitution which shall resolve all implications against the power, and leave nothing to the United States government excepting what is expressly granted.[2]

[1] Bryce's Am. Com. 370.

[2] The mode of argument seems not to change as time passes. Mr. Justice Miller said: "The proposition that it has no such power is supported by the old argument, *often heard, often repeated, and in this court never assented to*, that when a question of the power of congress arises, the advocate of the power must be able to place his finger on words which expressly grant it. The brief of counsel before us, though directed to the authority of that body (congress) to pass criminal laws, uses the same language. Because there is no express power to provide for preventing violence exercised on the voter as a means of controlling his vote, no such law can be enacted. It destroys at one blow, in construing the constitution of the United States, the

On the other hand have been those who contend that other powers may be exercised, although there is no express designation or specific enumeration of them, but they exist by necessary implication from the express powers.

These are the two schools of interpretation and construction which have existed from the first.

Professor Bryce also notices another source of power than the implied power claimed for the American congress, which he states in this manner: "The courts have occasionally gone even further afield, and have professed to deduce certain powers *of the legislature*[1] from the sovereignty inherent in the national government."[2] He mentions in this connection the Legal Tender Cases, which we have heretofore had occasion to notice in connection with the power of the national government to acquire disconnected territory, and which will be the subject of special examination in this connection.

Sec. 246. *Express and Implied Powers.*— The extent of the powers of the United States recognized by its highest judicial tribunal before the period of the civil war was usually classed under two distinct heads, namely, *express* and *implied* powers; but after all, these two are in reality but one and the same,

doctrine universally applied to all instruments of writing, that *what is implied is as much a part of the instrument as what is expressed.* This principle, in its application to the constitution of the United States, more than to almost any other writing, is a necessity, by reason of the inherent inability to put into words all derivative powers,—a difficulty which the instrument itself recognizes by conferring on congress the authority to pass all laws necessary and proper to carry into execution the powers expressly granted and all other powers vested in the government or any branch of it by the constitution. Art. 1, sec. 8, cl. 18." Ex parte Yarbrough, 110 U. S. 651.

[1] The enumerated powers of congress to effectuate *objects* committed to it is supplemented by the power and duty to effectuate the aggregate powers of the nation. "In the eighth section of article 1 it is declared that congress shall have power to make all laws which shall be necessary and proper for carrying into execution the *foregoing powers,* AND all other powers vested by this constitution in *the government of the United States,* OR in any department OR office thereof. As a government it was invested with all the attributes of sovereignty. It is expressly declared in article VI, that the constitution and the laws of the United States made in pursuance thereof, and all treaties made under the authority of the United States, shall be the supreme law of the land." Legal Tender Cases, 12 Wall. 555.

[2] Bryce's Am. Com. 372.

although made apparent by different methods — the one by mere interpretation and the other by construction.[1]

Chief Justice Marshall, who is frequently called the expounder of the national constitution, and whose just fame must ever rest on the wise and liberal canons of construction which he formulated and applied,[2] never claimed any powers *for congress* excepting those *granted to it* by the constitution. In fact, he never had occasion to go farther.

Prior to the decision of the case of *McCulloch v. Maryland*,[3] in which Justice Marshall delivered his famous opinion upon the subject of express and implied powers of the government, Mr. Justice Story, his associate upon the bench, expressed himself at length upon the sources of the powers of congress.

In that opinion[4] Justice Story said: "The constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by 'the people of the United States.' There can be no doubt that it was competent to the people to invest the general government with all the powers which they might deem proper and necessary, to extend or restrain these powers according to their own good pleasure, and to give them a paramount and supreme authority. As little doubt can there be that the people had a right to prohibit to the states the exercise of any powers which were, in their judgment, incom-

[1] See Index, titles "Construction," "Interpretation." "We are accustomed to speak for mere convenience of the express and implied powers conferred upon congress. But in fact the auxiliary powers, those necessary and appropriate to the execution of other powers singly described, are as expressly given as is the power to declare war, or to establish uniform laws on the subject of bankruptcy. They are not catalogued, no list of them is made, but they are grouped in the last clause of section 8 of the first article, and granted in the same words in which all other powers are granted to congress." Legal Tender Cases, 12 Wall. 550.

[2] Great as were his powers of reasoning and statement, these are not the surest foundation of his fame. Reasons were supplied him in most cases by others equally gifted in that direction who argued before him, or to whose views he had access; but the moral qualities of courage of conviction, and unswerving adherence to the only principle by which the nation could live, entitle him to be called the preserver of the constitution.

[3] 4 Wheat. 316.

[4] Martin v. Hunter's Lessee, 1 Wheat. 305. This case involved the power of the judicial department and the duty of congress to effectuate it by appropriate legislation.

patible with the objects of the general compact; to make the powers of the state governments, in given cases, subordinate to those of the nation; or to reserve to themselves those sovereign authorities which they might not choose to delegate to either. The constitution was not therefore necessarily carved out of existing state sovereignties, *nor a surrender of powers already existing in state institutions*, for the powers of the states depend upon their own constitutions; and the people of every state had the right to modify and restrain them, according to their own views of policy or principle. On the other hand, it is perfectly clear that *the* sovereign *powers vested in the state governments* by their respective constitutions *remain* unaltered and *unimpaired, except so far as they were granted to the government of the United States.*

"These deductions do not rest upon general reasoning, plain and obvious as they seem to be. They have been positively recognized by one of the articles in amendment of the constitution, which declares that 'the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.'

Sec. 247. *Implied Powers Are Granted Powers.*— "The government, then, of the United States can claim no powers which are not granted to it by the constitution, and *the powers actually granted must be such as are expressly given, or given by necessary implication.* On the other hand, this instrument, like every other grant, is to have a reasonable construction according to the import of its terms; and where a power is expressly given in general terms, it is not to be restrained to particular cases, unless that construction grows out of the context expressly or by necessary implication. The words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged.

"The constitution unavoidably deals in general language. It did not suit the purpose of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers shall be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages,

the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers as its own wisdom and the public interests should require."[1]

Sec. 248. *The Character of the Constitution — Marshall's Views.*— Three years later than the examination of the nature and extent of the powers of the United States mentioned in the last section, wherein Judge Story wrote the opinion, Chief Justice Marshall delivered his famous opinion in *McCulloch v. Maryland.*[2]

His preliminary remarks throw much light upon the question, not decided during the life-time of Judge Marshall, and which will be the subject of the next section, namely, the inherent powers of the government,— cautioning the reader again that the subject now under discussion is merely the extent of the actually *granted* powers.

Speaking of the nature of the national convention which framed the constitution, he says: "It was indeed elected by the state legislatures, but the instrument (the constitution), when it came from their hands, was a mere proposal without obligation, or pretensions to it. It was reported to the then existing congress of the United States, with a request that it might be submitted to a convention of delegates chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification. From these conventions the constitution derives its whole authority. The government proceeds directly from the people in the name of the people.

"The assent of the states to such action is implied in calling

[1] Martin v. Hunter's Lessee, 1 Wheat. 305, 325–27.

[2] 4 Wheat. 314. Two great questions were involved — the power of congress to incorporate a bank; the power of a state to tax an agency of the United States. See Corporations and Taxation.

the conventions, but the people are at liberty to accept or reject, and their act is final.

"The assent of the states in their corporate capacity is not required, nor could the state government reject.

"It has been said that the people had already *surrendered* all their powers to the state sovereignties, and had nothing more to give."

He then concludes that it was necessary to establish a national government; that the people act directly, and that the nation derives its powers directly from them.

Sec. 249. *Extent of Powers Actually Granted.*— He then approaches the question directly involved. He says the "extent of the powers *actually granted* is perpetually arising, and will probably continue to arise as long as our system shall exist.

"*All will admit that the government of the Union, though limited in its powers, is supreme within its sphere of action.*[1]

Sec. 250. *True Method of Interpretation.*—"Among the enumerated powers we do not find that of establishing a bank or creating a corporation, but there is no phrase in the constitution which, like the articles of confederation, excludes incidental or other implied powers and which requires that everything granted shall be expressly and minutely described.

"Even the tenth amendment, which was framed for the purpose of quieting the excessive jealousies which had existed, omits the word 'expressly,' and declares that only powers not delegated to the United States nor prohibited to the states are reserved to the states or to the people; thus leaving the question whether a particular power, which may become the subject of contest, has been delegated to one government or prohibited to the other, *to depend on a fair construction of the whole instrument.*[2]

"In America the powers of sovereignty are divided between the governments of the Union and those of the states. They are each sovereign with respect to the objects committed to it."

He announces the result as follows: "We admit, as all must admit, that the powers of the government are limited and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national leg-

[1] McCulloch v. Maryland, 4 Wheat. 314–405.

[2] Precisely the position taken in Martin v. Hunter's Lessee.

islature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in a manner most beneficial to the people. *Let the end be legitimate, let it be within the scope of the constitution*, and all means which are appropriate, which are plainly adapted to that end, which are not *prohibited, but consist with the letter and spirit of the constitution, are constitutional.*"[1]

Sec. 251. *Resume' of These Decisions.*— It will be observed in both of these great decisions, which is true of all others which preceded them, that powers actually granted must be such as are expressly given, or given by necessary implication.[2]

It is clear, therefore, that implied powers, so far as any light is thrown upon that subject by the opinions of Story and Marshall, are powers implied from the powers *actually granted;*[3] but there is left open by these opinions another avenue of construction and another foundation for powers in the national government which it would seem could not have escaped the insight of these great jurists.

In speaking of the constitution Judge Story says: "It was not carved out of the existing state sovereignties, nor the surrender of powers already existing in the state constitutions, for the powers of the states depended upon their own constitutions."

Again, that the sovereign powers vested in the state governments by their respective state constitutions remained unaltered and unimpaired except so far as they were granted to the government of the United States.

Even in the case to which attention has heretofore been called, in which Marshall discusses the power to acquire foreign territory,[4] he concedes the power to acquire foreign territory, which Jefferson and others held to be beyond the express powers of the nation, to be in them,— that is, by implication; the chief justice there saying: "The constitution confers absolutely

[1] McCulloch v. Maryland, 4 Wheat. 314.

[2] *Ante*, p. 101.

[3] This term is used intentionally, being the one used by Story and Marshall. It marks more sharply the distinction between *inherent* and *implied* powers.

[4] Am. Ins. Co. v. Canter, 1 Pet. 511. The question of power of acquiring was not before him, but the question related to the mode of governing.

on the government of the Union the powers of making war and of making treaties, and consequently that the government possesses power of acquiring territory either by conquest or by treaty."

It seems almost obvious that in many circumstances even the construction of the word "necessary" given by the chief justice in *McCulloch v. Maryland*[1] cannot be tortured into the necessity for taking and holding disconnected territory;[2] and that the better and the safer rule, and the rule more consonant with logic, is the one heretofore advanced, which will be further noticed in the next section.

Sec. 252. *Inherent Powers of the Nation.*— While, as has been observed in the last section, there is nothing in the opinions of Marshall or Story or any other member of the supreme court before the civil war which in terms speak of any other powers in the United States government than those which are actually *granted* by the constitution, it is both from the nature of the circumstances and from the language used that these jurists recognized that new questions would constantly arise, and that they were to be settled by the construction of the whole constitution in connection with the facts and circumstances surrounding its adoption, its development, and the sphere of sovereignty within which the particular act in question might belong.

The language of Justice Story suggests at least that not all of the powers *vested* in the nation were carved out of the powers belonging to the states; and it certainly leaves the door open for other applications of the same principle of construction, and for the existence of all other powers ordinarily attributed to nations and which a state could under no circumstances exercise.

Sec. 253. *Principle of Inherent Powers.*— If an object sought to be accomplished is an object which a state under no circumstances has the power to accomplish, and if the means adopted do not invade the exclusive powers of the states, nor restrict the liberties of the citizen guarantied in the constitution, and is the exercise of a power ordinarily exercised by

[1] 4 Wheat. 316.

[2] This seems to have been Judge Story's opinion long subsequent to the decision of Am. etc. Ins. Co. v. Canter, 1 Pet. 531. *Ante*, p. 222. See *ante*, 224, note, and next section.

nations, has not the nation the inherent power to accomplish the object *vested* in it by the very fact of its establishment?

The functions of an author in this regard, while they do not preclude him from the expression of personal opinions upon open questions, are more properly and usefully exercised by stating the views of jurists whose opinions are acknowledged to be of weight, and the decisions of the proper tribunals upon whom are conferred the power of expressing authoritative opinions.

That our courts have affirmed the existence of a power the source of which is not found in the grants expressly enumerated in the constitution seems clear.

So Mr. Bryce notices that our courts have occasionally gone even further afield (than in the cases noticed), and have professed to deduce certain powers *of the legislature* (*congress*) *from the sovereignty inherent in the national government.*[1]

In its last decision on the Legal Tender Cases a majority of the court seem to have placed the decision on this ground, although special reference is made to the power of congress to borrow money.

It has passed beyond the domain of controversy that it is not necessary, in order to sustain a power, that the specific thing aimed at should be expressly named in the constitution.

Justice Miller very aptly says that such a proposition, although often asserted, often argued, often repeated, has in the supreme court of the United States never been assented to; but he goes no further in that connection than to say that what is implied from what is expressed is as much a part of the instrument as what is expressed, reaching in that connection the same bounds before him reached by Story and Marshall.[2]

There is, however, a significant expression in the constitution which is mentioned by Justice Miller in his opinion in that case.

The last clause of article 1 confers *upon congress* the power "to make all laws necessary and proper for carrying into execution first the foregoing powers (*granted to congress*), and all powers *vested* by this constitution in the *government* of the United States *or* in any department or office thereof."

[1] The distinction involved in this expression is important, and hence its reiteration.

[2] Ex parte Yarborough, 110 U. S. 651–58.

The language of the clause is broad and sweeping. It confers the power upon congress to make laws necessary to effectuate all powers; not only such as are in that article before enumerated as being conferred upon congress, but all powers vested by this constitution *in the government* (the whole government being obviously intended), or in any department or officer thereof.

It also recognizes that the four corners of the document may all be explored and all referred to in deducing a power or construing a law, and the preamble of the constitution is quite as much a part of the document as any other portion of it, and the character of the new body politic an important element in the construction.

Sec. 254. *Inherent Powers in the Government Create Resulting Powers in Congress.*— The doctrine of inherent powers *vested* in the government differs in terms materially from the question as to proper and appropriate means of exercising powers actually conferred *by the grant or grants* of the constitution to a department; and all *grants* are of this nature. It proceeds upon the idea that by the very act of creating a new and national government there are inherent powers which may be vested in the national government, or the nation, independently of the grants of the constitution, but inherently a part of it.

The law of nations recognizes the right and the obligation of a nation to preserve itself and its members.

The same law recognizes the national obligation, duty and rights which the dictates of humanity teach, and which sovereigns have acted upon since governments were instituted. Are all such excluded by our constitution, and is this nation prohibited from exercising such rights or performing such duties? This is a question of international law, but of municipal law as well. The right of intervention on grounds of humanity, or because of natural ties of race or religion, has been frequently asserted and exercised.[1]

The preamble of the constitution states that one of the objects is to provide for the common defense and promote the general welfare.

"The same principles which evince the right of a nation to

[1] Wheaton's Internat. Law (Dana's ed.), §§ 63–69. See 1 Wilson's Works, 133.

do everything which it lawfully may for the preservation of itself and of its members evinces its right, also, to avoid and prevent, as much as it lawfully may, everything which would load it with injuries, or threaten it with danger."[1]

It is obvious that a nation which is to exist in perpetuity may look forward and remove all dangers and menaces present and future threatening itself and posterity; and so the preamble mentions "ourselves and our posterity."

In connection with the power to acquire territory, attention was called to the views of Mr. Justice Story, as expressed in his Commentary on the Constitution, where he says: "The friends of the measure are driven to the adoption of the doctrine that the right to acquire territory was *incidental to national sovereignty;* that it was a *resulting* power growing necessarily out of the aggregate powers confided by the federal constitution."[2]

This opinion of the commentator throws a light upon his opinion as a judge, and may explain the caution with which he left open the door of construction in the case before referred to.

Sec. 255. *National Objects Not Derived from the States.*[3]— Mr. Justice Wilson, speaking to the convention of Pennsylvania, then sitting in deliberation upon the adoption or rejection of the constitution, announced this principle of the partition of power between the federal and the state governments: "It was easy to discover a proper and satisfactory principle on the subject. Whatever object of government is confined in its operation and effects within the bounds of a particular state should be considered as belonging to the government of the United States. But, though this principle be sound and satisfactory, its application to particular cases would be accompanied with much difficulty."[4]

Like many other constitutional questions, principles antedating the constitution may be of the utmost importance as throwing light upon the nature and meaning of that instrument.

Justice Wilson, speaking of the old confederacy, and speak-

[1] 1 Wilson's Works, 141.

[2] Story on the Const., sec. 1280; *ante*, p. 224.

[3] The *states* are not the original and ultimate source of sovereignty. *Ante*, § 248.

[4] 1 Wilson's Works, 533.

ing before the adoption of the present constitution, said of the United States: "Though it *in congress assembled derive from the particular states* no power, jurisdiction or right which is not expressly[1] delegated by the confederation, it does not thence follow that the United States in congress *have no other powers*, jurisdiction or rights than those delegated by the particular states.

"The United States have general rights, general powers and general *obligations*, not derived from any particular states, nor from all of the particular states taken separately; but resulting from the union of the whole. . . .

"To many purposes the United States are to be considered as one undivided, independent nation, and as possessed of all the rights and powers and properties by the law of nations incident to such.

"Whenever an object occurs to the direction of which no particular state is competent, the management of it must, of necessity, belong to the United States in congress assembled. There are many objects of this extended nature. The purchase, the sale, the defense, and the government of lands and countries, not within any state, are all included under this description. An institution for circulating paper, and establishing its credit over the whole United States, is naturally ranged in the same class."[2]

Chancellor Kent, discussing the power of the United States to incorporate a bank, and commenting upon the case of *McCulloch v. Maryland*,[3] states that it is worthy of notice that the power of congress to establish a national bank seems not at the time to have been questioned. The constitutionality and validity of this ordinance were ably enforced by Judge Wilson, referring to the language quoted,[4] and by not speaking in dissent he tacitly at least approves the proposition.[5]

Sec. 256. *The Doctrine Established — Legal Tender Cases.*— The final conclusion reached in the Legal Tender Cases is accomplished by recognizing the inherent power in the general

[1] The clause in the articles of confederation used the word "expressly," while that word is omitted in the tenth amendment pertaining to the same subject.

[2] 1 Wilson's Works, 557–559.

[3] 4 Wheat. 316.

[4] 1 Wilson's Works, 549.

[5] 1 Kent Com. *212–254.

government, and the duty of congress to adopt all proper means necessary to accomplish that object.

Mr. Justice Strong, delivering the opinion of the court, says: "It is impossible to know what those non-enumerated powers are, and what is their nature and extent, without considering the purposes they were intended to subserve. Those purposes, it must be noted, reach beyond the mere execution of all powers definitely intrusted to congress and mentioned in detail. They embrace the execution of all other powers vested by the constitution in the government of the United States, or in any department or officer thereof. It certainly was intended to confer upon the government the power of self-preservation. Said Chief Justice Marshall, in *Cohen v. Virginia:*[1] 'America has chosen to be, in many respects and to many purposes, a nation, and for all these purposes her government is complete;[2] for all these objects it is supreme. It can then, in effecting these objects, legitimately control all individuals or governments within the American territory.' He added, in the same case: 'A constitution is framed for ages to come, and is designed to approach immortality as near as mortality can approach it.' . . . That would appear, then, to be a most unreasonable construction of the constitution which denies to the government created by it the right to employ freely every means, not prohibited, necessary for its preservation, and for the fulfillment of its acknowledged duties. Such a right, we hold, was given by the last clause of the eighth section of the first article. The means or instrumentalities referred to in that clause and authorized are not enumerated or defined. In

[1] 6 Wheat. 414.

[2] This is precisely the line of argument pursued by Jay and Wilson in Chisholm v. Georgia, 2 Dall. 416. Of this decision Cooley says, in his discourse on the federal supreme court: "We shall not pause to show — what is self-evident — that the Union could scarcely have had a valuable existence had it been judicially determined that the powers of sovereignty were in the states or in the people of the states severally. Neither is it important to show that the doctrine of an indissoluble Union is at least in its elements embraced. The qualified sovereignty, state and national the subordination of the state to the nation, the position of the citizen are all exhibited. It must logically follow that a nation as a sovereignty is possessed of all those powers of independent action and self-preservation which the successors of Jay subsequently demonstrated were by implication conferred upon it." Const Hist. in Am. Law, p. 49.

the nature of things, enumeration and specification were impossible. But they were left to the discretion of congress, subject only to the restrictions that they be not prohibited, and be necessary and proper for carrying into execution the enumerated powers given to congress, and all other powers vested in the government of the United States, or in any department or officer thereof.

"And here it is to be observed, it is not indispensable to the existence of any power claimed for the federal government that it can be found specified in the words of the constitution, *or clearly and directly* traceable to some one of the specified powers. Its existence may be deduced fairly from more than one of the substantive powers expressly defined, or from them all combined. It is allowable to group together any number of them, and infer from them all that the power claimed has been conferred."[1]

He argues further: that important powers were understood by the people to be *vested incidentally* is shown by the clamor of the people for amendments restricting the exercise of implied powers, and argued that "they tend to show that, in the judgment of those who adopted the constitution, there were powers created by it, neither expressly specified nor deducible from any one specified power, or ancillary to it alone, but which grew out of the aggregate of powers conferred upon the government, or out of the sovereignty instituted."[2]

He notices that these powers are called by Story, in his Commentaries, "*resulting* powers, arising from the aggregate powers of the government."[3]

The conclusion of Mr. Justice Strong evidently is that the inquiry is as to the existence of a power over the objects of government, and the nature of these objects, as to whether they are of such character as relate to national affairs or those which belong properly to the state.[4]

[1] Legal Tender Cases, 12 Wall. 457, 533, 534.

[2] Id. 535.

[3] Id. 457–535.

[4] Justice Strong says: "We are accustomed to speak for mere convenience of the express and implied powers conferred upon congress. But in fact the auxiliary powers, those necessary and appropriate to the execution of other powers singly described, are as expressly given as is the power to declare war, or to establish uniform laws on the subject of bankruptcy. They are not catalogued, no list of them is made, but they are grouped in the last clause of section 8 of the first article, and

Sec. 257. *The Doctrine Clearly Stated.*—Justice Bradley's opinion in the same case is still more specific upon the existence of inherent powers. He says: "The constitution of the United States established a government and not a league, compact or partnership. It was constituted by the people. It is called a government. In the eighth section of article I it is declared that congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this constitution in *the government of the United States* (the italics here used are his), or in any department or office thereof. As a government it was invested with all the attributes of sovereignty. It is expressly declared in article VI that the constitution, and the laws of the United States made in pursuance thereof, and all treaties made under the authority of the United States, shall be the supreme law of the land. . . .

"The United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country — war, peace, and negotiations and intercourse with other nations,— all which are forbidden to the state governments."[1]

It has jurisdiction over all those general subjects (objects) of legislation and sovereignty which affect the interest of the whole people equally and alike, which subjects are expressly or impliedly prohibited to the state governments; and he adds: "Such being the character of the general government, it seems to be a self-evident proposition that it is invested with all those *inherent* and *implied* powers which, at the time of adopting the constitution, were generally considered to belong to every government as such, and as being essential to the exercise of its functions. If this proposition be not true, it certainly is true that the government of the United States has express authority, in the clause last quoted, to make all such laws (usually regarded as inherent and implied) as may be necessary and proper for carrying on the government as constituted, and vindicating its authority and existence."[2]

granted in the same words in which all other powers are granted to congress." Legal Tender Cases, 12 Wall. 457–550.

[1] Legal Tender Cases, 12 Wall. 457–555.

[2] Ibid.

Sec. 258. *Resume' of the Question.*— From the decisions and comments presented, it may be gathered that there have been recognized but two different classes of powers, namely, *express* and *inherent* powers. Those powers which are frequently called implied powers, but which are held to arise by necessary implication from the express powers, are in reality but express powers, and were so designated by both Chief Justice Marshall and Justice Story, and by the judges in the Legal Tender Cases.

The formula that congress possesses enumerated powers, and only such powers as are enumerated, finds no justification in the constitution itself; neither is there any evidence that the framers of the constitution intended to enumerate all the powers.

Mr. Paschal, in his Annotated Constitution, says that the division which we commonly see of the articles of the constitution, and their designation and separation by Arabic numbers, as in this case into eighteen clauses, is a work of the printers, and is not shown in the original.

The practice of speaking of the powers of congress as enumerated cannot be abandoned after so long use, but it may be borne in mind that "enumeration" is a term invented by the constructionist and not furnished by the makers of the constitution.

One might almost say that the enumeration was of the objects as well as of the means.

The inherent powers, and perhaps it may be said the natural duties and obligations, of the people as a nation are as thoroughly established and well recognized to-day as was that which was called the "implied powers" prior to the civil war.

CHAPTER XV.

THE NATIONAL REVENUE.

SEC. 259. *Sources of Power.*—Chief among the causes for the failure of the old confederacy was the want of power of the general congress to provide the nation with an adequate revenue for the maintenance and the support of the government.

During the Revolutionary war this want was felt, and it was only by individual contribution and effort that the continental army was sustained.

After the establishment of the confederation, the ingenuity of Robert Morris devised a plan for national revenue, which, in connection with the loyalty of the people, supplied in a meagre way the wants of the nation; but when the outward stress of war diminished the common interest and local affairs began to be prominent, the inherent weakness of the bond between the parties to the old articles of confederation became too plain and apparent to be overlooked.

What mattered it that there was a shadow of a nation with the same name which now designates the national union?

The substance and personality was lacking. There was no national government. There was a mere compact, empowering those intrusted with its supervision with the right to recommend measures to the states.[1]

Naturally, then, the first concern of the government, after establishing a firm bond of perpetual union, was to supply the material things without which no nation can endure.

The preamble of the constitution recites that in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare and thereby "secure the blessings of liberty to ourselves and our posterity, we do ordain," etc.

Clause 2 of section 8 of article I, relating to the means of providing a revenue, says that to pay the debts (obviously the

[1] See Income Tax Case, 157 U. S. 429, and 158 U. S. 601.

debts already incurred),[1] to provide for the common defense and the general welfare of the United States, congress shall have power to *lay* and collect taxes, duties, imposts and excises.

It will not escape the observant reader that the words "provide for the common defense and general welfare" are a repetition of the great object of the constitution left unaccomplished, for, at the time of the adoption of the constitution and by its adoption, a more perfect and indissoluble union was created. Justice was established or built up.

Sec. 260. *Limitation on the Power.*— The last clause of this second clause constitutes a limitation or direction upon the mode: "but all duties, imposts and excises shall be uniform throughout the United States."

Other inhibitions or regulations appear in other parts of the constitution.

For example, in the third paragraph of section 1 is a requirement "that representation and direct taxes shall be apportioned among the people according to their respective numbers."

In the fourth clause of section 9 of this article it is provided that "no capitation, or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

In the fifth article it is provided that "no tax or duty shall be laid on articles exported from any state."

Sec. 261. *Nature of the Power to Tax.*— The words used in the constitution were not new words, devised and invented for a new purpose, but were words in common use, and were presumably used in no new sense.

No new interpretation or meaning is to be given to them unless on account of the changed circumstances of the people who were making use of them.

It is important then to inquire the meaning of these terms in the jurisprudence out of which the people of the new government had recently emerged.

Taxation Defined.— There is no essential difference or controversy in relation to the meaning of the word "taxation," although there is some distinction in the methods of expressing it.

"Taxes are a public imposition levied by the authority of the government, for the purpose of carrying on the government

[1] See art. VI, § 1.

in all its machinery and operations." This is the language of the court in *Loan Association v. Topeka.*[1]

Again another says: "Taxes are burdens or charges imposed by law upon persons or property for public purposes or to accomplish some governmental end — the *regular*, uniform and equal contributions which the people are required to make for the support of the government."[2]

Judge Cooley says the word "*taxation* in its most enlarged senses embraces all the *regular* impositions made by government upon the person, property, privileges, occupations and enjoyments of the people for the purpose of raising public revenue."[3]

None of these definitions throw any light upon the true distinction between taxation and other public imposition and burdens, and in truth they tend rather to obscure the true conception and understanding of the term.

It is also frequently said that taxation is the exercise of the sovereign power; but inasmuch as every act of government is but the exercise of some part of the sovereignty delegated to some branch of the government, it is difficult to understand how such a general explanation elucidates the subject.

Sec. 262. *Taxation Distinguished from Commercial Regulation.*[4] — If we turn to the English constitution we find that taxation is not among the powers or prerogatives which the personal sovereign of England could exercise. As arbiter of commerce, he had, for the especial purpose and object of regulating commerce, the power to impose excises and impositions on the subjects of commerce.

Thus, in *Campbell v. Hall*,[5] decided in 1774, during the reign of George III., and during the time of our Revolution, it is brought out in the argument and in the decision, in speaking of the treaty by which England obtained Grenada from the French, the seventh article of which required that the inhabitants should pay no other duties than they before paid to the French king, that the *capitation* tax should be paid out of the

[1] 20 Wall. 655.

[2] 25 Am. & Eng. Ency. of Law, 11, 12. Taxes need not be regular; they may be occasional. The word is out of place.

[3] Cooley's Prin. Const. Law, 55. See his "Taxation."

[4] See the Treatment of Commerce.

[5] Cow. Rep. 206.

king's demesne. A proclamation of the king, dated October 7, 1763, stated that for the government of Grenada we have thought fit to declare by our letters patent that they shall summon and call general assemblies in the same manner as is used and directed in the provinces of America, and we have also given power to the said governors, with the consent of our said councils and the representatives of the people, to make laws agreeable to the laws of the constitution of England. Then is provided the following regulations of commerce: "Whereas, in the Barbadoes and in the British Leeward Islands, there was a *duty* of four and a half per cent. upon all sugars exported; and whereas, it is reasonable and expedient, and of importance to our other sugar islands, that the like duty should take place in our said island of Grenada;" and then proceeds: "We have thought fit, and our royal will and pleasure is, and we do hereby, *by virtue of our prerogative royal*, order, direct and appoint, that from and after the 29th day of September next ensuing the date of these presents, a duty or impost of four and a half per cent. in specie shall be raised and paid to us, *our heirs and successors*, upon all dead commodities, the growth and produce of our said island of Grenada, that shall be shipped from the same, in lieu of all *customs* and *import duties*."[1]

It is everywhere admitted and nowhere contradicted, that the English crown, though he was the personal sovereign to whom allegiance was due, had not the power of general taxation, but that taxation as such must come from the representatives of the people assembled in the great congress of the nation, namely, parliament.[2]

In *Johnson v. McIntosh*,[3] Chief Justice Marshall remarked that "since the expulsion of the Stuart family the power of imposing taxes by proclamation has never been claimed as a branch of the regal prerogative."

Upon this principle, and having in view the distinction between a tariff for the regulation of commerce and general taxation, the power of parliament to tax the colonies, when there was in parliament no representative of the colonies, was denied, and the assertion of such a power by the declaratory act of

[1] Campbell v. Hall, Cow. Rep. 206. This was a purely commercial regulation.

[2] See Pollock v. Farmers' L. & T. Co., 157 U. S. 557.

[3] 8 Wheat. 598.

parliament, combining with other reasons, caused the colonists to declare that the crown had abdicated government here by combining and confederating with others to subject us to a jurisdiction unknown to the British constitution.

Sec. 263. *Nature of Taxation.*— Taxation was regarded in English law as a voluntary contribution of the people, made through their representatives assembled in parliament, for the maintenance and support of the government and for public improvements, as distinguished from providing the crown with a revenue; and so in America there is no occasion to change the phrase.[1] No part of parliament had any share in these grants, so that they did not partake of the nature of sovereign legislation. In our constitution the origin of all revenue bills is in the house.

Taxation is more properly defined as the contribution of the people, which by the constitution established by them may be ascertained and imposed upon every individual and his property for public purposes.

"A tax is understood to be a charge, a pecuniary burden, for the support of the government. Of all burdens imposed upon mankind that of grinding taxation is the most cruel. It is not taxation that the government should take from one the profits and gains of another. That is taxation which compels one to pay for the support of the government from his own gains and of his own property."[2]

There is nothing which can be the subject of property but what may be the subject of taxation; and according to the principles of government, the individual may be compelled to pay a personal contribution, which is commonly called a poll-tax; and

[1] Chief Justice Bradley says: "England has no written constitution, it is true; but it has an unwritten one, resting in the acknowledged, and frequently declared, privileges of parliament and the people, to violate which in any material respect would produce a revolution in an hour. A violation of one of the fundamental principles of that constitution in the colonies, namely, the principle that recognizes the property of the people as their own, and which, therefore, regards all taxes for the support of government as gifts of the people through their representatives, and regards taxation without representation as subversive of free government, was the origin of our own revolution." Slaughter-house Cases, 16 Wall. 36–115.

[2] United States v. Railroad Co., 17 Wall. 326.

in addition to these there may be restrictions upon and prohibitions against business.[1]

That the object for which a tax must be imposed shall be a public one is fundamental, never contradicted; but the question as to what is a public purpose is frequently a question of doubt and difficulty.

Sec. 264. *Who May be Taxed.*— Upon principles of general national law, the government undertakes to protect all persons, whether citizens or aliens, temporarily or permanently within the realm; and it is not only just, but recognized, that all such persons and all of their property shall be subject to the same burdens and impositions which might be imposed upon the like property of a citizen.[2]

The power of the general government takes the place of the sovereign power of England as to all persons and all property within the dominion of the United States and beyond a state; and upon the same principle that the English crown had the right to tax conquered territories, so the inhabitants of our territories and their property are subject to the imposition of taxes by the general government.[3]

It is not necessary, however, that the power which congress has to exercise its right of taxation in the territories should be exercised merely because the same power is exercised over the people of or property in a state, or that it should be essential to an imposition upon the states that a similar one should be made, or made upon similar principles, in the territories.[4]

Sec. 265. *Congress Cannot Tax State Agencies.*— The states are within their respective spheres equally necessary, equally indestructible, equally instruments and agencies of the government established by the people, as the United States, and it follows that the United States cannot tax state agencies or property of the state in use for purposes of the state government.[5]

[1] Head Money Cases, 112 U. S. 580. See also Police Power and Commerce.

[2] Witherspoon v. Duncan, 4 Wall. 210; Cooley on Taxation, p. 15.

[3] Loughborough v. Blake, 5 Wheat. 315–317.

[4] Loughborough v. Blake, 5 Wheat. 315.

[5] Collector v. Day, 11 Wall. 113. See also United States v. Railroad Co., 17 Wall. 326; Cooley's Const. Lim. (6th ed.) 592; State v. Atkins, 1 Abb. (U. S.) 22; 10 Fed. Cas. 241; 35 Ga. 315; Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, and 158 U. S. 601.

There is no dispute upon the general rule of law applicable to this subject.

The power of taxation by the federal government is limited to impositions and burdens upon those persons within its jurisdiction and over which it has control.

It may not, under the guise of taxation, affect or destroy the instruments or agencies of the state governments,— equal parts of the great system of law established by the people of the United States.

The right of the states to administer their own affairs in their own manner, through their own agencies, general and local, is established by an unbroken line of decisions and by the practice of the courts.

It necessarily carries with it an exemption of these agencies and instruments from the taxing power of the federal government, on the principle announced in *McCulloch v. Maryland*,[1] that the power to tax is a power to destroy, and that it necessarily is a discretionary power. It then follows that if the power is admitted to exist, it may be used as an instrument to destroy and oppress; hence, the reciprocal principle is established, that the states may not tax federal agencies, nor the United States the agencies of the state governments.

A municipal corporation, or a railroad owned and operated by a state, are within this rule.[2]

The courts of a state cannot be impeded or obstructed by an act of congress which declares void contracts not stamped for the purpose of imposing internal revenue.[3]

Nor may state officials be embarrassed by a tax on their salaries.[4]

Sec. 266. *Exports Cannot be Taxed — No Excise, Tax or Duty Shall be Laid on Articles Exported from Any State.*— This provision of the constitution prohibits entirely anything in the nature of tariff on exports or any levy or imposition upon them for the purpose of regulating commerce or raising a revenue.[5]

[1] 4 Wheat. 316.

[2] United States v. Railroad Co., 17 Wall. 322; *ante*, p. 320, note 5.

[3] Bowen v. Byrne, 55 Ill. 467; Green v. Holway, 101 Mass. 243; Sayles v. Davis, 22 Wis. 225.

[4] Collector v. Day, 11 Wall. 113.

[5] Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429.

It does not, however, prevent the collection of internal revenue upon property not for export, nor the imposition upon property of the charges necessary for the purpose of identifying and segregating these goods which are to be exported from a state from other articles of the same kind by the ordinary processes of inspection and affixing marks or stamps thereto. Thus, by the acts of congress of 1868 and 1872, an excise tax of thirty-two cents per pound was imposed on all manufactured tobacco, except smoking tobacco, on which the tax was sixteen cents per pound, with an exception in favor of tobacco which was intended for export, and as to such tobacco it was provided that it might be removed without the payment of the tax, irrespective of the size of the packages; but it was enacted that all tobacco and snuff intended for export, before being moved from the manufactory, shall have affixed to each package an engraved stamp indicative of such intention, and for the expense attending the providing and affixing such stamps, twenty-five cents for each package so stamped should be paid to the collector on making the entry for such transportation.[1]

It was contended by the owners of the tobacco that this regulation was a violation of the constitutional provision against imposing any tax or duty on articles to be exported.

The court, however, held that such was not the object or effect, but the regulation was merely a necessary incident to the proper collection of the taxes upon the property properly taxed, and the only means by which fraud could be prevented in that regard.

Ten years later the same question arose in reference to the same law, and, in addition to the reasons above given, the court noticed that goods intended for exportation to another state are liable to taxation as a part of the general mass of property of the state of their origin until actually started.

It was held in this case that the regulation was only a reasonable one, to ascertain and separate the goods intended for export from those not so intended; indeed, the regulation amounts to a special indulgence granted to the owner of the article, and only requires their declaration of an intention to appropriate such goods to the purposes of foreign exportation.[2]

[1] Pace v. Burgess, 92 U. S. 372. [2] Turpin v. Burgess, 117 U. S. 504.

Sec. 267. *Methods of Taxation.*— The methods of taxation are designated in a way little calculated to define the character and limitations of the power. For example, the only method specifically spoken of is direct taxation.[1] This occurs in the third section of article 1, providing that representatives and *direct* taxes shall be apportioned in the several states.

And again in the fourth clause of section 9 of the same article, which provides that no *capitation*[2] or *other direct* tax shall be laid unless in proportion to the census or enumeration hereinbefore directed to be taken.

The genus *taxation* is spoken of, and one species which was at that time recognized was enumerated, namely, *direct* taxation.

In connection with these are designated duties, imposts and excises, together with a capitation tax, with the purposes for which any and all of these may be resorted to.

Sec. 268. *Revenues of the English Crown.*— By referring to Blackstone's Commentaries,[3] in which the learned commentator gives a concise exposition of the king's revenues, it will be seen that the ordinary revenues of the king originally depended entirely upon the tie of personal allegiance and its incidents as understood in connection with the feudal system, introduced by William the Norman, and within these fell none

[1] Hamilton is quoted as saying, in regard to the distinction between direct and indirect taxes: "What is the distinction between direct and indirect taxes? It is a matter of regret that terms so uncertain and vague in so important a point are to be found in the constitution. We shall seek in vain for any antecedent settled legal meaning to the respective terms. There is none. We shall be as much at a loss to find any disposition of either which can satisfactorily determine the point." There being many carriages in some of the states and very few in others, he points out the preposterous consequences if such a tax be laid and collected on the principle of apportionment instead of the rule of uniformity. He insists that if the tax there in question was a direct tax, so would be a tax on ships according to their tonnage. He suggests that the boundary line between direct and indirect taxes be settled by a "species of arbitration," and that direct taxes be held to be only "capitation or poll taxes, and taxes on lands and buildings, and general assessments, whether on the *whole property* of individuals or on their *whole* real or personal estate." All else must, of necessity, be considered as indirect taxes. Springer v. United States, 102 U. S. 586.

[2] Here capitation tax is used as a generic term. 157 U. S. 569.

[3] Vol. 1, ch. 8.

of the means of raising the revenue which are ordinarily resorted to in the United States.

The King's Extraordinary Revenue.— In proportion as the exactions of the king as a feudal sovereign were limited and destroyed, so the people supplied the government with a new means of providing a revenue.

It was still at the time of Blackstone called the "king's revenue," but the designation was his extraordinary revenue.

The learned commentator congratulates the people on the destruction of those arbitrary exactions which fell with no uniformity, and bore heavily upon some and lightly upon others, at the same time stating it was not to be wished that there should be an abolition of taxes.

He then makes the following just observation upon the idea of government and true basis of magistracy, which he says will be found to consist in this: that some few men are deputed by many others to preside over public affairs, so that individuals may the better be enabled to attend to their private concerns; it is necessary that those individuals should be bound to contribute a portion of their private gains in order to support that government and reward that magistracy which protects them in the enjoyment of their respective properties. But the things to be aimed at are wisdom and moderation, not only in *granting*, but also in the method of raising the necessary supplies; by contriving to do both in such a manner as may be most conductive to the national welfare, and at the same time most consistent with economy and the liberty of the subject, who, when properly taxed, contributes only, as was before observed, some part of his property, in order to enjoy the rest."[1]

Sec. 269. *Regular and Perpetual Revenue.*— Blackstone divides these taxes into annual and perpetual; that is, those which are raised according to the needs and exigencies of the occasion, which would be determined by an investigation of the necessary expenses of the government, and making an estimate of what would be produced by perpetual taxes, meaning excises, internal revenue taxes and import duties, and making up the deficiency by voluntary contribution of the people, ascertained and imposed by the commons.

[1] 1 Cooley's Blk. (3d ed.) 306.

First among these he mentioned the land tax. These are mentioned in the Magna Charta under the designation of scutage and tailage.[1]

He classes the grants of scutages and tailages and subsidies granted by the commons together.

Another one of these fixed customs was the annual malt tax.

Among the perpetual taxes recognized in the English law were customs or duties, toll tribute or tariff, payable on merchandise exported and imported. Of these he says: "The customs or the duties, toll, tribute or tariff, payable upon merchandise exported and imported. The considerations upon which this revenue (or the more ancient part of it, which arose only from exports) was invested in the king were said to be two: 1. Because he gave the subject leave to depart the kingdom, and to carry his goods along with him. 2. Because the king was bound of common right to maintain and keep up the ports and havens, and to protect the merchants from pirates. Some have imagined they are called with us customs because they were the inheritance of the king by immemorial usage and the common law, and not *granted* him by any statute; but Sir Edward Coke had clearly shown that the king's first claim to them was by grant of parliament (3 Edw. I.), though the record thereof is not now extant."[2]

Sec. 270. *Direct Taxation in England.*— These revenues of the crown took the shape of grants, which it was the exclusive privilege of the house of commons to originate.

Mr. Burke, in his speech on American taxation, points out very clearly the distinction between such acts and regulations of commerce which it was among the prerogatives of the crown to prescribe, upon the same principles adverted to in the case of *Campbell v. Hall*,[3] above noticed.

Such acts, having a title directly purporting to be only a commercial regulation, and being in truth nothing more, were not resisted by the American colonies.

[1] "'Taxes' means burdens, charges or impositions put or set upon persons or property for public uses; and this is the definition which the code gives to tailage. 2 Inst. 522; Carth. 438; Matter of the Mayor, etc., 11 John. 80." Paschal's Ann. Const. 95.

[2] 1 Cooley's Blk. (3d ed.) 313.

[3] Cowper, 206; Johnson v. M'Intosh, 8 Wheat. 541.

Sec. 271. *Taxation, as Such, Distinguished from Regulation of Commerce.*— The distinction here made is quite similar to that between the imposition of a tax on exports by the states or the United States and an imposition regulating such export. It also bears upon the imposition allowable under the commerce clause of the constitution.

The act of the British parliament of 1764 was the first act applying to the colonies, wherein, in the preamble, it was recited that parliament *granted in the colonies* and plantations of America, and it was just and necessary that *a revenue should be raised there.* In this manner the question was raised between the sovereign power of the crown, which was recognized as a part of his prerogative as arbiter of commerce, and those impositions voluntarily made by the people for the support of the government which we call taxes.[1]

Sec. 272. *Direct and Indirect Taxes.*— The general word "tax" being a broad or generic term is said to include all of the other species enumerated in the constitution, and it is assumed that a tax must be either direct or indirect.[2]

Perhaps it is not possible to find or invent definitions which will so accurately describe the elements of each species of imposition, exaction and regulation authorized by the constitution as will distinguish it from others of a given class. Certain it is that these terms have not been so defined, nor has there been an attempt on the part of the court to furnish a definition for future cases.

In the first case involving a consideration of this question, it is said by Justice Chase that indirect taxes are to be laid by

[1] See 1 Blk. Com. 273; Speech of Edmund Burke, April 19, 1774; also the address of James Wilson, on the subject of Legislative Authority of the Parliament over the Crown, published August 17, 1774; Story's Com. on Const., sec. 192.

Chief Justice Fuller quotes from the speech a sentence making clear the distinction as follows: "As Burke declared in his speech on conciliation with America, the defenders of the excellence of the English constitution 'took infinite pains to inculcate, as a fundamental principle, that, in all monarchies, the people must, in effect, themselves, mediately or immediately, possess the power of granting their own money, or no shadow of liberty could subsist.' The principle was that the consent of those who were expected to pay it was essential to the validity of any tax." Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429–556.

[2] Hylton v. United States, 3 Dall. 171.

the rule of uniformity, whereas the direct tax has been and should be laid or assessed in proportion to the census or enumeration required by the constitution;[1] that is to say, the constitution gave power to congress to lay and collect taxes of every kind or nature without restraint excepting on importation.

These impositions are to be imposed and collected upon two different principles, namely: three kinds of taxes, to wit, duties, imposts and excises, were to be spread uniformly upon all subjects of taxation.

Capitation and other direct taxes are to be apportioned among the states according to the census.

Justice Chase, in his opinion, is inclined to the view that there are but two classes of direct taxes, namely: poll tax, without regard to property, profession or any other circumstances, and a land tax; and expresses a doubt whether a general assessment of personal property within the United States is included within the term "tax."

And it was held in that case that a tax on carriages was not a direct tax, and an act imposing the burden was upheld.[2]

[1] "Albert Gallatin, in his 'Sketch of the Finances of the United States,' published in November, 1796, said: 'The most generally received opinion, however, is, that by direct taxes in the constitution, those are meant which are raised on the capital or revenue of the people; by indirect, such as are raised on their expense. As that opinion is in itself rational, and conformable to the decision which has taken place on the subject of the carriage tax, and as it appears important, for the sake of preventing future controversies, which may be not more fatal to the revenue than to the tranquillity of the Union, that a fixed interpretation should be generally adopted, it will not be improper to corroborate it by quoting the author from whom the idea seems to have been borrowed.' He then quotes from Smith's Wealth of Nations, and continues: 'The remarkable coincidence of the clause of the constitution with this passage in using the word "capitation" as a generic expression, including the different species of direct taxes, an exception of the word peculiar, it is believed, to Dr. Smith, leaves little doubt that the framers of the one had the other in view at the time, and that they, as well as he, by direct taxes, meant those paid directly from and falling immediately on the revenue; and by indirect, those which are paid indirectly out of the revenue by falling immediately upon the expense.' 3 Gallatin's Writings (Adams' ed.), 74, 75." Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429–569.

[2] Hylton v. United States, 3 Dall. 171. See 1 Cooley's Blk. 308, 309. The term "indirect tax" does not appear in the constitution. Hylton v. United States, 3 Dall. 176.

Sec. 273. *Product of Land Follows Condition of Land.*— In the case just cited it was unnecessary to determine whether a tax on the products of land was a direct or indirect tax.

Justice Paterson expresses this opinion: "Perhaps the immediate product of land, in its original and crude state, ought to be considered as the land itself; it makes a part of it; or else the provision made against taxing exports would be easily eluded. Land, independently of its produce, is of no value. When the produce is converted into a manufacture it assumes a new shape; its nature is altered; its original state is changed; it becomes quite another subject, and will be differently considered. Whether direct taxes, in the sense of the constitution, comprehend any other tax than a capitation tax and tax on land, is a questionable point. If congress, for instance, should tax, in the aggregate or mass, things that generally pervade all the states in the Union, then, perhaps, the rule of apportionment would be the most proper, especially if an assessment was to intervene. This appears by the practice of some of the states to have been considered as a direct tax. Whether it be so under the constitution of the United States is a matter of some difficulty; but as it is not before the court it would be improper to give any decisive opinion upon it."[1]

Sec. 274. *Criteria Suggested by Hylton Case.*— This remark of Mr. Justice Paterson suggests the key or test for determining the difference between direct and indirect taxation; but his argument suggests that there can be no infallible criterion which shall, by certain and precise designation, fix a line between direct taxation which shall be apportioned and excise duties and customs and licenses, which must be uniform as to the objects of the imposition, and exactions upon the transaction of business or the possession or distribution of property, which shall be a mere regulation of commerce or a protection of some of the objects of the government.

It is to be observed that the imposition laid, which is involved in the Hylton case, was not generally upon all vehicles, but upon vehicles kept for use, so that the manufacturer of these same vehicles, or a jobber, no matter how many of them had been in his possession, was not within the provision of the law.

[1] Hylton v. United States, 3 Dall. 171.

It is quite manifest, especially when regarded with the light of the discussion in the recent Income Tax Case, that the imposition, in order to be sustained, could only be regarded as a tax upon the *use* of the designated things regarded in that light, and properly designated as an excise tax.

The case of *Hylton v. United States* is very narrow in the scope of the actual decision, and is not overruled either impliedly or professedly by the decision of the Income Tax Cases.

The language of the judges heretofore mentioned, instead of being intended to lay down broad principles for future cases, was cautiously used and expressly left open for future cases.

That capitation taxes and taxes upon land are direct taxes has never been doubted; but the impression which seems to have obtained among the profession, and to have become a fixed rule by the decision in the United States supreme court in *Springer v. United States*,[1] that capitation and land taxes are the only species of direct taxation, seems not to have been based upon any independent reasoning in reference to the nature of the thing taxed, or any distinction between the thing, whether it be an intangible thing, such as a franchise, a chose in action, or a tangible chattel, or an estate in land.

Sec. 275. *The Rule and the Reason of it.*— In the first decision of the Income Tax Case,[2] wherein it was decided that income arising from real property was a direct tax, and in the second case,[3] where it was held that income arising from the use of personal property was likewise a direct tax, there was made, in the course of the argument, the real distinction between property in a thing and the thing itself, which has heretofore been pointed out.[4]

Mr. Choate, in his argument, invoked the principle that the highest interest in land that a man might in England obtain was an estate, and that if the entire beneficial use of it was granted by deed, accompanied by seizin, the land itself doth pass.[5]

[1] 102 U. S. 586.

[2] Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429; 158 U. S. 601.

[3] 158 U. S. 601.

[4] Shylock remarked: "You do take my house when you do take the prop whereon it stands."

[5] 157 U. S. 540.

A devise of the entire rents and profits is a devise of that out of which the rents and profits may issue.

Upon the same principle, the court of appeals of New York have announced the principle, universally accepted, that in the law of eminent domain, or in view of the constitutional provision against unreasonable seizures and searches, a man's property, real or personal, might be effectually taken or destroyed, and the thing itself remain physically untouched.[1]

By looking to the substance and disregarding the form, the result was arrived at that a tax upon an income arising from the use of any and all property, which fell directly on the man himself, was a direct tax.

Thus, it is said that the enforced subtraction from the yield of all the owners' real or personal property is not so different from a tax on the property as to cause one to be classed as direct and the other indirect.[2]

Sec. 276. *Indirect Taxation.*—

Customs Duties, Imposts, Excises, Tariff and Internal Revenue.[3]—All of the above terms are encountered in an investigation of the power exercised and means used by the United States in raising a revenue or regulating commerce. Indirect taxes are not spoken of. Duties, customs and excise are the words used in the constitution[4] to designate taxes other than capitation and direct taxes.

Sec. 277. *Difficulties to be Encountered.*—The difficulty of construing and applying the constitution in reference to the power to impose indirect taxes is enhanced by the intimate relationship which existed between the levying of imposts and excise for the purpose merely of raising a revenue, and for the purpose of regulating commerce.[5]

Again, the rightful exercise of the police power on the part of the states has been a question of great difficulty when it

[1] Wynehamer v. People, 13 N. Y. 378.

[2] 158 U. S. 618.

[3] See, for meaning of these terms, 158 U. S. 622 *et seq.* Customs duties, as such, were not within the king's prerogative. They began, as such, in the reign of Edward I., when parliament granted him three pence per pound on all merchandise exported or imported. Dyer, 165; 2 Beawes' Lex Merc. 919.

[4] See Cooley, Taxation, pp. 3, 5, 23.

[5] Pollock v. Farmers' L. & T. Co., 158 U. S. 620.

came in conflict with the powers of the general government over the subject of commerce.

Notwithstanding the efforts which have been made to discover some principle which would furnish a practical guide for determining in all cases the distinction between a direct and indirect tax and taxation, properly so called, and the regulation of commerce and business, no certain *criteria* exist.

It seems impossible that anything short of a constitutional definition can be devised which will limit the courts in the exercise of that discretion and discrimination which knows no bounds, respects no barriers and removes all impediments to the result desired.[1]

Sec. 278. *Indirect Taxes — Definition.*— Indirect taxation is not used in the constitution, but was used by the framers of that instrument in antithesis to direct taxation.[2] The distinction intended to be made by this use is that the *indirect* imposition does not fall primarily and ultimately upon the person paying it,[3] but is imposed upon the materials or commodities which the owner, be he merchant, manufacturer or carrier, uses as a subject of his traffic; and because of this distinction it is said that the imposition is levied upon the use of the thing rather than upon the ownership of it, and in such a way that the individual has a choice by which he can avoid the contribution by not purchasing or not using in the particular manner the property or thing in question, or not importing it.

Direct taxes are so imposed that, while the thing itself is the cause of the tax and the measure of it,[4] such tax is against the man, and is a different thing and imposed upon different principles from the collection of customs, duty or excise, the inter-

[1] The definition of Judge Cooley includes, within direct taxes, income tax, and, while opposed to the federal case when framed, is correct now. On the other hand, "business" is erroneously included. The definition of indirect taxes is correct so far as it goes, but must be held to be too narrow for the present time. Page 5.

[2] Income Tax Cases, 158 U. S. 622.

[3] If one stops to consider the nature of a tax other than a poll tax, viz., an imposition or levy against every person according to the value or possession of things, made by his consent, express or implied, *i. e.*, a grant, which when levied and assessed becomes a debt, and only a lien by statute, it becomes more plain that the man is taxed directly. The transaction is with the man. On the other hand, in case of the excise, custom or duties the thing is primarily burdened.

[4] The protection of the man and the property are the considerations of it.

nal revenue tax or license, which is included under the designation of indirect taxation or business regulation.

Sec. 279. *Indirect Taxes, Why So Called.*—Blackstone, speaking of such imposition, says: "Other customs payable on exports and imports were distinguished into subsidies, tonnage, poundage and other imposts."

Again he says: "These customs are then, we see, a tax immediately paid by the merchant, although ultimately by the consumer. And yet these are the duties felt least by the people; and, if prudently managed, the people hardly consider that they pay them at all. For the merchant is easy; being sensible, he does not pay them for himself; and the consumer who really pays them confounds them with the price of the commodity."[1]

Judge Cooley, in his work on Taxation, says that indirect taxes are those levied on commodities (evidently articles of trade in the course of commerce) before they reach the consumer, and are paid by those on whom they ultimately fall, not as taxes, but as a part of the price; and secondly, the duties upon imports, and the excise and stamp duties levied upon manufactures.[2]

He remarks that states always derive their principal revenue from direct tax, and the federal government from those which are indirect.

He notices the view of the political economist Turgot, whose views are cited in the Income Tax Cases, that indirect taxes are resorted to "in order to pluck the goose without making it cry out."[3]

Prior to the late income tax, it was held that an income tax levied against an inhabitant is rather a duty or excise on the transaction of business than a tax upon the individual because of the ownership of the property.[4]

[1] Cooley's Blk. (3d ed.) 315. Here we see an intimation on the political controversy as to whether the consumer pays the tax or whether the importer pays the tariff.

[2] Page 5. These are sometimes designated respectively as external and internal taxes. See 158 U. S. 624.

[3] Cooley on Taxation, p. 5. The American goose was not originally so docile. The first excise tax caused the Pennsylvania whiskey insurrection, an account of which is given in Von Holst's Const. Hist. U. S., vol. 1, pp. 94–101. It may be noticed that the collection of the revenue was the point of impact between the seceding states and the national government in 1861.

[4] Pacific Ins. Co. v. Soule, 7 Wall.

Sec. 280. *Inaccuracy in Use of Terms.*— It has been said that an indirect tax is "a tax levied on *commodities*[1] before they reach the consumer;" they embrace taxes on imports, excise taxes and licenses on occupations, and the like.[2]

This does not express clearly what is intended. The true idea is that it is an imposition upon the article after it has embarked upon its mission and become an article in manufacture or trade. It then attains the quality of a commodity.

Sec. 281. *Distinguishing Features.*— The writer has noticed no instance of a tax upon the product of land or an unmanufactured article in the hands of the original producer which has been designated as anything else than a direct tax.

Plainly, the grower of tobacco, for example, might be compelled to stamp his tobacco, upon the same principle that articles intended to be exported may be required to be stamped, in order to protect the government against fraud in the legitimate imposition of indirect taxes or impositions; but this is another thing from the tax.

It will be found that another attribute accompanies direct taxation which does not accompany the indirect imposition.

It will be observed that as to direct taxation the generic language is "capitation or other direct taxation."

In direct taxation the individual is taxed because of what he owns, and the primary liability is against the individual; whereas in the case of duties and excise, the property may be seized and held until the tax is paid, without any formality as to judgment or due process of law.[3]

Illustration.— In illustration of this may be noticed the argument of Mr. Guthrie, which found sanction in the opinion of the court, where he says the tax upon classes of corporations under the old income law was sustained, not because it was a tax upon the property, but upon the distinct ground that it

433. See also Wilcox v. Middlesex Co., 103 Mass. 544; Springer v. United States, 102 U. S. 586.

[1] This word *commodity* has a technical meaning in the nomenclature of the law merchant; it was applied only to a thing embarked in commerce. See 2 Beawes' Lex. Merc., p. 918. Notice also Anderson's definition, which attaches to the word the signification of the privilege accorded the owner of exporting or importing.

[2] Veazie Bank v. Fenno, 8 Wall. 533; Scholey v. Rew, 23 Wall. 331.

[3] This is the real distinction, clearly made by Chief Justice Fuller in Income Tax Case, 158 U. S., at page 627.

was an excise on their business. Such was the reason assigned by Mr. Justice Swayne in the case of *Pacific Ins. Co. v. Soule*,[1] and such the ground reiterated by Mr. Justice Miller in delivering the opinion of the court in *Railroad Co. v. Collector*.[2]

The bank tax was held to be a tax, not upon property or income, but upon the act of issuing notes; not on the obligation itself, but on its *use in a particular way;* and the judgment in *Veazie Bank v. Fenno*,[3] followed by *National Bank v. United States*,[4] clearly shows this to be the true ground.[5]

Sec. 282. *Rationale of Former Decisions.*— In his opinion in the Income Tax Case, Chief Justice Fuller says: "Let us examine the cases."

He states as to the *Pacific Insurance Co. v. Soule* case that it was a tax upon the business of an insurance company, and an excise.

Referring to the *National Bank v. United States* and *Veazie Bank* case, he comments upon the language of Mr. Chief Justice Waite, where he says: "The tax thus laid is not on the obligation, but on its use in a particular way."

And the case of *Scholey v. Rew*, which was a case of *a succession tax*, which the court held to be plainly an excise tax or duty.

The chief justice distinguishes all these cases from the case then under consideration, in that they do not fall upon *property or the person directly*, but upon the use of the property in a particular way.

The ruling principle, then, which has received the sanction of the highest judicial tribunal, rests upon clear and substantial reasons, that direct taxation (other than mere capitation tax) falls upon the individual because of his ownership, while the indirect taxation, whether it be called tariff, custom, duty, impost, excise or license, falls upon the particular use of property, the regulation of the right to engage in certain callings and the regulation of certain businesses.

Sec. 283. *Succession and Inheritance Taxes.*— The power of the state to impose what are called succession and inheritance

[1] 7 Wall. 433.
[2] 100 U. S. 595.
[3] 8 Wall. 533.
[4] 101 U. S. 1.
[5] Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429–445.

taxes rests upon much plainer grounds than the same impositions when made by congress.

The sovereignty of the state extends to the manner of holding and transferring property situated within its borders; and while property is recognized as the right to dispose of, as well as own and use, nevertheless this does not carry with it the right to *devise* it in a particular direction.

It follows that a state has the right to exact any condition it sees fit for the privilege of taking by inheritance.

The United States, however, does not stand in the same position in reference to property situated within the limits of a state, and an inheritance tax, strictly speaking, must rest upon other grounds, if it can be defended at all.

The power of taxing property, security, devise or succession as such has been exercised by the United States, but it cannot be said, in the case of the United States, that it has any right to impose a condition upon the inheritance which must be complied with before the estate can vest, because there can be no doubt that this is one of the exclusive rights of a state.

Under the acts of congress which were occasioned by the civil war and remained in force until 1870, the inheritance tax was not a condition to the taking of the estate, but was an imposition on account of the ownership, and the designation is but a mode of discriminating between persons.

It would seem that such an imposition falls under the designation of a direct tax, and would be unobjectionable upon the ground of conflict with the exclusive right of the state to regulate the devolution of property.[1]

Sec. 284. *Lay, Levy, Impose.*— In the exercise of the power to provide the treasury with a revenue, the constitution speaks of laying tax, etc. The laying, levying or imposing is an act of declaring that such an amount of tax shall be raised and collected from certain persons, or certain property, or certain businesses.

Where the taxes are for a single instance or a number of instances or a direct purpose, that would fall under what Blackstone terms "annual taxes," although they may not be fixed as regards period of time.

[1] See Wright v. Blakeslee, 101 U. S. 174.

Such a tax requires the assessment and collection from the individual.

As to direct taxation, the requirement of the law is that it shall be levied upon the people of the states proportionately to their representation in congress.

It seems to be under contemplation of the law that impositions which were to be levied and collected from the persons of a given state might be paid by the state itself, if it desired to avoid the actual collection by the United States. Otherwise the tax is collected by the officers of the United States.[1]

Sec. 285. *Assessment* is the process of inquiry and adjustment by which the amount each person shall pay upon his specific property is determined and designated.

Upon general principles it is a deprivation of the citizen's rights, and contrary to the requirement against unjust discriminations, that inequality in the mode of assessment should occur.

The impositions must be uniform as to persons and property standing in the same situation. Within these restrictions, that method and mode of ascertaining and fixing the amount best suited to the needs of the government may be followed.[2]

Before the adoption of the constitution there was no mode of proceeding known by which taxes could be collected without a previous determination of the amount to be paid, either by judgment of a court of law or by action of some public officer. In all decisions wherein there is a reference to the assessment and collection of taxes, the person whose duty it was to ascertain the amount of the taxes is spoken of as an officer.

Thus, in the *Dollar Savings Bank* case,[3] the court say: "An assessment is only determining the value of the thing taxed, and the amount of the tax required of each individual. It may be made by designated officers, or by the 'law itself.'"[4]

Sec. 286. *Collection and Enforcement.*— The method of collection of direct taxes is not necessarily uniform, and several methods may be pursued at the same time.

[1] Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429; 158 U. S., at page 620.

[2] Santa Clara Co. v. So. Pac. R. Co., 18 Fed. Rep. 385.

[3] 19 Wall. 227.

[4] "But where a tax is levied on property not specifically, but according to its value, to be ascertained by assessors appointed for that purpose upon such evidence as they may obtain, a different principle comes in. The officers in estimating the value act judicially." Hager v. Reclamation Dist. No. 108.

The first tax of 1798 was collected by United States officers.[1]

A direct tax being against the person is not, in the absence of a statute, a lien upon property, but is a personal charge against the individual.[2]

Ordinarily, however, all taxes and impositions are by the statutes made a lien upon the property.[3]

Judge Cooley enumerates various methods of collecting taxes, but it will only be necessary here to emphasize the principle underlying the imposition of direct taxes, namely, that a direct tax is a debt in favor of the government and against the individual, differing from an ordinary debt, which one incurs in pursuance of a direct promise to pay or by reason of a direct contract or breach of his contract only in its origin.[4]

Independently of special provisions in acts of congress or of states, it follows that suits at law may be maintained by the United States to recover taxes duly assessed.[5] And the giving of a specific remedy does not exclude a resort to common-law methods.[6]

Sec. 287. *Collection of Indirect Taxes.*—Indirect taxes may be collected by the summary process of immediate seizure of the goods, where they are imported or in the custom-house, or

[1] Pollock v. Farmers' Loan & Trust Co., 157 U. S. 472.

Cooley notices the following methods of collecting taxes:

1. By suit. See State v. Williams, 8 Tex. 384; Houston, etc. R. R. Co. v. State, id. 148.

2. By the arrest of the person taxed. See Lothrop v. Ide, 13 Gray, 93; Hall v. Hall, 3 Allen, 5.

3. By distress. See State v. Allen, 2 McCord, 55, 60.

4. By the detention of goods and chattels.

5. By sale of lands. See Hutchins v. Moody, 30 Vt. 655.

6. By the imposition of penalties. See Sprague v. Bailey, 19 Pick. 436.

7. By forfeiture of property taxed. See Barbour v. Nelson, 1 Litt. 60, for the affirmative, and Wild's Lessee v. Serpell, 10 Gratt. 405, for the negative, of this proposition.

8. By conditions on the exercise of a right. See Griffin v. Rising, 11 Met. 339; Batterson v. Barlow, 60 Pa. St. 54. Cooley, Taxation, p. 299.

[2] Cooley on Taxation, p. 299. "The rule is settled that, to constitute any charge a lien upon property, such lien must be specifically declared by the statute." Burgdorf v. District of Columbia, 7 App. D. C. 405.

[3] Lyon v. Alley, 130 U. S. 177. See also Burgdorf v. District of Columbia, 7 App. D. C. 405. So water rates in cities are frequently held to be a paramount lien. Union Pac. R. R. Co. v. Cheyenne, 113 U. S. 516.

[4] People v. Seymour, 16 Cal. 340.

[5] Garrett v. Memphis, 5 Fed. Rep. 860. See also Dollar Savings Bank v. United States, 19 Wall. 227.

[6] Savings Bank v. United States, 19 Wall. 238.

by suit against the person who has refused to comply with the law, or for the collection of penalties, and in the case of smuggling there are certain penalties which may be enforced by suit or by seizure and forfeitures.

These are part of the duties of officers of a department of government. The judicial remedies open to them fall within the jurisdiction of courts, and may be noticed under the examination of jurisdiction or procedure or crimes, and need not be further noticed here.

Sec. 288. *Taxation by the Territories.*—It is the common practice in the United States to invest the people residing within a territory with the powers of self-government, and among other powers usually given is that of taxation.

This power is to be exercised in accordance with the same general principles which pervade the power of taxation.

As the organization of these territories is not always complete and regular, some anomalous conditions exist in reference to taxing districts.

Again, the Indian tribes are frequently found domiciled within the territories. Taxes are, however, levied and imposed upon their property by the territorial legislatures and local authorities authorized by them.[1]

Such taxes imposed upon the property of Indians within the territories do not conflict with the power of the United States to regulate commerce with the Indian tribes.[2]

[1] Thomas v. Gay, 169 U. S. 264; Wagoner v. Evans, 170 U. S. 588.

[2] Thomas v. Gay, 169 U. S. 264.

CHAPTER XVI.

POWER TO REGULATE COMMERCE.

SEC. 289. *Relation of Commerce to Other Subjects.*—Next in the order of enumeration of the powers of congress is the power to borrow money on the credit of the United States; but much more intimately connected with the subject of direct taxation which we have under consideration, and from which it is hard to distinguish many of the exercises of the powers, and which frequently limit the powers of the states as to taxation, is the commerce clause of the constitution, which gives to the United States the power to regulate commerce with foreign nations and among the several states and with the Indian tribes.

Of vital importance to the existence of the Union, equally with the power to levy taxes directly against the individual and against property, was the power to regulate commerce with other nations and among the states.

The power to regulate commerce, as it has been interpreted and extended by the decisions of the supreme court of the United States, affects materially the taxing power of the states, and is far more dangerous to the autonomy of the state and the right of local self-government, and the power of the state under the police power to protect its citizens from noxious things and noxious persons, than the exercise of the inherent powers in the government which have been so clamorously denied and so closely scrutinized.[1]

[1] Mr. Chief Justice Taney, in the Passenger Cases, seems not to have regarded the state taxing power as abridged. He says: "I may, therefore, safely assume that, according to the true construction of the constitution, the power granted to congress to regulate commerce *did not in any degree abridge the power of taxation in the states.* . . . They are expressly prohibited from laying any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws, and also from laying any tonnage duty. So far their taxing power over commerce is restrained, but no further." 7 How. 283, 480.

"It is clear," say Prentice & Egan in their treatise on the Commerce Clause, "that such an interpretation as that for which Mr. Chief Justice Taney contended would be wholly incompatible with the controlling

Under the modern interpretation of the commerce clause, the state is utterly helpless to erect any barrier against the flood of noxious liquors and noxious articles which, under the protection of commerce, non-residents may pour in upon it, although such articles are, and always have been, conceded to be of such a nature and character that any government or state may properly regulate or entirely prohibit.[1]

Sec. 290. *Proper Place to Treat the State Power.*— It so happens that the discussion and construction of the commerce

púrpose of the constitution to secure commerce among the states from state regulation. There seems to be no doubt that the convention understood the power of taxation was capable of use, not only as a means of revenue, but also for commercial regulation.

"'The line of distinction,' says Madison, 'between the power of regulating trade and that of drawing revenue from it, which was once considered a barrier of our liberties, was found upon discussion to be absolutely indefinable.' [But this is not saying that the distinction was not discernible when the instance was brought to view.]

"Again, in commenting upon the case of McCulloch v. Maryland, Madison remarks: 'When the distinction between separate powers is disregarded, and for the definite connection between means and ends is substituted legislative discretion as to the former, the legislative power becomes limitless. Ends may shift their character and will, according to the exigency of the legislative body. What is an end in one case may be a means in another; may, in the same case, be either an end or a means, at the legislative option. The British parliament, in collecting revenue from the commerce of America, found no difficulty in calling it either a tax for the regulation of trade or the regulation of trade with a view to a tax, as suited the argument or the policy of the moment.'" Prentice & Egan, Com. Cl., 197–98.

[1] Leisy v. Hardin, 135 U. S. 100. See also Rhodes v. Iowa, 170 U. S. 412; Nance v. Vandercook, 170 U. S. 438. "In Henderson, etc. v. Mayor of New York, 92 U. S. 259, the court, speaking by Mr. Justice Miller, while declining to decide whether, in the absence of action by congress, the states can, or how far they may, by appropriate legislation, protect themselves against actual paupers, vagrants, criminals and diseased persons arriving from foreign countries, said that no definition of the police power, and 'no urgency for its use, can authorize a state to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of congress by the constitution.' Page 271. Chy Lung v. Freeman, 92 U. S. 275. And in Railroad Co. v. Husen, 95 U. S. 465, Mr. Justice Strong, delivering the opinion of the court, said that 'the police power of a state cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and, under color of it, objects not within its scope cannot be secured at the expense of the protection afforded by the federal constitution. Pages 473, 474." Quoted in Brennan v. Titusville, 153 U. S. 300. As to articles not noxious, see the Oleomargarine Cases, Paul v. Com. of Pa. and Schollenberger v. Com. of Pa., 18 Sup. Ct. Rep. (U. S.), May, 1898, p. 757.

clause of the federal constitution most frequently arises in a discussion of the power of the state to impose taxes, to enact quarantine laws, harbor regulations, exact licenses, to prohibit the transaction of certain lines of business, to prohibit the sale of certain noxious goods or articles, to prohibit the transportation through the state of animals or persons infected with disease, or to prohibit the entry into the state of persons deemed unfit by the people of the state to mingle with them.

Naturally, then, the great bulk of the law is more properly treated in reference to the limitations on the police and taxing powers of the state and the power of the state legislature to pass laws upon the subject.

In its proper place, under the powers of the state, will be examined the limitations upon the powers of the state by reason of the commerce clause. Here it is proper to treat only the nature of the power conferred by the commerce clause, and the extent of its exercise by the United States, and the character of the power as being exclusive or concurrent with that of the United States, and such matters as pertain to the power of congress.[1]

Sec. 291. *"Regulate Commerce"—Meaning of the Term.*— In these two words are found the whole scope of the power. The extent of it, then, is to *regulate;* the subject of the regulation is commerce.

The species or departments of its exercise are "with foreign nations and among the several states and with Indian tribes."

The embargo or entire prohibition is clearly distinguishable from the *regulation* of anything.

The prohibition of the liquor traffic is a familiar instance wherein the distinction is constantly drawn between regulating and prohibiting.

It will be observed that, in speaking of the inherent powers of the general government, they were discussed in relation to matters wherein there was no express mention, either by way of a grant or in words which excluded any implication.

As a question of constitutional construction, the power of the United States to lay an embargo stretches the canons of construction beyond the point necessary to imply inherent powers.

[1] Hence the title of Judge Cooley, "Constitutional Limitations."

There is an obstacle more difficult to overcome in this connection than in any other exercise of a non-enumerated power.

According to general rules of construction, the express mention of one thing excludes the implication of another.

The subject of commerce is designated, the extent of the power is also fixed, and the nature of *the power to regulate* is expressly mentioned.

An embargo in times of peace is a simple prohibition.

It is obvious that such a power might bear more heavily upon one section of the country, or upon states not upon the seaboard, than upon those in another section of the country where but a small portion of the business of its inhabitants was in foreign trade.

Mr. Justice Story said that he had always considered an embargo as going to the utmost limit of *constructive* power under the constitution. "It stands upon the extreme verge of the constitution, being in its very form and terms an unlimited prohibition or suspension of foreign commerce."[1]

Being aimed at a foreign nation and exercised with discretion, it has popular sympathy; but being an unlimited power, and the exercise of which, though laid in general terms, may operate on a special few and those in a section, it is more than probable that it was not within the contemplation of the framers of the constitution.

The constitutionality, however, of the measure is settled both by long acquiescence and by judicial decision, or at least *obiter* of such weight as to be practically conclusive.[2]

The extent, however, of its exercise is not entirely beyond controversy. Judge Story says that the power may be invoked on the maxim, *Salus populi suprema lex;* but the maxim might with equal force be invoked to sustain the police power.

Sec. 292. *Nature and Validity of Embargo — Marshall's Opinion.*— "The universally acknowledged power of the government to impose embargoes must also be considered as showing that all America is united in that construction which comprehends navigation in the word 'commerce.' Gentlemen have said, in argument, that this is a branch of the war-making

[1] Life and Letters of Justice Story, I, pp. 185, 186, quoted in 1 Von Holst, Const. Hist. U. S., 204.

[2] Story's Com. on Const., § 1292.

power, and that an embargo is an instrument of war, not a regulation of trade.

"That it may be, and often is, used as an instrument of war, cannot be denied. An embargo may be imposed for the purpose of facilitating the equipment or manning of a fleet, or for the purpose of concealing the progress of an expedition preparing to sail from a particular port. In these, and in similar cases, it is a military instrument, and partakes of the nature of war. But all embargoes are not of this description. They are sometimes resorted to without a view to war, and with a single view to commerce. In such a case an embargo is no more a war measure than a merchantman is a ship of war because both are vessels which navigate the ocean with sails and seamen.

"When congress imposed that embargo which for a time engaged the attention of every man in the United States, the avowed object of the law was the protection of commerce and the avoiding of war. By its friends and its enemies it was treated as a commercial, not as a war measure. The persevering earnestness and zeal with which it was opposed, in a part of our country which supposed its interests to be vitally affected by the act, cannot be forgotten. A want of acuteness in discovering objections to a measure to which they felt the most deep-rooted hostility will not be imputed to those who were arrayed in opposition to this. Yet they never suspected that navigation was no branch of trade, and was therefore not comprehended in the power to regulate commerce. They did indeed contest the constitutionality of the act, but on a principle which admits the construction for which the appellant contends. They denied that the particular law in question was made in pursuance of the constitution, not because the power could not act directly on vessels, but because a perpetual embargo was the annihilation, and not the regulation, of commerce. In terms, they admitted the applicability of the words used in the constitution to vessels; and that in a case which produced a degree and an extent of excitement calculated to draw forth every principle on which legitimate resistance could be sustained. No example could more strongly illustrate the universal understanding of the American people on this subject."[1]

[1] Gibbons v. Ogden, 9 Wheat. 1–192.

Sec. 293. *Commerce — Extent of the Term.*— The word "commerce" is not open to a definition which may rigidly describe all those matters which may at some future time fall within the power granted by this clause of the constitution.

It naturally includes traffic — the purchase and sale of goods and commodities. It has also been held to embrace transportation of persons and of tangible things, and the exigencies of modern business have brought into play, as an instrument of commerce, the transmission of messages by telegraph and telephone.

Commerce also includes navigation. Not only does it include all these forms of intercourse, but it includes all the instruments by which it is accomplished,— steamboats, steam railways, stages, coaches, and the necessary adjuncts thereto, such as wharves, depots, streams, canals, lakes, etc.; in fact, everything which may reasonably and properly be termed essential or convenient for the exercise of commerce.

Chief Justice Marshall, in *Gibbons v. Ogden*,[1] began the authoritative exposition of the term "commerce," and it has been extended with the growth of the subject and the invention of modern appliances until there is no longer any doubt as to the extensive meaning of the word.[2]

Sec. 294. *Not All Interstate Contracts Are Commerce.*— The business carried on between persons domiciled in different states and countries must, to fall within the designation of the constitution, be a business which is recognized as a part of commerce.

Insurance Contracts.— In *Paul v. Virginia*,[3] an insurance agent was engaged in soliciting contracts for fire insurance. It was held that the character of the business, and not the fact that it was carried on between citizens of different states, is the test as to whether a license or exaction against the business, or against the solicitor, was a regulation of interstate commerce, and that the business of insurance did not fall within the intention of the clause.

[1] 9 Wheat. 1–186. See Hopkins v. United States, 19 Sup. Ct. Rep. 40.

[2] Gibbons v. Ogden, 9 Wheat. 1, 186–190; Brown v. Maryland, 12 Wheat. 446; North River Steamboat Co. v. Livingston, 3 Cow. 713; Leloup v. Mobile, 127 U. S. 640.

[3] 8 Wall. 168. See also Insurance Co. v. New York, 119 U. S. 110; Hooper v. California, 155 U. S. 648.

The Drummer Cases.— It is not safe, however, to conclude that all cases of insurance fall within the same principle. A contract to indemnify the owner of property, which was clearly a legitimate commodity of commerce, from loss during the period of its transportation and while it remained within the protection of interstate commerce, might possibly be held to be an incident of commerce.

The principle upon which a solicitor of insurance is held subject to the imposition of a license and regulation of a state does not cover the case when an attempt is made to exact a license fee or regulate the manner of soliciting the purchase or sale of legitimate objects of commerce intended for importation into a state.

The subject of licensing so-called drummers, or what are termed in more polite phrase, commercial travelers, falls within the inhibition against state or municipal power, and it is held that any burden imposed upon an agent who is engaged in interstate commerce, legitimately and *bona fide*, is a burden or regulation of the commerce.[1]

Sec. 295. *Nature of the Power — Exclusive and Concurrent.* That the power of the United States to regulate interstate and

[1] Brennan v. Titusville, 153 U. S. 289; Asher v. Texas, 128 U. S. 129; Robbins v. Taxing Dist., 120 U. S. 489. A recent case shows how thoroughly well understood is this rule. The opinion of the court in Talbot v. State, Crim. Ct. of App. (Texas), decided March, 1898 (44 S. W. Rep. 1091), is as follows: "The offense was committed in January, 1898. The punishment was assessed at a fine of $150. The evidence shows that the appellant was representing Cole Bros., who resided in Greencastle, Putnam county, Ind., and who carried on their business at that place. Cole Bros. have not, and never have had, a place of business within the limits of the state of Texas, and appellant is their agent and representative soliciting orders for the placing of lightning rods on houses in Grayson county, and when the orders are secured they are sent to the place of business of Cole Bros., at Greencastle, Ind. Lightning rods were then made in obedience to said orders, shipped to Texas, and, when required to do so, appellant assisted in placing these lightning rods at the places desired by the purchasers. For this he collected the money for the sale, or took notes, as the case might be. Without going into any discussion of the matter further than heretofore, we hold that the conviction was erroneous. This seems, under the decisions of the supreme court of the United States, to be a tax upon interstate commerce." See Ex parte Holman, 36 Tex. Cr. R. 255; Brennan v. Titusville, 153 U. S. 289; Asher v. Texas, 128 U. S. 129; Corson v. Maryland, 120 U. S. 502; Robbins v. Taxing Dist., 120 U. S. 489; Hopkins v. United States, 19 Sup. Ct. Rep. 40.

international commerce is paramount has never been seriously disputed; but whether, under all circumstances, the power of congress is exclusive of the powers of the state, in matters affecting or even regulating the pursuit of commerce and its instrumentalities and agencies, has been the subject of much argument, and is a question of no small difficulty. The judges in the same cases have frequently had occasion to disagree in several important particulars; later decisions have overruled the earlier holdings.

The most useful task, then, is not to pass in review the different decisions of the supreme court, but to bring forward and distinguish the phases in which the questions have appeared and emphasize the principles upon which the conclusions have been reached.

Bearing in mind that commerce includes navigation as well as all the other means by which it may be carried on, we are enabled to see the bearing of the great case which sets forth the first phase in which the question was presented.[1]

Sec. 296. *First Phase — All Regulations as Such Must Emanate from Congress.*— The idea intended to be conveyed by this expression is that if the *object* of the legislation and its effect is properly classed as a regulation of interstate commerce, including, of course, the navigation of a stream, which, although lying wholly within a state, is still properly classed as among the agencies of commerce, such legislation is beyond the power of the state.[2]

The first great case which may be said to be the base line or initial point from which all reasoning upon this subject starts is *Gibbons v. Ogden*.[3] In this case the state of New York granted an exclusive license or monopoly to Robert Livingston to navigate with steamboats the waters within her borders.

There had been no legislation on the subject by congress other than the pilotage law.[4] The question directly presented

[1] Gibbons v. Ogden, 9 Wheat. 1, 240.

[2] The *object* of the statute is important, as commerce might be *affected* by acts not of the nature of regulations. 9 Wheat. 1. See Hopkins v. United States, 19 Sup. Ct. Rep. 40.

[3] 9 Wheat. 1.

[4] The first congress adopted the following provision: "And be it further enacted: That all pilots in the bays, inlets, rivers, harbors and ports of the United States shall continue to be regulated in conformity with the existing laws of the states, re-

was whether the power of congress was exclusive in the sense that the state was divested of it *in toto* from the beginning, even where congress had not acted, and it was held that the power to regulate commerce *as such* was not possessed by the state in any degree. The ruling has never been departed from.

It should be observed that the state legislation involved in this case was a regulation of commerce, pure and simple, and did not involve an exercise of the taxing power or the police power.

Sec. 297. *Second Phase — The Exercise of its Police Power by a State May Affect Commerce Where Congress Has Not Legislated.* — A more difficult question arises when a state, in the exercise of its police power, which otherwise would be entirely proper and legitimate, affects the subjects of commerce or obstructs its instruments or impedes their free exercise.

It will be seen that in this case the power exercised is admittedly the police power, clearly distinguishable from a regulation of commerce, and as clearly within a state power as is the power to regulate commerce within the jurisdiction of congress.

The early view of the supreme court in this situation is expressed in the opinions and decisions of the case of *New York v. Miln.*[1] A statute of the state required the master of any vessel arriving from foreign countries to make affidavit of the name, age, etc., of his passengers, with a penalty for omission.

While it was admitted that the subject of commerce was affected, it was also decided that the power exercised was clearly the police power as such; and there being no congressional legislation, this exercise of the police power was sanctioned.

The question, as a question of the exclusive nature of the power of congress, was not directly involved as it was in *Gibbons v. Ogden.*

The conflicting views of the judges in that case, Judge Story dissenting, will be seen by a comparison of expressions quoted below.[2]

spectively, wherein such pilots may be, or with such laws as the states may, respectively, hereafter enact for the purpose, until further legislative provision shall be made by congress." See In re Rahrer, 140 U. S. 545; Cooley v. Board of Wardens, 12 How. 319.

[1] 11 Peters, 101.

[2] *Majority opinion:* Barbour, J.,

SEC. 298. *Third Phase—Where the Subject of the State Legislation is Not Directly Aimed at, but an Instrument of Commerce is Affected.*—In another case[1] arising prior to *New York*

says: "But we do not place our opinion on this ground. We choose rather to plant ourselves on what we consider impregnable positions. They are these: That a state has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, where that jurisdiction is not surrendered or restrained by the constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty, of a state to advance the safety, happiness and prosperity of its people, and to provide for its general welfare by any and every act of legislation which it may deem to be conducive to these ends, where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained: and that, consequently, in relation to these, the authority of a state is complete, unqualified and exclusive." Mayor, etc. of New York v. Miln, 11 Pet. 101–137.

Judge Story, dissenting, says: "I admit, in the most unhesitating manner, that the states have a right to pass health laws and quarantine laws, and other police laws not contravening *the laws of congress* (not the United States constitution), rightfully passed under their constitutional authority. I admit that they have a right to pass poor laws, and laws to prevent the introduction of paupers into the state under the like qualifications. I go farther, and admit that, in the exercise of their legitimate authority over any particular subject, the states may generally use the same means which are used by congress, if these means are suitable to the end. But I cannot admit that the states have authority to enact laws which act upon subjects beyond their territorial limits or within those limits, and which trench upon the authority of congress in its power to regulate commerce. It was said by this court in the case of Brown v. Maryland (12 Wheat. 419), that even the acknowledged power of taxation by a state cannot be so exercised as to interfere with any regulation of commerce by congress.

"It has been argued that the act of New York is not a regulation of commerce, but is a mere police law upon the subject of paupers; and it has been likened to the cases of health laws, quarantine laws, ballast laws, gunpowder laws, and others of a similar nature. A state cannot make a regulation of commerce to enforce its health laws, because it is a means withdrawn from its authority. It may be admitted that it is a means adapted to the end, but it is quite a different question whether it be a means within the competency of the state jurisdiction. The states have a right to borrow money, and borrowing by the issue of bills of credit would certainly be an appropriate means; but we all know that the emission of bills of credit by a state is expressly prohibited by the constitution. If the power to regulate commerce be exclusive in congress, then there is no difference between an express and an implied prohibition upon the states." Id., 11 Pet. 154.

[1] Willson v. Black Bird Creek Marsh Co., 2 Pet. 245.

v. Miln, the owners of a vessel operating under a license from the United States giving it permission to carry on the coasting trade was obstructed in its progress by a dam erected under the authority of the state of Delaware, in the undoubted exercise of its police power, the purpose of the dam being to assist in draining the marsh, which was a serious menace to health. The owners of the boat broke down the dam and were sued in trespass.

Chief Justice Marshall, delivering the opinion of the court, remarks: "That the state law authorizes a construction of the dam, and the act of the legislature shows clearly that it is one of many creeks on the Delaware shore, where the tide ebbs and flows; that the value of the property on its bank is much enhanced by excluding the water, and the health of the inhabitants probably improved." He says: "Measures calculated to produce these objects, provided they do not come into collision with the acts of the general government, are undoubtedly within those which are reserved to the states; but the measure authorized by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. This abridgment, unless it comes into conflict with the constitution or laws of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognizance."

He indulges in the following *obiter:* "That if congress had passed an act, having for *its object* the regulation of commerce, which came into conflict with this exercise of the state power, we should not feel much difficulty in holding the act void."

But he held, notwithstanding, the licensing of the vessel, which clearly brought her within *a legitimate instrument* of commerce, and the *locus quo* was the navigable tide waters, although within the borders of a state, still the general and exclusive power of the federal government to regulate commerce did not necessarily exclude action on the part of a state which affects commerce.

Sec. 299. *The Distinction Between These Cases.*— The difference in principle between these cases is that in *Gibbons v. Ogden* the act of the state was in no sense a police measure.[1] It was a regulation of commerce and wholly *ultra vires, void.*

[1] See Vance v. Vandercook Co., 170 U. S. 438; Hopkins v. United States, 19 Sup. Ct. Rep. 40.

In *New York v. Miln* the act was clearly a police measure, but its operation was directly upon subjects of commerce and nothing else. *Held valid.*

In the *Willson v. Black Bird Creek* case the act was a police regulation; in its main objects it affected other things than commerce, but it collaterally or incidentally entirely obstructed navigation. *Held valid.*

Sec. 300. *Fourth Phase — The First Original Package Case: An Article of Commerce Imported from a Foreign Country.* In *Brown v. Maryland*[1] articles of dry goods (cloth) were imported from a foreign country into the state of Maryland. Congress had passed laws regulating its importation. The state law authorized the exaction of a license as a source of revenue and regulation of trade, and *not as a police measure.* The state law was held to be void, and it was held that it was incident to the right to import that the owner be allowed to sell in the original package. No question of police was involved.

Sec. 301. *Fifth Phase — The Second Original Package Case.* The License Cases[2] present another phase in which the question of the exclusive power of congress over commerce arises, and the corresponding police power of the state. In these cases laws of the states prohibiting or requiring licenses as a condition of sale of intoxicating liquors were involved. The state laws were passed in the exercise of the police power. The liquors were shipped in from sister states. Convictions were sustained. These cases are quite parallel with *Leisy v. Hardin*,[3] but were regarded in that case as overruled by *Bowman v. C. & N. W. Ry. Co.*[4] Be that as it may, the ancient interpretation

[1] 12 Wheat. 419.

[2] 5 How. 504.

[3] 135 U. S. 600.

[4] 125 U. S. 493. The cases noticed in the note differ in principle from any of the cases above noted. In Rhodes v. Iowa, 170 U. S. 412, a statute of Iowa which required that any carrier who should transport any intoxicating liquors from place to place in Iowa should suffer a penalty, unless he obtain a certificate from the county auditor of the first point, was held not to apply to liquors coming from without the state, and that the state of Iowa could not pass a law which affected liquor coming from without; and in that case it was held that the Wilson bill, which was a law in effect subjecting all liquors from without to the same inhibitions placed upon liquors held within a state, did not prevent the transportation into the state, but did, by virtue of the Wilson act, prevent the sale in the original package. In Vance v. Vandercook Co., 170 U. S. 438, it was held a state law of South

of the constitution has given way to the demands of modern traffic.

Sec. 302. *Later Change in These Views.*— Mr. William Draper Lewis points out very clearly the line of conflict between the view of Mr. Justice Story and that of Chief Justice Marshall as expressed in *Gibbons v. Ogden* and *Willson v. Blackbird Marsh* cases, and very justly remarks that, under the principles announced by Chief Justice Marshall, there would have been no logical difficulty in sustaining the constitutionality of the prohibition law of Iowa, held in *Leisy v. Hardin* to be unconstitutional. It was beyond dispute that the Iowa prohibition laws are properly classed as police measures, and were passed in good faith for that purpose and not for the purpose of regulating or affecting commerce, and that commerce was not in any sense *regulated*[1] thereby, but that the sale of whisky by any owner in the state was prohibited by the exercise of the state power, there being at the time no act of congress of the United States in conflict with the act of the state of Iowa.[2]

Carolina, which required every resident of the state who desired alcoholic liquors *for his own use* to communicate his purpose to the state chemist, was unconstitutional in so far as it deprived any non-resident of the right to ship, by means of interstate commerce, any liquor into South Carolina. In this case it was *argued* that "as the state law here in question does not forbid, but, on the contrary, authorizes the sale of intoxicants within the state, hence it is not a police law, therefore not enacted in the exercise of the police power of the state, and consequently does not operate upon the sale of original packages within the state."

[1] The state law simply declared that such articles were not to be subjects of traffic within her borders.

[2] Lewis' Fed. Power Over Com., p. 42. It affords me pleasure to acknowledge my indebtedness to Mr. Lewis.

Marshall's views on the subject, as expressed in the case of Gibbons v. Ogden, are as follows: Speaking of what are known as police regulations, he says: "No direct general power over these objects is granted to congress, and, consequently, they remain subject to state legislation. If the legislative power of the Union can reach them it must be for national purposes; it must be where the power is expressly given for a special purpose or is clearly incidental to some power which is expressly given. It is obvious that the government of the Union, in the exercise of its express powers, that, for example, of regulating commerce with foreign nations and among the states, may use means that may also be employed by a state in the exercise of its acknowledged power; that, for example, of regulating commerce within the state. If congress license vessels to sail from one port to another in the same state, the act is supposed to be, necessarily, incidental to the power expressly granted to congress, and implies no claim of a direct power

It is now, however, the established law of the United States that the state cannot, under its police power, prohibit the importation into a state of any commodity which has become the subject of interstate commerce.[1]

Sec. 303. *The General Welfare of the People Subordinate to the Interests of Traffic.*—Notwithstanding our plan to treat the subject of the police power with the other powers of the state, it may be here noticed that the grant of the power to the United States has been extended by construction to the limits of holding that after an article or commodity of commerce has finished the course of its travel, has reached its destination, passed from the hands of the carrier and into the hands of its owner, it may be sold from hand to hand in the original package in which it was imported, even against the prohibition of a state law and the absence of any law of congress on the subject.

This theory is reached upon the reasoning that it must be the subject of distribution, else commerce is impeded and obstructed.[2]

to regulate the purely internal commerce of a state, or to act directly on its system of police. So, if a state, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other, which remains with the state, and may be executed by the same means. All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality." Gibbons v. Ogden, 9 Wheat. 1, 203.

[1] Leisy v. Hardin, 135 U. S. 100. See next section.

[2] "That regard be had to the public welfare, is the highest law." Brown v. Maryland, 12 Wheat. 419, was the first of the cases directly bearing on this question. There the importation was from a foreign country, and *congress had passed a law on the subject.* The state law was held void. Taney argued in favor of the state law, but afterward in the License Cases approved the decision. In Brown v. Maryland the article was dry goods and the police power was not involved. The License Cases are very different. They involved the power to prohibit the sale in the original package, or to exact a license fee for such sale as a police measure. Congress had passed no law in conflict with the state law. The state laws were held valid. Leisy v. Hardin, 135 U. S. 100, involved the validity of the Iowa prohibition law, prohibiting the sale of liquor. Held

The effect of the rule is to reverse the ancient and venerable proposition that the chief end of government is the safety, morality and welfare of the people, and establishes the now famous rule that all rights and all interests are subordinate to traffic.

The doctrines which have been crystallized into the maxims of the law, *salus populi suprema lex* and *sic utere tuo ut alienum non lædas*,[1] and the early maxim that all rights and all contracts are held subject to the police power of the state, are annulled.[2] Commerce is king.

The courts seem to have lost sight of the fact that the subjects of commerce must always be an article of traffic or a private contract, involving the carriage or sale of an article of property or the transportation of persons or things.

Laying aside for a moment the transportation of persons,[3] the most dignified transaction of commerce possible can amount to no more than a transfer of some chattel property.

The police power, until the rise of this new doctrine, was supposed to override all private interest. It was supposed to be as thoroughly and exclusively within the power of the state

invalid as to liquor imported from another state while in the original package. The history and grounds of these decisions are examined in Rhodes v. Iowa, 170 U. S. 412, and Vance v. Vandercook Co., id. 438. It is significant to notice that the License Cases are *not followed*, but treated as *overruled*.

[1] "Enjoy your own property in such a manner as not to injure that of another person." See Cooley's Const. Lim. (6th ed.) 706.

[2] See Cooley's Const. Lim. (6th ed.) 708.

[3] Slaves not being by the law merchant of the United States regarded as proper subjects of general commerce were not regarded as within the protection of the clause and were within another clause. In Shelton v. Marshall, 16 Tex. 352, Wheeler, J., said: "As respects the power of the states over the subject of the constitutional inhibitions in question (the introduction of slaves as merchandise), what we deem the sound and correct doctrine was stated by Chief Justice Taney in Groves v. Slaughter, 15 Pet. 508, viz.: 'In my judgment the power over this subject is exclusively with the several states, and each of them has a right to decide for itself whether it will or will not allow persons of the description to be brought within its limits from another state, either for sale or for any other purpose; and also to prescribe the manner and mode in which they may be introduced, and to determine their condition and treatment within their respective territories; and the action of the several states upon this subject cannot be controlled by congress, either by virtue of its power to regulate commerce or by virtue of any other power conferred by the constitution of the United States.'" Paschal's Annotated Const. 109.

as was the power to regulate commerce invested in the federal government.[1]

The power to regulate commerce necessarily assumes that the article is a legitimate subject of commerce, and necessarily the federal supreme court must be the ultimate tribunal to decide whether the article is legitimately the subject of commerce or legitimately an object of police inhibition; but having decided that certain noxious articles, or certain articles, are so liable to or susceptible of improper use as to be the subject of police regulation, it would seem to be going beyond the essential and proper exercise of the *regulation* of commerce to allow private corporations or private individuals to inflict upon the people of the state things noxious, undesirable and deleterious in their effect either upon the health or morals of the people.

The present state of the law and the course of these decisions is very clearly set forth in the opinions and dissenting opinions in *Rhodes v. Iowa*[2] and *Vance v. Vandercook Co.*[3]

Sec. 304. *Congress Has No Police Power Over Matters Within a State.*— It has been said by recent writers that "the fact that the states are in large measure deprived of power to exclude from their territory persons and property which they consider hostile to their interests requires that the federal government should be prompt in its effort to give full measure of protection."[4]

Just what is intended by this is not clear; but it should be remembered, in construing the exclusive power of the federal government over foreign and interstate commerce and commerce with the Indian tribes, that the police jurisdiction is as exclusively in the states as is the commerce power in the United States, and that in the dual system of the administration of government, in which different bodies politic exercise distinct and different powers, the nature of these powers have been changed by the separation, and that the power of the people and the welfare of the people is just as sacred now as it would be if there were no federal republic.

[1] The Oleomargarine — Original Package — cases are distinguishable in this: that in these cases it is well maintained by the supreme court that oleomargarine is not a noxious or deleterious article, and that the acts of the states are not fair exercises of the police power. Paul v. Pennsylvania, Schollenberger v. Pennsylvania, 18 Sup. Ct. Rep. 757.

[2] 170 U. S. 412.

[3] Id. 438.

[4] Prentice & Egan, Com. Cl. 59.

[5] Cleveland v. Augusta, 102 Ga. 233.

The better rule would be to exclude from the privileges of commerce those articles which are properly classed as noxious, and to give free and open transport anywhere and everywhere, untrammeled and unburdened, to those matters not under the ban, but at the same time whatever was properly inhibited from barter or sale among the people of a single state, and justly classed as noxious or deleterious to health or morals, should receive no sanction of commerce to enter the limits of a state.

That congress has no police power is too well settled to admit of discussion.

Chief Justice Chase, in *United States v. De Witt*,[1] says: "As a police regulation, relating exclusively to the internal trade of the states, it can only have effect where the legislative authority of congress excludes, territorially, all state legislation; as, for example, in the District of Columbia. Within state limits it can have no constitutional operation. This has been so frequently declared by this court, results so obviously from the terms of the constitution, and has been so fully explained and supported on former occasions, that we think it unnecessary to enter again upon the discussion."[2]

Sec. 305. *Private Contracts Subordinate to Commerce Power.* The power of congress over subjects of interstate commerce and the means and instruments engaged therein affects not only the powers of the state, but extends to the restraint and regulation of private contracts in reference to matters of commerce and the methods of conducting it.

All contracts in restraint of trade and contracts having for their object unjust discrimination against persons or places are clearly within the control of congress if the subject-matter of the contract be properly interstate or foreign commerce, or commerce with the Indian tribes.

Whatever of doubt may have remained in the minds of the

[1] 9 Wall. 41.

[2] It was held that "the twenty-ninth section of the Internal Revenue Act of March 2, 1867 (14 Stat. at Large, 484), which makes it a misdemeanor, punishable by fine and imprisonment, to mix for sale naphtha and illuminating oils, or to sell or offer such mixture for sale, or to sell or offer for sale oil made of petroleum for illuminating purposes, inflammable at less temperature or fire test than 110 degrees Fahrenheit, is in fact a police regulation, relating exclusively to the internal trade of the states," *and consequently void.* United States v. De Witt, 9 Wall. 41. See Cooley's Const. Lim. (6th ed.) 706.

managers of great enterprises in reference to how far pools and combinations might be entered into for the purpose of maintaining rates and prices is set at rest by two recent decisions of the supreme court of the United States.[1]

It is thoroughly well settled that congress may restrain individuals from making contracts which directly and injuriously affect the public and which are made in the exercise of interstate commerce.[2]

Not every contract or every act which indirectly and remotely affects interstate commerce, however, is within the power of inhibition of congress.[3]

Statutes which have been so far enacted by congress apply only to contracts whose direct and immediate effect is to restrain interstate commerce.

It was said by the court in a recent case "that the act of congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have indirectly, or remotely, some bearing upon interstate commerce to restrain it."[4]

Sec. 306. *Contracts Regulating Traffic by Carriers.*— Experience has shown that the tendency of great corporations is not only to consolidate in single hands vast aggregations of capital, but that separate organizations will combine for the purpose of preventing competition.

To a certain extent contracts which prevent ruinous competition are not unlawful,[5] but with the plenary power which is invested in congress, it is for congress to determine and regulate all interstate rates and traffic; and so it has been recently settled that there is no constitutional right of the citizen invaded by the acts of congress which restrain individuals and corporations engaged in interstate commerce from entering into what are known as "joint traffic contracts," which have for their object the prevention of competition and the sustaining of rates.

[1] United States v. Joint Traffic Ass'n (Oct. 24, 1898), 19 Sup. Ct. Rep. 25; United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290.

[2] Frisbie v. United States, 157 U. S. 160.

[3] Hopkins v. United States, 19 Sup. Ct. Rep. 40, and cases cited.

[4] Id.

[5] Greenhood, Pub. Pol. 683.

It is said in a recent case that "the prohibition of such contracts may, in the judgment of congress, be one of the reasonable necessities for the proper regulation of commerce, and congress is the judge of such necessity and propriety, unless, in case of a possible gross perversion of the principle, the courts might be applied to for relief. . . . The power to regulate commerce has no limitation other than those prescribed in the constitution. The power, however, does not carry with it the right to destroy or impair those limitations and guaranties which are also placed in the constitution or in any of the amendments to that instrument."[1]

Notwithstanding the liberty of the citizen to contract, there are many kinds of contracts not *mala in se*, or of themselves immoral, but which may be prohibited by the states or by congress.[2]

Sec. 307. *Federal Authority to Protect Property.*— The established principle is that the general government has not only powers which are specifically enumerated, but as an incident thereto, and necessarily flowing therefrom, the right to use every means necessary and proper to protect and preserve these powers and to carry them into effect. So, as elsewhere appears, congress has incidental power to remove dangers by acquiring foreign territory. The right to create a corporation as an instrument of carrying on its power to conduct the physical affairs of the nation is another incidental power.

In the same manner it has not only the right, but it is the duty of congress, to make efficacious use of all the powers intrusted to it.

It is peculiarly the province of the federal government to see that the instruments and avenues of commerce are not unlawfully impeded.

The power extends to the right to regulate the methods of navigation of steam and sailing vessels, the conduct of the business of interstate communication by telegraph, the proper and improper use of the mails,[3] and, indeed, the protection and reg-

[1] United States v. Joint Traffic Ass'n, 19 Sup. Ct. Rep. 25. See also Navigation Co. v. United States, 148 U. S. 312; Interstate Com. Com. v. Brimson, 154 U. S. 447; Counselman v. Hitchcock, 142 U. S. 547.

[2] Id.

[3] Dunlap v. United States, 165 U. S. 486.

ulation of all matters legitimately within the scope of interstate commerce.

The fact that the act or contract or conduct which may injuriously affect or impede commerce is within the police power of the state or general powers of the state in reference to the ownership of property does not prevent the United States from interfering in all legitimate ways.

It is the duty, therefore, of every department of the government to interfere and act promptly in the protection of these powers.

It has been finally decided that it is the duty of the judicial department to act by legal process of the court to prevent the obstruction of interstate commerce or interference with the instruments which the government has chosen for the purpose of carrying the mails.

It matters not whether the obstruction is occasioned by a single individual or combination of individuals.[1]

Sec. 308. *Government by Injunction is Government by Law.* The resort to the courts by individuals and corporations for protection against alleged invasion of the rights of the complainants, and the granting of relief to them by the courts by virtue of the writ of injunction, has received in popular phrase the appellation "Government by injunction."[2]

There are those who use this phrase as an opprobrious term, intending thereby to condemn any interference of the courts with the free exercise of the so-called rights of the people to assemble, and with clamorous outcry and show of force maintain their supposed rights and liberties by means of strikes, by which they endeavor to compel the employer to hire certain individuals and to pay the demanded price, and to refrain from hiring any and all others.

To one who reflects upon the long struggle for the establishment of a government of law, as distinguished from a military administration, or what is called a government of men, it seems difficult to understand how a free and reflecting people can con-

[1] In re Debs, 158 U. S. 564.

[2] When the private person is afforded redress against the government or against aggregations of men or powerful individuals, the process is commended. See Smyth v. Ames, 169 U. S. 446; Income Tax Case, 157 U. S. 437.

demn any resort to the judicial tribunals by any person for any purpose whatever.

Not to descend to argument, it may be here noticed that there was, at the time of the great disturbance out of which the case of Debs emanated, a great protest and cry against the interference by the federal executive with local affairs by the use of federal troops.[1]

On the other hand it is obvious that those who cry against the use of the federal troops and the interference by the federal executive, and at the same time abuse the courts for the exercise of a jurisdiction under the epithet "government by injunction," are not desirous of any restraint upon their action, and hold to the opinion that they must have unbridled license to be their own protector and the redresser of their own supposed wrongs.

It would seem to all sober and reflecting minds that the opinion of Mr. Justice Brewer in the Debs case[2] states clearly and justly the proper view which the citizen, desirous of the preservation of our free institutions, should take.

He says, quoting from a Connecticut case: "In *Stamford v. Stamford Horse Railroad Co.*,[3] an injunction was asked by the borough to restrain the company from laying down its track in a street of the borough. The right of the borough to forcibly remove the track was insisted upon as a ground for questioning the jurisdiction of a court of equity, but the court sustained the injunction, adding: 'And none the less so because of its right to remove the track by force. As a rule, injunctions are denied to those who have adequate remedy at law. Where the choice is between the ordinary and the extraordinary processes of law, and the former are sufficient, the rule will not permit the use of the latter. In some cases of nuisance, and in some cases of trespass, the law permits an individual to abate the one and prevent the other by force, because such permission is necessary to the complete protection of property

[1] The then governor of the state of Illinois protested against the invasion of his power. But the disturbance continued.

One may, without intending to criticise the general government, venture the opinion that there has been too little use made of the federal troops in every recent disturbance in the protection of citizens of the United States in their persons and property and civil rights.

[2] 158 U. S. 564.

[3] 56 Conn. 381.

and person. When the choice is between redress or prevention of injury by force and by peaceful process, the law is well pleased if the individual will consent to waive his right to the use of force and await its action. Therefore, as between force and the extraordinary writ of injunction, the rule will permit the latter.'

"So, in the case before us, the right to use force does not exclude the right of appeal to the courts for a judicial determination, and for the exercise of all their powers of prevention. Indeed, it is more to the praise than to the blame of the government, that, instead of determining for itself questions of right and wrong on the part of these petitioners and their associates, and enforcing that determination by the club of the policeman and the bayonet of the soldier, it submitted all those questions to the peaceful determination of judicial tribunals of its rights and powers and the correlative obligations of those against whom it made complaint. And it is equally to the credit of the latter that the judgment of those tribunals was by the great body of them respected, and the troubles which threatened so much disaster terminated.

"Neither can it be doubted that the government has such an interest in the subject-matter as enables it to appear as party plaintiff in this suit. It is said that equity only interferes for the protection of property, and that the government has no property interest. A sufficient reply is that the United States have a property in the mails, the protection of which was one of the purposes of this bill. *Searight v. Stokes*[1] arose upon a

[1] 3 How. 151–169. The act of congress of July 2, 1890, gives the remedy of injunction in cases of conspiracy to obstruct or destroy interstate commerce, and this is wholly within the power of congress to grant. United States v. Elliott, 62 Fed. Rep. 801; Id., 64 Fed. Rep. 25; Prentice & Egan, Com. Cl., 324.

In the Debs Case, 158 U. S. 564, it was found that there was an obstruction of the artificial highways for the passage of interstate commerce and the transmission of the mails, and held that the circuit court had power to issue an injunction.

An injunction will also lie to prevent the chief officers of a labor organization from enforcing a rule of their organization which makes the highest offense against the order for a member in the employ of a railroad company to handle cars received from another company with which a conflict sanctioned by such officers exists, and where such refusal will be in direct violation of the interstate commerce act, which requires that

compact between the United States and the state of Pennsylvania in respect to the Cumberland road, which provided, among other things, 'that no toll shall be received or collected for the passage of any wagon or carriage laden with the property of the United States.'"

Sec. 309. *The Interstate Commerce Act.*— Under the general power to regulate commerce, congress at an early time passed laws regulating commerce with foreign states and regulations for the navigation of vessels on the coast and the great inland seas.

The extent of the control of congress over navigable rivers lying wholly within a state was not understood or determined until the decision of *Gibbons v. Ogden*[1] in 1824.

As pointed out by Judge Cooley in an able exposition of the regulation of commerce by congress,[2] it appears that for a great many years federal power over interstate commerce was exercised chiefly in a negative way, by restraining the action of the states from infringing on the general powers of the government.

This was usually accomplished by invoking the action of the judicial department, either in suits to recover damages for the unlawful exercise of power, or to restrain the threatened exercise of power.

For the first half century the interstate commerce was not of such a nature, or so great in volume, as to require general and thorough regulation and supervision by national authorities; but during the last twenty-five years interstate commerce has become so varied in its nature, so vast in its volume, com-

there shall be furnished equal facilities for the interchange of all traffic. Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co., 54 Fed. Rep. 746.

An injunction will lie, even though the act is a crime, where there is a *conspiracy* of employees to injure and destroy their employers' property. Arthur v. Oakes, 24 C. C. A. 239; 63 Fed. Rep. 310.

Injunction will also lie where railroad employees, continuing as such, refuse to perform their duties, where such refusal results in irreparable loss to the employer, and interferes with the transmission of the mails and with interstate commerce; and in another case it was held that employees could be enjoined from conspiring to quit the employ of the receiver of a road, where such action would result in damage and embarrassment to the road. See Southern Cal. R. Co. v. Rutherford, 62 Fed. Rep. 796; Arthur v. Oakes, *supra;* Farmers' Loan & Trust Co. v. Northern Pac. R. Co., 60 Fed. Rep. 803. See

[1] 9 Wheat. 1.

[2] First Report of Interstate Commerce Commission (1887).
Cooke's Trade and Labor Combinations, § 16.

petition so great, and the owners of the instruments of commerce so powerful in the enormous aggregate of capital, that the national congress at last recognized the imperative necessity of the general regulation of interstate commerce.

Proceeding upon lines so thoroughly established, that congress had the right to make use of any means or instruments to accomplish the recognized object, congress in 1887 passed what is known as the Interstate Commerce Act, a brief act of but twenty-four sections, occupying less than fifteen pages of ordinary book size.

SEC. 310. *Scope of the Act.*— The act related entirely to the business of transportation, and was expressly applied to common carriers engaged in the transportation of passengers or property not wholly within a single state.

It defined the word "railroad" to include all bridges and ferries and all leases of road-beds or rolling stock, and defined the word "transportation" to include all the instrumentalities of shipment or carriage.

Regulation of Rates.— Not every person who, for accommodation or in casual instances, accepts compensation for the transportation of individuals or property is within the technical meaning of the words "common carrier."

A common carrier is one who engages habitually in the business of transportation. The common law had long recognized the existence of common carriers, and the courts of England had, along with the law merchant as a part of it, worked out an elaborate code of rules and regulations as to the law of common carriers.

Independently of any constitutional provision, common carriers, and in fact all persons engaged in a public occupation, are subject to the control of the state; but this act was the first authoritative declaration by congress adopting into it, by implication at least, a portion of the common law merchant.

SEC. 311. *Unjust and Unreasonable Charges* are prohibited by the act, which requires that charges for receiving, delivering, storage or handling and transportation of passengers or property shall be reasonable and just, and every unjust and unreasonable charge for such services is prohibited and declared to be unlawful.

This section necessarily required that there should be some

scale, standard or measure of what was reasonable or unreasonable, some proper instruments and tribunals through and by which to enforce its provisions.

Sec. 312. *Uniform Rates Required.*—The next section of the act provided for uniform rates and charges against persons and for services of a like kind and character, and declared that any person violating this rule should be guilty of unjust discrimination, and the same was prohibited and declared to be unlawful.

Sec. 313. *Unjust Discrimination Prohibited.*—The third section specifically prohibits unjust discrimination against localities or places or descriptions of traffic; also prohibited unjust discriminations against different carriers who were so situated as to be connecting lines.

Sec. 314. *Long and Short Haul Regulation.*—The next section prohibited such discriminations as would permit a greater charge for a short haul than would be exacted for a longer distance over the same line in the same direction.

It, however, recognized that circumstances may require modification of any general rule; that a short haul in a sparsely settled country may be more expensive to the carrier, and that other circumstances might modify the general rule.

It therefore provides that, upon application to the commission appointed under this act, such common carrier may, in special cases, be authorized to charge less for longer than for shorter distances.

The subject of this section has been one of the most prolific sources of litigation.[1]

Sec. 315. *Freight Pools are Prohibited* by the fifth section. Schedules of freight rates and passenger fares are required to be made public and accessible by printing and hanging in accessible places in depots and receiving rooms, and it is required that any changes by way of advance could not be allowed excepting upon ten days' notice, and charges not in accordance with the rates so posted and published are prohibited.

Sec. 316. *Joint Traffic Contracts* and schedules must be filed with the Interstate Commerce Commission and made public, if in the judgment of the commission the same is desirable.

Failure to comply with the law and regulations in reference to the publishing of freight and passenger tariffs was the re-

[1] See sec. 324

straint of such common carrier from further transporting or receiving property, a *mandamus* to compel compliance with the provisions, and the power of the courts to enforce their decrees by proceedings for contempt.

Sec. 317. *Evasions Prohibited — Private Actions Allowed.*— The seventh section prohibits any shifts or devices by which a continuous course of transportation should be cut up into short hauls.

The eighth section allowed a private action of damages by the person injured by any violation of the act.

The ninth section allowed the injured person an election to pursue his civil action for damages or to lodge a complaint with the Interstate Commerce Commission, and provided that the election of one remedy excluded the other.

Sec. 318. *Provisions as to Production of Evidence.*— The statutes also provided "that, in any such action brought for the recovery of damages, the court before which the same shall be pending may compel any director, officer, receiver, trustee or agent of the corporation or company defendant in such suit to attend, appear and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such testimony or evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding."

Penalties.— The tenth section inflicted penalties for individual violation by officer, receiver, employee, etc., of the carriers.

Sec. 319. *The Interstate Commerce Commission.*— The tribunal or board now so familiarly known as the Interstate Commerce Commission was created by the eleventh section of the act just noticed.

It is composed of five commissioners, appointed by the president by and with the consent of the senate. The term of office is six years, except that any person chosen to fill a vacancy is appointed only for the unexpired term.

Any commissioner may be removed by the president for inefficiency, neglect of duty or malfeasance in office.

The influence of party politics is recognized by the provision

that not more than three of said commissioners shall be of the same political party.

The utility of the maxim that no person may be allowed to act where his interest and integrity comes into conflict is recognized by the provision: "No person in the employ of or holding any official relation to any common carrier subject to the provisions of this act, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold such office."

Commissioners are prohibited from engaging in any other business, vocation or employment, and it is expressly provided that a vacancy in the commission shall not impair the right of the remaining commissioners to exercise all the powers of the commission.

Sec. 320. *Power and Duty of Commission.*— Under section 12 of the act the commissioners are given broad authority to inquire into the management of the business of all common carriers, and the commission is required to keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the commission to perform the duties and carry out the objects for which it was created.

It is given the right, "for purposes of this act, to require the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements and documents relating to any matter under investigation."

Sec. 321. *Co-operative Jurisdiction of the United States Circuit Courts* is required by provisions which allow the commissioners to state to the court the matter under investigation, and directs the court to issue subpœnas, and compel the attendance of witnesses and the production of books and papers and the giving of testimony, etc.

Sec. 322. *Nature of the Power Conferred on the Commission.* This section has given rise to several important decisions.

It was at first doubted, and so decided by the circuit courts, that the duties required of the circuit court under this section were not judicial, but merely ancillary to a performance of the functions of an administrative body; but the supreme court decided that a controversy and investigation by the Interstate

Commerce Commission was a case of a controversy, within the meaning of the section of the judiciary act conferring judicial powers, and in this manner fully established this important power of the commission.[1]

Sec. 323. *The Power to Compel the Giving of Evidence.*— That portion of the section which required a person to testify, even though he claimed that such testimony might tend to criminate him, but that such evidence should not be used against such person in the trial of a criminal case, likewise raised a very important and difficult question, and it was decided that, under that section as originally framed, witnesses could not be compelled to testify, notwithstanding the provision which prohibited the use of their testimony.[2]

In 1893 congress passed an amendment to this section which gave complete amnesty and immunity from the criminating effect of any inquisition.

This latter act gave protection commensurate with the constitutional provision and was held valid, and gave to the commission authority essential to the efficacious exercise of its duty. The distinction between the two sections will appear in the note.[3]

Sec. 324. *Power of the Interstate Commerce Commission Not Absolute and Final.*— The act of congress is intended to commit to the Interstate Commerce Commission the entire subject of the regulation of traffic by common carriers, and the power is plenary and complete over all subjects and for all purposes.

It has the right to fix a schedule of rates and to prescribe

[1] Interstate Com. Com. v. Brimson, 154 U. S. 447.

[2] Counselman v. Hitchcock, 142 U. S. 547.

[3] Brown v. Walker, 161 U. S. 591; also Tucker v. United States, 151 U. S. 164. The section of the act of February 4, 1887, is as follows: "The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding." That of the act of February 11, 1893, is as follows: "But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify, or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpœna, or the subpœna of either of them, or in any such case or proceeding: Provided, that no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying."

changes in rates, under the section requiring that all rates shall be reasonable, uniform, etc.

So it is within their province to determine the reasonable exercise of discretion in reference to long and short hauls, but its action is not final and conclusive, being subject to review in the courts, and the carrier aggrieved may apply to the courts for redress, if it so choose.

The carrier may take the responsibility of fixing its own rates and accepting and receiving the freight, in which case the contest might be instituted by the shipper or by the Interstate Commerce Commission; but in the end it is for the courts to determine whether or not the rates are reasonable, uniform, or fall within the exception which allows a discrimination under peculiar circumstances.[1]

Sec. 325. *Navigable Waters — The High Seas.*— The term "high seas" naturally directs the mind to the ocean or those great bodies which are called seas; but, for the purpose of commerce and navigation, as well as for the purpose of jurisdiction and littoral rights, between all of which there exist important distinctions, the high seas embrace other bodies of water, and even streams.

For example, the great lakes, or navigable streams which form the boundary lines between two nations, are regarded as a part of the high seas.

The river St. Marie, for example, is a navigable stream constituting the boundary line between the United States and the British Dominion of Canada. On its waters may freely pass the shipping of the United States and of the world.

So, also, is the Detroit river; and, as between the nations of the world, such streams are regarded as a part of the high seas.[2]

The important distinction between regarding such a body of water as a part of the high seas, and simply regarding it as a

[1] Interstate Com. Com. v. Ala. Mid. Ry. Co., 168 U. S. 144. This clause has given rise to an amount of litigation far beyond the scope of this treatise to examine in detail. The treatise by Messrs. Prentice and Egan to which reference is made treats quite thoroughly the whole subject, and is of recent date (1898).

A collection of all of the decisions on the subject of interstate commerce is being made. It has now reached seven volumes and is cited as Interstate Commerce Reports.

[2] United States v. Rogers, 150 U. S. 272.

navigable stream, is that while the center is the *boundary*, neither has complete sovereignty over any part of the stream, while both have *jurisdiction* over it from shore to shore, which is not confined or measured by the middle thread of the stream, but extends over every part of it; and in such a case the vessel sailing on such waters is regarded as a part of the country to which the citizens owning it belong, or in whose name the traffic is carried on; that is to say, under what flag the ship is sailing.

Important questions growing out of these doctrines threatened the United States in the conflict with Great Britain over the mouth of the Mississippi river; and so the right of the United States to freely navigate the St. Lawrence river through all its course, notwithstanding both its banks, for a long part of its course, lie within a foreign territory, was claimed, but the claim was settled by treaty.[1]

The United States has always contended for the right of free navigation of all the great natural waterways of the world which connect with the ocean, whether they be lakes or running streams.

Mr. Clay, secretary of state to President Adams, demonstrated to the satisfaction of the department, at least, this right, claiming in defense thereof that the act of the congress of Vienna, in opening the Rhine and other rivers to all nations, showed that the inhabitants of a country through which such a river passes have the right to enjoy the navigation of that river to and into the sea, even though passing through territories of another power; subject, of course, to proper police regulations prescribed by the government of the nation through which the river passes.

This principle does not, however, allow all nations to enter from the ocean and navigate the stream without permission of the nation owning the banks.[2]

Sec. 326. *Navigable Waters — Inland Lakes.*— Little difficulty arises in the determination of the respective rights of the states and the United States in reference to the control over navigable inland lakes.

If such lakes are navigable in fact, and are adapted to the

[1] The Apollon, 9 Wheat. 362.

[2] 1 Whart. Int. Nat. Law Dig., sec. 30. See also 1 Kent's Com. *35.

use of navigation and commerce, they are without question within the dominion and control of the general government.[1]

The question is here to be viewed, not in the light of any question which may arise as to the littoral[2] rights of proprietors of the shore of the lake, or as a question of state jurisdiction, but only in the aspect of an instrument of commerce.

Sec. 327. *Navigable Waters — Running Streams.* — Among the principal highways, and at one time the chief highways of commerce, were the streams of the United States.

Under the English common law, it has been stated, although upon doubtful authority,[3] that only so much of a stream as felt the ebb and flow of the tide was to be considered navigable, and in adopting the common law there was some tendency to adopt this view; but on account of the difference in circumstances, the extent of the country, and the consequent length of our inland streams, this doctrine has long since been discarded, and the question of navigability is to be decided as a

[1] See The Genessee Chief, 12 How. 443; Illinois Cent. Ry. v. Illinois, 146 Ill. 387; Scranton v. Wheeler, 57 Fed. Rep. 803.

[2] See Mahler v. Transportation Co., 35 N. Y. 352; Donald v. Malloy, 71 N. Y. 546. The word "littoral" is the appropriate term to designate the lake shore; "riparian" is applicable to the bank of a stream.

[3] Chancellor Kent held in Palmer v. Mulligan, 3 Caines, 318, that a river was not at common law navigable above the ebb and flow of the tide. He had ample authority for holding that the king had title so far as the tide flowed, but there is doubt whether the fact of navigability was not the test at common law. A writer in Case and Comment says: Hale in De Jure Maris does not seem to have understood that navigability was limited by the ebb and flow of the tide, for he treats all navigable rivers, as well fresh as salt, as public highways. Neither Woolrych nor Phear limits navigability to tide water. In Williams v. Wilcox, 8 Ad. & El. 336, Orr Ewing v. Colquhoun, L. R. 2 App. Cas. 838, and Hines v. Mansfield, Noy, 104, navigability is recognized as extending above tide water; while in Rex v. Montague, 4 B. & C. 590, Miles v. Rose, 5 Taunt. 706, and Lyon v. Turner, 1 Cowp. 86, tide water is recognized as being non-navigable; Lord Mansfield saying in Lynn v. Turner, *ex facto oritur jus:* Moreover, only a few years before Kent made his declaration of the law, the court had, in the case of Pierse v. Fauconberg, Burr. 292, left it to the jury to say whether or not the Tees was navigable above Yarum bridge, without making the question depend in any way upon the tide. Kent's view of the common law prevails, but the common-law test of navigability is not generally applied. See Hardin v. Jordan, 140 U. S. 371, and Water Power Co. v. Water Commissioners, 168 U. S. 349, where the whole course of the doctrine may be traced.

question of fact; that is to say, whether a given stream is susceptible of practical use as a medium of commerce.[1]

The navigation of all inland streams, bays and harbors must necessarily be under the control of the general government, and it is within the power of the government to make such use of the bed of the stream as will facilitate commerce; and to that end it has been decided that obstructions which have been placed in a stream, such as dams and bridges, may be condemned and removed to open the free course of commerce.[2]

The equitable rights of parties in such cases, which arise by reason of having built obstructions because of their riparian ownership, under authority and on the supposition that the stream was not navigable, based on the fact that the government had not formally declared it to be navigable, or had not taken any steps which indicated such a view, must be respected,[3] because the *mere fact* of the navigability of a stream does not affect the rights of the riparian owner until such a time as his right conflicts with that of the general government.[4]

The power of the government is very broad. It has been held that one of several channels of a stream may be closed in order to improve navigation in another.[5]

This power of the general government over navigable waters lying wholly within the boundary of a state is equally supreme and absolute.

Congress may determine and declare what constitutes an obstruction or interference with the rights of navigation.

It may prescribe what acts shall be performed and what public works may be constructed in order to prevent injury thereto, and it may enforce these regulations even though the

[1] Water Power Co. v. Water Commissioners, 168 U. S. 349. A very fine presentation of the control of congress over navigable streams is given by Messrs. Prentice & Egan in their Commerce Clause, pp. 95–137.

[2] See Scranton v. Wheeler, 57 Fed. Rep. 803.

[3] Monongahela Nav. Co. v. United States, 148 U. S. 312.

[4] The subject of boundary riparian rights of individuals will be treated under the head of real property, where the matter most frequently arises, not as a *regulation* of commerce, but as a conflict between individual and public right.

[5] South Carolina v. Georgia, 93 U. S. 4. See Pennsylvania v. Wheeling I. B. Co., 18 How. 421, and cases cited in 57 Fed. Rep. 814, 815.

effect thereof is virtually to deprive persons of the right to use their property in the way it had theretofore been used, and in that manner practically deprive them of the means of livelihood. Such has been the effect of the acts of congress and their delegated agencies exercised in the protection of navigable streams on the borders of which mining operations are conducted; but the right of the general government is now thoroughly established and determined, and it follows that private contract and private ownership must be held subject to the commerce power of the general government.[1]

[1] North Bloomfield Gravel Min. Co. v. United States, 88 Fed. Rep. 664. In a case tried in the United States district court for the Northern Division of Illinois, where the question arose as to the right to dam the Rock river for the purpose of diverting a part of the water of the stream from its channel for the purpose of feeding the Illinois and Michigan canal, the court held that such complete diversion might be resorted to, and amounts to the right to destroy one stream to create another.

CHAPTER XVII.

FINANCE AND CURRENCY.

"A simple invention it was in the old world Grazier, sick of lugging his slow ox about the country till he got it bartered for corn or oil, to take a piece of leather, and thereon scratch or stamp the mere figure of an ox (or Pecus); put it in his pocket and call it Pecunia, Money."— Carlyle.

SEC. 328. *Power to Borrow and Coin Money and Punish Counterfeiting.*— Among the express powers given to congress by the constitution are those enumerated under the heading "To borrow money on the credit of the United States,"[1] and "to coin money, regulate the value thereof and of foreign coin, and fix the standard of weights and measures,"[2] and to provide for the punishment of counterfeiting the securities and current coin of the United States.[3]

The powers expressed in these different clauses of the constitution — the power to borrow money and of coining and regulating the value of domestic and foreign coin — are treated by the supreme court as analogous powers, and as falling within the general power and duty of congress to provide a currency for the whole country and to protect the same.[4]

SEC. 329. *The Power to Borrow Money.*— The power to borrow money is exercised in its simplest form by procuring a direct loan and issuing a promise to repay; but the power to borrow money by the government may be effected according to the custom of nations in various ways; and in accordance with the canon of construction so often mentioned and so thoroughly established, that all means may be used which are legitimate to accomplish a given end, unless the means are specially prohibited any of the various devices may be resorted to.[5]

[1] Const. U. S., art. I, sec. 8, p. 2.
[2] Id. 5.
[3] Id. 6.
[4] Juilliard v. Greenman (Legal Tender Case), 110 U. S. 421.
[5] This was the specific subject under consideration when the former rule was announced. McCulloch v. Maryland, 4 Wheat. 316.

The United States government has resorted to various measures to accomplish the powers given in express terms. The power to borrow money on the credit of the United States, and the power to coin money, regulate the value thereof and of foreign coin, are not given simply for the sake of exercising them. They are but the means of effectuating the objects for which the constitution was adopted.

The specific object is to provide a national currency, and establish a system of credit and exchange by which the fiscal affairs of the nation and of individuals may be so arranged as to establish the national credit, fund and liquidate the national indebtedness, provide means for the common defense, and assist in the regulation and exercise of foreign and interstate commerce.

Sec. 330. *Methods of Exercising the Power.*— The borrowing of money by the use of bonds, and pledging the credit of the United States directly, needs no further mention here, other than to redirect attention to the principle that the general government has the power to protect such loans from injury, directly or indirectly, by the exercise of the taxing power of the state as a means of effectuating and establishing the credit of the United States, and of making this credit an efficient instrument in the execution of the power given or implied.

In the power to borrow money, and the power to coin money and regulate the value thereof, is involved the issuing directly by the United States of its own treasury notes, or what are called the paper money of the United States, redeemable by the general government, and also the establishment of national banks, by which private individuals are allowed to engage in the business of banking,[1] and at the same time issuing, under regulation and restriction, pledges of the credit of the United States, which pass from hand to hand as money, bearing on their face the mint mark of genuineness and of value implied in the pledging of the credit of the United States to their redemption.

Sec. 331. *National Banks.*— The constitutionality of the laws allowing the creation of national banks is no longer open to question.

These national banks are in fact, and are held to be, but in-

[1] McCulloch v. Maryland, 4 Wheat. 316.

struments and means adapted to, and properly adopted for, the purpose of providing a circulating medium and regulating the finance of the country.[1]

As such instruments of commerce and government agencies, they are free from any prejudicial action on the part of the states, either by way of taxation or by way of penalties to be imposed upon them as such.[2]

It does not follow, however, that the capital stock of or shares in a national bank are not subject to taxation.[3]

A tax by the United States on the circulation of a national bank is not a revenue bill within the rule that requires that such bills shall originate in the house.[4]

A state cannot, under the usury laws, inflict penalties upon national banks.[5]

Sec. 332. *The Utility of the National Banking System.*— The policy of the national banking system is too thoroughly established to need any discussion whatever, and any discussion of its policy would be but the expression of individual opinion, open to the criticism which must needs attend the utterance of any person upon a question upon which political parties divide.

It may not be out of place, however, to revert very briefly to opinions antedating even the present constitution in reference to the utility of national a bank.

Mr. Justice Wilson, discussing this question, says:

"Let us turn our attention to some of the most material advantages resulting from a bank.

"1st. It increases circulation and invigorates industry. 'It is not,' says Dr. Smith, in his Treatise on the Wealth of Nations,[6] 'by augmenting the capital of the country, but by rendering a greater part of that capital active and productive than would otherwise be so, that the most judicious operations of banking can increase the industry of the country. The part of his capital which a dealer is obliged to keep by him unemployed, and in ready money, for answering occasional demands,

[1] Farmers' & Mech. Nat. Bank v. Dearing, 91 U. S. 29.

[2] McCulloch v. Maryland, 4 Wheat. 316.

[3] New Orleans v. Citizens' Bank, 169 U. S. 361. See also California Bank v. Kennedy, 167 U. S. 362.

[4] Twin City Bank v. Nebeker, 167 U. S. 197.

[5] Farmers' & Mech. Nat. Bank v. Dearing, 91 U. S. 29.

[6] Vol. 1, pp. 483, 484.

is so much dead stock, which so long as it remains in this situation produces nothing either to him or to his country. The judicious operations of banking enable him to convert this dead stock into active and productive stock; into materials to work upon, into tools to work with, and into provisions and subsistence to work for; into stock which produces something, both to himself and to his country. The gold and silver which circulates in any country, and by means of which the produce of its land and labor is annually circulated and distributed to the proper consumers, is, in the same manner as the ready money of the dealer, all dead stock. It is a very valuable part of the capital of the country which produces nothing to the country. The judicious operations of banking, by substituting paper in the room of a great part of this gold and silver, enables the country to convert a great part of this dead stock into active and productive stock; into stock which produces something to the country. The gold and silver money which circulates in any country may very properly be compared to a highway, which, while it circulates and carries to market all the grass and corn of the country, produces, itself, not a single pile of either. The judicious operations of banking, by providing, if I may be allowed so violent a metaphor, a sort of wagon-way through the air, enables the country to convert, as it were, a great part of its highways into good pasture and corn-fields, and thereby to increase very considerably the annual produce of its land and labor.'

Sec. 333. *Paper Money as Viewed Before the Constitution.*— "The same sensible writer informs us in another place[1] that 'the substitution of paper in the room of gold and silver money replaces a very expensive instrument of commerce with one less costly, and sometimes equally convenient. Circulation comes to be carried on by a new wheel, which it costs less both to erect and to maintain than the old one. There are several sorts of paper money, but the circulating notes of banks and bankers is the species which is best known, and which seems best adapted for this purpose.' 'These notes come to have the same currency as gold and silver money, from the confidence that such money can at any time be had for them.'"[2]

[1] Vol. 1, pp. 435–36.

[2] 1 Wilson's Works, 569.

Sec. 334. *The Methods Sanctioned Legal Tender Notes.*[1]—This branch of the question, namely, the power to borrow money, may be passed with a quotation from the latest of the Legal Tender Cases:[2]

"Congress, as the legislature of a sovereign nation, being expressly empowered by the constitution 'to lay and collect taxes, to pay the debts and provide for the common defense and general welfare of the United States,' and 'to borrow money on the credit of the United States,' and 'to coin money and regulate the value thereof and of foreign coin;' and being clearly authorized, as incidental to the exercise of those great powers, to emit bills of credit, to charter national banks, and to provide a national currency for the whole people, in the form of coin, treasury notes, and national bank bills; and the power to make the notes of the government a legal tender in payment of private debts being one of the powers belonging to sovereignty in other civilized nations, *and not expressly withheld from congress*[1] by the constitution,—we are irresistibly impelled to the conclusion that the impressing upon the treasury notes of the United States the quality of being a legal tender in payment of private debts is an appropriate means, conducive and plainly adapted to the execution of the undoubted powers of congress, consistent with the letter and spirit of the constitution, and therefore, within the meaning of that instrument, 'necessary and proper for carrying into execution the powers

[1] "The second subdivision of the same section of the constitution authorizes congress 'to borrow money on the credit of the United States.' Here the meaning of the word 'money' is necessarily somewhat different. 'Money,' says Mr. J. Stuart Mill, in his Principles of Political Economy (vol. 2, book 3, ch. 8, p. 9), 'which is so commonly understood as the synonym of wealth, is more especially the term in use to denote it when borrowing is spoken of. When one person lends to another, as well as when he pays wages or rent to another, what he transfers is not the mere money, but a right to a certain value of the produce of the country to be selected at pleasure, the lender having first bought this right by giving for it a portion of his capital. What he really lends is so much capital; the money is the mere instrument of transfer. But the capital usually passes from the lender to the receiver through the means either of money or of an order to receive money; and at any rate it is in money that the capital is computed and estimated. Hence, borrowing capital is universally called borrowing money.'" Metropolitan Bank v. Van Dyck, 27 N. Y. 491.

[2] Juilliard v. Greenman, 110 U. S. 421.

vested by this constitution in the government of the United States.'[1]

Sec. 335. *Legal Tender Paper Money Not a Mere War Measure.*—"Such being the conclusion in matter of law, the question whether at any particular time, in war or in peace, the exigency is such, by reason of unusual and pressing demands on the resources of the government, or of the inadequacy of the supply of gold and silver coin to furnish the currency needed for the use of the government and of the people, that it is, as a matter of fact, wise and expedient to resort to this means, is a political question to be determined by congress when the question of exigency arises, and not a judicial question, to be afterwards passed upon by the courts. To quote once more from the judgment in *McCulloch v. Maryland:*[2] 'Where the law is not prohibited and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.'

[1] This is adopting precisely the ground and reasoning of Mr. Justice Wilson stated in his argument in favor of the old Bank of North America. He says: "To many purposes the United States are to be considered as one undivided, independent nation, and as possessed of all the rights and powers and properties by the law of nations incident to such.

"Whenever an object occurs, to the direction of which no particular state is competent, the management of it must of necessity belong to the United States in congress assembled. There are many objects of this extended nature.

"In the earlier Legal Tender Cases (12th Wallace), Justice Strong stated that in investigating the powers conferred by the constitution, it is indispensable to keep in view the objects for which those powers were granted; and at page 533, after reciting the language of Chief Justice Marshall, he continues: 'It would appear to be a most unreasonable consideration of the constitution which denies to the government created by it the right to employ *every means not prohibited* necessary for its preservation and for the fulfillment of its acknowledged duties.'

"Justice Bradley, in his concurring opinion in the same case, after expressing his views as to the nature of the government, says: 'Such being the character of the general government, it seems to be a self-evident proposition that it is invested with those inherent and those implied powers which, at the time of adopting the constitution, were considered to belong to every government as such, and as being essential to the exercise of its functions.' There is a common opinion that the legal tender acts were an exercise of a power beyond anything involved in the opinions of Chief Justice Marshall, and, strictly speaking, such is the case." See 1 Wilson's Works, 558, and note.

[2] 4 Wheat. 423.

"It follows that the act of May 31, 1878, chapter 146, is constitutional and valid; and that the circuit court rightly held that the tender in treasury notes, reissued and kept in circulation under that act, was a tender of lawful money in payment of the defendant's debt to the plaintiff."[1]

Sec. 336. *To Coin Money.*— The strict constructionist would see in the use of the word *coin*, preceding the word *money*, a restriction on the power of congress, in the making of money, to a circulating medium made of metal to be coined in the mints of the government.[2] The power as construed means rather create than merely coin; coining is but one of the means of creating.

That may be money which is not considered or recognized as a legal tender for debts. Thus, in the United States, gold and silver coin and United States notes are considered as money. Gold coin has always been regarded as a legal tender, silver in a restricted sense, and paper likewise.[3]

The word *money* is often used as applicable to other media of exchange. Bank notes actually current are treated as

[1] Juilliard v. Greenman (Legal Tender Case), 110 U. S. 421.

[2] "The congress of the United States has power, by the eighth section of the first article of the constitution, 'to coin money and regulate the value thereof, and of foreign coin.' The term *money* is used in different places in the constitution, as it is elsewhere, in somewhat different senses. Here, however, it means, in my judgment, metallic money, gold, silver and copper, or the metals used for coin, and nothing more. The phrase 'coining' cannot, without violence, be applied to the issue of paper money. To coin money is to make, stamp and issue coins as money. Coins are pieces of metal, of a particular weight and standard, and to which a particular value is given in account and payment. The clause which follows, 'to regulate the value thereof,' evidently means to authorize the regulation of the value of the coin thus issued, or the money coined, and that this is strictly metallic money appears from the words immediately following, 'and of foreign coin.' The design was to confer upon congress the power to regulate the value of domestic and foreign coins, and as the domestic money whose regulation is thus conferred upon congress is the money whose coinage is authorized by the first part of the clause, the inference is irresistible that this money is simply domestic coin or metallic money. The clause confers upon congress absolute and exclusive power over the circulating coin of the country, domestic and foreign, by *regulating the standard and coinage* of the former and the *value in account* of the latter." Metropolitan Bank v. Van Dyck, 27 N. Y. 490.

[3] Woodruff v. Mississippi, 162 U. S. 300.

money, because allowed to circulate as such through the channels of trade and commerce unquestioned.

It may be taken as established that congress has the power to designate the media of exchange which shall constitute money.

Sec. 337. *The Legal Tender Attribute.*— The power of the United States to impress upon its paper currency the quality of legal tender has passed beyond the range of discussion.

The result and conclusion is well expressed in the opinion of Mr. Justice Grey in the latest Legal Tender Case:[1]

"The constitutional authority of congress to provide a currency for the whole country is now firmly established. In *Veazie Bank v. Fenno*,[2] Chief Justice Chase, in delivering the opinion of the court, said: 'It cannot be doubted that under the constitution the power to provide a circulation of coin is given to congress. And it is settled by the uniform practice of the government, and by repeated decisions, that congress may constitutionally authorize the emission of bills of credit.' Congress having undertaken to supply a national currency consisting of coin, of treasury notes of the United States, and of the bills of national banks, is authorized to impose on all state banks or national banks or private bankers, paying out the notes of individuals or of state banks, a tax of ten per cent. upon the amount of such notes so paid out. *Veazie Bank v. Fenno*, above cited; *National Bank v. United States*.[3]

"The reason for this conclusion was stated by Chief Justice Chase, and repeated by the present chief justice, in these words: 'Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that congress may, constitutionally, secure the benefit of it to the people by appropriate legislation. To this end, congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end, congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its own authority. Without this power, indeed, its attempts to

[1] Juilliard v. Greenman, 110 U. S. 421.

[2] 8 Wall. 533, 548.

[3] 101 U. S. 1.

secure a sound and uniform currency for the country must be futile.'[1]

"It appears to us to follow, as a logical consequence, that congress has the power to issue the obligations of the United States in such form, and to impress upon them such qualities as currency for the purchase of merchandise and the payment of debts, as accord with the usage of sovereign governments. The power, as incident to the power of *borrowing* money and issuing bills or notes of the government for money borrowed, of impressing upon those bills or notes the quality of being a legal tender for the payment of private debts, was a power universally understood to belong to sovereignty, in Europe and America, at the time of the framing and adoption of the constitution of the United States. The governments of Europe, acting through the monarch or the legislature, according to the distribution of powers under their respective constitutions, had and have as sovereign a power of issuing paper money as of stamping coin."[2]

Sec. 338. *To Regulate the Standard of Value.*— Among the great questions which at the present time divide the people into two great parties is the question relating to the nature of the power of congress to create a standard of value by which to establish a ratio between the two principal metals which have from time immemorial constituted the principal media in our financial system.

The very words used indicate that in the process of regulation some standard must be adopted. This may or may not approximate the commercial value of the commodity used as a medium of exchange.

It is also well understood at the present time that underneath, and upon which rests the stability of the currency, is the assurance of the nation given to foreign nations and to its own citizens to maintain the value of its media of exchange. In the same manner in which we have heretofore seen that no particular section of the constitution can be consulted and viewed isolated from the rest, so in this instance we see the next clause of the section quoted making the sentence read

[1] 8 Wall. 549. Also National Bank v. United States, 101 U. S. 6.

[2] Legal Tender Case, 110 U. S. 445–447.

"that congress has the power to regulate the value of money and of foreign coin."

The relation of these two clauses in this sentence naturally suggests in connection with the last sentence, namely, that congress shall regulate the value of foreign coin, that something is intended other than the mere regulation within our territorial limits.

This is not like regulating the use, the regulation of manufactures, the regulation of commerce, traffic or exchange, but is *the regulation of value.*

Is there not some principle discoverable in accordance with which a standard of value must be regulated, *i. e.*, adopted, established?

Nothing is more common at the present day than to hear discussed the question of a double standard of values.

There is no authoritative declaration on the subject except by congress, and in the absence of any utterance by it we may submit the opinions of others and allow the reader to give them such weight and sanction as his judgment dictates.

Referring for a moment to the object of the power in question, namely, the power to coin money and regulate the value thereof, we may change the phrase somewhat and use it as an equivalent to a power *to create money.* In the light of the exercise of the fiat to impress the legal-tender quality upon paper currency the expression is allowable.

Money, as all must admit, is always spoken of as a medium of exchange. Men do not traffic in money: they traffic with it; and in the same manner in which artificial attributes are imparted by law to persons and things, so artificial attributes are impressed upon the media of exchange, and this artificial capacity gives it the power, the quality, the designation of money.

SEC. 339. *A Standard Must be International.*—Mr. Justice Field, quoting Mr. Webster, gives, it is believed, the true basis upon which to rest a standard, and the only feasible method for regulating the value of coin. He says: "The circulating medium of a commercial community must be that which is also the circulating medium of other commercial communities, or must be capable of being converted into that me-

dium without loss. It must also be able not only to pass in payments and receipts among individuals of the same society and nation, but to adjust and discharge the balance of exchanges between different nations. It must be something that has a value abroad as well as at home, by which foreign as well as domestic debts can be satisfied. The precious metals alone answer these purposes. They alone, therefore, are money; and whatever else is to perform the functions of money must be *their representative and capable of being turned into them at will.* So long as bank paper retains this quality it is a substitute for money. Divested of this, nothing can give it that character."[1]

[1] Woodruff v. Mississippi, 162 U. S. 300–307.

That this position is the true one is shown by the consensus of opinion of other great statesman opposed to Mr. Webster on most other questions.

In Senator Benton's great speech of 1834, in which he reviewed the history of the currency of the United States, may be found the facts admitted by all, which show the true course of history on the subject of the regulation of value as well as its effect upon the circulation of gold.

When the constitution was adopted we had no mint nor any coins. Within two months after the opening of congress in 1789, a statute was passed providing that gold coins of all nations *which equaled those of England, France, Spain and Portugal in fineness* were to be current at eighty-nine cents the penny-weight, and silver coins of all nations which equaled the Spanish dollar in fineness were to be current at one hundred and eleven cents the ounce. Here the standard of both gold and silver was fixed by a reference to foreign standards.

Under these provisions a great influx of gold followed. Senator Benton says: "These early statutes, added to historical recollections, could leave no doubt of the true meaning of the constitution, and that foreign coins were intended to be forever current within the United States."

This measure of value continued until changed in accordance with Mr. Hamilton's famous report, which should always be considered in connection with his views on the national bank and paper money.

Joining with Senator Benton in the sentiment which he expresses so eloquently: "God forbid," said he, "that I should do injustice to Gen. Hamilton — that I should say or insinuate aught to derogate from the just fame of that great man! He has many titles to the gratitude and admiration of his countrymen, and the heart could not be American which could dishonor or disparage his memory. But his ideas of government did not receive the sanction of general approbation; and of all his political tenets, his attachment to the paper system was most strongly opposed at the time, and has produced the most lasting and deplorable results upon the country. In the year 1791 this great man, then secretary of the treasury, brought forward his celebrated plan for the support of public credit — that plan which unfolded the entire scheme of the paper system, and im-

The principle to be deduced is the one upon which those who adopted the early standard of value, using gold as that standard, or by adoption of a value supposed to correspond with the value fixed by the great commercial powers of the world.

mediately developed the great political line between the Federalists and the Republicans."

A national bank was the leading feature of the plan, and making the national bank note receivable at par for all duties, debts and excises to the government placed these notes practically upon par as legal tender, though not expressly so.

In his report Secretary Hamilton, proposing the establishing of a mint, recommended that the relative value of gold to silver should be fixed at fifteen for one, and that recommendation became the law, and remained the law until 1834, when it was changed to a trifle over sixteen to one, and in 1837 at its present ratio of nearly sixteen to one (exactly 15.988 to one).

At this time (1791) the relative values of these metals in Spain and Portugal was sixteen to one, making our standard six per cent. below all gold-producing countries.

The fixing of a ratio, always a difficult and nice question, says Mr. Benton, was more difficult then, in 1792, because of the difficulty of obtaining exact knowledge of the relative value of these metals at that time in England and France; and Mr. Gallatin has since shown that the information which was relied upon (by Hamilton) was clearly erroneous.

Hamilton, Jefferson, Robert Morris, and in fact all of the financiers, are agreed upon the disastrous result likely to attend any mistake in the relative value of the two metals, as well as the basis upon which the value must be fixed or regulated.

That the fatal result followed is a mere matter of history, and stable currency was never attained until the re-adjustment of the standard to correspond with the valuation of the metal by the great commercial nations.

Mr. Benton sums up the matter thus: "It is not to be supposed that gold will come from these countries to the United States if the importer is to lose one dollar in every sixteen that he brings; or that our own gold will remain with us when an exporter can gain a dollar upon every fifteen that he carries out. Such a result would be contrary to the laws of trade; and therefore we must place the same value upon gold that other nations do if we wish to gain any part of theirs, or to regain any part of our own." Benton's View, vol. 1, p. 443.

Further on Mr. Benton made his acknowledgments to the great apostle of American liberty (Mr. Jefferson), for the wise, practical idea that the value of gold is a commercial question, to be settled by its value in other countries.

"These three clauses," he said, "were concurrent, and put foreign coin and domestic coin upon the same precise footing of equality in every particular which concerned their current circulation, their value and their protection from counterfeiters."

President Jackson, in his message of December 6, 1836, speaking of the currency, says that "it is apparent from the whole text of the constitution that it was the purpose of the convention to establish a currency consisting of precious metals. These, from their peculiar properties, which rendered them the standard of value *in all other countries, were adopted*

Investigation will show that such changes as have been made in the gold standard have been to approximate more closely this universal standard, so that the gold coin of the realm might pass the world over in exchanges of commodities.[1]

It is true that metal ancillary to the standard has not been impressed with a universal measure of value.

One of the political parties has advocated an agreement with the foreign powers of such a standard as will put silver on a fixed relative basis with gold, and has professed a desire to accomplish the establishment of a certain fixed ratio as soon as such an agreement can be arrived at with foreign nations, but at the present time all such efforts have been unavailing.

Others who seem to disregard the necessity for the adoption

in this, as well to establish its commercial standard, *in reference to foreign countries*, by a permanent rule, as to exclude the use of a mutable medium of exchange, such as of certain agricultural commodities, recognized by the statutes of some states as a tender for debts."

Is it not obvious that these remarks in reference to gold apply equally to silver? and that, until a uniform ratio of silver can be agreed upon between the great commercial nations of the world, no fixed, unvariable standard can, by the force of a fiat, give an immutable, unchanging value to a silver coin? Is not the principle clear that this clause in the constitution, to regulate the value of domestic and foreign coin, requires that it should be fixed with reference to foreign values?

[1] *Ratio of 16 to 1.*— In the proportion of 16 grains of silver to 1 of gold, or more precisely, of 15.988 to 1; that is, a silver dollar contains 371.25 grains of pure silver, and a gold dollar 23.22 grains of pure gold, there being 16 grains in the former to 1 in the latter.

Origin of the Ratio.— Fixed by law in 1792 at 15 to 1, representing the relative commercial values of the metals; changed to 16.002 to 1 in 1834, and to the present ratio in 1837.

Grains in a Gold Dollar.— 23.22 of pure gold and 2.58 of alloy. No gold dollars are now coined; but this is the proportion in eagles, double-eagles, half-eagles and quarter-eagles.

Grains in a Silver Dollar.— 371.25 of pure silver and 41.25 of alloy.

Value of Gold in Various Countries.— The Hon. M. L. Muhleman, of the United States sub-treasury, New York, says the grain of gold is of the same value in the civilized world; it is "the international standard; even silver is now measured by it alone in international transactions."

Value of Silver in Various Countries. — It is not uniform as gold. The most prevalent standard is the Mexican dollar, which contains 377.17 grains of pure silver, nearly 6 grains more than our dollar. As silver changes constantly in value so does the Mexican dollar. Its purchasing value in this country, though containing more silver than our own, is but little more than fifty cents, *because our own silver is maintained at a parity with gold* by the promise of the nation to redeem it in gold at its face value, irrespective of its commercial value by weight.

of a valuation with reference to the desires and needs of foreign countries seek to establish an artificial valuation by the United States, without reference to this seemingly essential element in fixing any legal standard of silver coin of the United States.

The matter may be left with the query whether, without the prohibition upon the use of foreign coins within the United States, a fixed standard can be safely given to the baser metal.

No question need be asked as to the other phase, for it is obvious that no artificial fiat of the American congress can fix any standard of value of American silver in the foreign exchanges and markets of the world.

CHAPTER XVIII.

BANKRUPTCY AND INSOLVENCY.

SEC. 340. *Origin of the Power and Ancient Law.*— Among the powers granted to congress is one to establish uniform laws *on the subject of bankruptcy* throughout the United States.

When it is remembered that the subject of bankruptcy was in England confined in its operation to merchant traders, and relates peculiarly to the extinguishment of all further remedies in reference to debts contracted by merchants, it seems strange that such a power should have been given to the general government. It is still more peculiar that the subject was not thrown in close connection with the subject of commerce rather than drawing it in juxtaposition with the subject of naturalization.[1]

It will be found by an examination of English and our own text-books that the subject of bankruptcy is generally treated among the means by which contracts are discharged. So in Kent's Commentaries it is treated as a means of transferring personal property.[2]

General provisions have existed in the laws of most civilized nations for the purpose of relieving unfortunate debtors from the perpetual burden of their debts.

The year of jubilee, under the Jewish dispensation, not only gave complete immunity against personal demands, but in many instances restored to the debtor that which was pledged for the debt; in modern times this privilege was extended only to persons who were known as traders. The barbarous provision of the twelve tables, which allowed the selling or even cutting in pieces of unfortunate debtors, gave way to more humane provisions.

It is noticeable, however, that early English statutes did not proceed upon the ground of humanity, or upon the same ground

[1] See Federalist, No. 42.

[2] 1 Kent's Com. 477; 2 Blk. Com., ch. 31.

of public policy which now may be said to be the spirit of bankrupt and insolvent laws.[1]

Insolvent laws which allow the debtor to make a voluntary assignment of his property to some public officer, or to some one who acts under the general law rather than as a trustee

[1] Persons who could avail themselves of the privileges of bankruptcy under the English law when Beawes wrote (1795) were as follows:

"Any person using the trade of merchandise by way of bargaining in gross or retail, exchange, rechange, bartery, chevifance, or otherwise. 13 Eliz., ch. 7. Or, seeking his trade or living by buying and selling, being a natural-born subject. 21 Jac. I., ch. 19.

"Or, an alien, or being a denizen, may become bankrupts. Id., § 15.

"Bankers, brokers and factors may become bankrupts.

"An innkeeper, as such, can be no bankrupt.

"Nor one victualing the fleet, though he sells the overplus to merchants. 5 Geo. II., ch. 30, § 39.

"A mere buying and selling brings not a man within the statute (for buying and selling of land will not make a man liable to be a bankrupt), but it is intended of such who gain the greatest part of their living both by buying and selling of personal effects. Having a share in a ship, being a farmer, or keeping a boarding-school, makes not a bankrupt; buying only, or selling only, makes not a bankrupt; but buying in England and selling in Ireland does. Skinner, 276, 291; 3 Mod. 327, 328; 1 Show. 96, 268; 3 Lev. 309; Mich. 1 W. and M. in B. R." 2 Beawes' Lex Mer., 501.

The English law as to what made a man a bankrupt at that time is thus stated by Beawes:

"1st. To depart the realm.

"2d. To begin to keep house, or otherwise. (By "keeping house" was meant to stay indoors and so evade service of process. Cummings v. Bailey, 6 Bing. 370.)

"3d. To absent himself. 13 Eliz., ch. 1.

"4th. To take sanctuary. 1 Jac. I., ch. 15.

"5th. To suffer himself wilfully to be arrested for any thing or debt not grown due, or for a just consideration.

"6th. To suffer himself to be outlawed.

"7th. To yield himself to prison; and

"8th. To depart his dwelling-house to the intent or purposes to defraud or hinder a just creditor or creditors of his or their just debts or duty.

"9th. Willingly or fraudulently to procure himself to be arrested, or his goods, money or chattels to be attached or sequestered.

"10th. To make any fraudulent grant or conveyance of his lands, tenements, goods or chattels, to the intent, or whereby his creditors may be defeated or delayed in the recovery of their just debts. 21 Jac. I., ch. 15.

"11th. Being arrested for debt shall, after his arrest, lie in prison two months upon that or any other arrest or detention for debt. These to be lunar months. 21 Jac. I., ch. 19.

"12th. Procuring any protection, as that of foreign ambassadors, the verge of the court, or any other than that of privilege of parliament.

"13th. Being arrested for 100*l.* or more of just debt or debts, and escaping out of prison.

"14th. If a man conceals himself in his house but a day or an hour to delay

under a composition deed, and in that manner secures its equal distribution among his creditors, was not originally thought of as a part of the common law of England.

The earliest English statutes proceeded upon the idea that the debtor had committed some fraudulent or criminal act,[1] and this was called an act of bankruptcy; and in consequence thereof his creditors, or any of them, had the right to force him into bankruptcy and to seize his property.

The dissimilarities between the rights of persons insolvent or bankrupt under the ancient law and at the present time are probably more numerous than their similarities.

An historical account of the various insolvent and bankrupt acts which prevailed in England prior to the American Revolution throws little light upon the subject of insolvency and bankruptcy under the state and national laws of this government as they now exist.[2]

or defraud his creditors, it makes him a bankrupt. Palm. 325.

"15th. If a merchant trader indebted keeps in another man's house or on shipboard, it is adjudged a keeping in his house, but the withdrawing must be on purpose to defraud creditors; and, if a man goes sometimes at large so as he may be met with one time or other, it will excuse him.

"16th. Neglecting to make satisfaction for any just debt to the amount of one hundred pounds within two months after service of legal process for such debt upon any trader having privilege of parliament.

"17th. Paying or giving security to a petitioning creditor, whereby he shall privately have more in the pound than the other creditors, constitutes a fresh act of bankruptcy, supersedes the commission obtained by such favored creditor; and another creditor, by petition, shall have a new commission granted; and the first petitioning creditor shall be obliged to refund the sum or sums he had partially received from the bankrupt, and shall be excluded from all benefits whatever under the second commission, his whole debt being forfeited. 5 Geo. II., ch. 30, § 24.

"18th. Any member of parliament being a merchant, and owning more than 100*l.* to any one creditor, and not paying, receiving or compounding with such creditor, or not giving bond with two sufficient sureties to be approved by a judge of the court in which the action is brought, within two months after he has been served with a summons for that purpose, shall be accounted a bankrupt. 4 Geo. III., ch. 35; 1 Sal. 110." 2 Beawes' Lex Mer., 502, 503 (1795).

[1] See History of Bankruptcy, 2 Pars. on Cont., ch. XII, where the best account of the subject is given.

[2] It was by a close adherence to such history and the analogies and deductions from it that those judges who held void the acts of congress allowing voluntary bankruptcy reached their conclusions. See the reasoning in 1 How. *269, *sub.* Nelson v. Carland.

Sec. 341. *Policy of the English Law.*— From the notes to the preceding section it will be seen that originally the provisions of the bankrupt act extended only to those who committed an act of bankruptcy. None of these acts were voluntary in the sense of setting the process of discharge in motion, but at the time when that statement was prepared the act was not necessarily fraudulent or culpable.

The effect of a discharge in bankruptcy was to extinguish the debt. This was probably based upon the idea of the reciprocal benefit which should exist between those who had the privilege of seizing and distributing equitably all of the property which a man possessed in favor of the person thus subjected to the law.

So it was the policy of the English law of bankruptcy to confer an equality of privilege and benefit both upon the creditor and debtor; "upon the creditors, by compelling the bankrupt to give up all his effects to their use, without any fraudulent concealment; on the bankrupt, by exempting him from the rigor of the common law, whereby his person might be confined at the will of his creditor, though in reality he had no effects to satisfy the debt. Whereas the law of bankrupts, taking into consideration the sudden and unavoidable losses to which men in trade are liable, has given them the liberty of their persons, and some pecuniary allowances, upon condition that they surrender up their whole estate to be divided among their creditors."[1]

The English parliament was not concerned with the same questions of power which embarrass the state legislatures or the exercise of the power by congress, and in that respect parliament had power to enact such bankruptcy laws as the dictates of policy suggested.

Sec. 342. *The Power of the State Over Insolvency and Bankruptcy.*— State legislation is necessarily limited in its operation to subjects within its territorial jurisdiction, or seeking the protection of its laws, and the state by legislation cannot affect non-resident debtors or creditors; nor can it relieve its citizens from the necessity of obeying the jurisdiction of foreign states

[1] Beawes' Lex Mer. 501.

when they voluntarily place themselves or their goods within such states.[1]

The clause in the constitution which prohibits the passage by the states of any law impairing the obligation of a contract sets a limitation upon the power of a state insolvent or bankruptcy law to affect injuriously contracts of residents as well as non-residents which are entered into before the passage of the law.[2]

So long, however, as the United States congress has not legislated upon the subject, and as to such matters not controlled or affected by congressional legislation, the states have the power to pass insolvent laws or bankruptcy laws, provided they do not impair the obligation of a contract.[3]

Mr. Brandenburg, in his very recent work, states the well-recognized doctrine:

"All state laws relating to the subject-matter of the federal statute are suspended or superseded during the existence of the federal law, even as between citizens of the same state, but are not repealed by it, and are only suspended, so that, upon the repeal of the federal law, the state law is revived without the necessity of re-enactment.[4]

"It has been held, however, that a federal bankrupt act (the act of 1873) 'does not *ipso facto* suspend state laws for the collection of debts;' such, for example, as state laws relating to the insolvent estates of persons under legal disability, such as lunatics or spendthrifts, or an insolvent law which merely protects the person of the debtor from imprisonment.

"And so it has been held that there is no proper analogy between insolvent laws, properly so called, and those principles of the common law which allow and sanction the conveyance of his property by a debtor for the equal benefit of all his creditors,[5] and no such relation or resemblance as to warrant the

[1] Gilman v. Lockwood, 4 Wall. 409; Denny v. Bennett, 128 U. S. 489. A discharge by a state law does not operate upon debts due to the United States. United States v. Wilson, 8 Wheat. 253.

[2] Ogden v. Saunders, 12 Wheat. 213; Denny v. Bennett, *supra*.

[3] Tua v. Carriere, 117 U. S. 201.

[4] A state insolvency law enacted while the national act is in force is not void, but may become operative by repeal of the federal act. Tua v. Carriere, 117 U. S. 201.

[5] A composition deed is here referred to. See Clark v. White, 12 Pet. 178. The case of Denny v. Bennett, referred to below (sec. 344), is similar to a composition, though conducted under a statute.

conclusion that, because the existence of a federal bankrupt law suspends all state insolvent laws, it must therefore also suspend those common-law principles. Accordingly, a common-law assignment for the benefit of all his creditors alike was held to be valid, notwithstanding the existence of the federal bankrupt law, as against a creditor refusing to accept the benefit thereof, and who, in an action for the recovery of his debts, seeks to garnish the assignee upon the ground that the assignment is void. Whether such assignment would be held to be an act of bankruptcy, if the question were raised in a direct proceeding for that purpose, is not passed upon.

"But so far as such state laws attempt to discharge the contract as against citizens of other states they are unconstitutional; and so a discharge under a foreign bankrupt law cannot be pleaded in bar to an action on a contract made in this country.[1] A state law discharging the person or the property of the debtor, and thereby terminating the legal obligation of the debt, cannot constitutionally be made to apply to debts contracted prior to the passage of the law; but the law may be made to apply to such future contracts as can be considered as having been made in reference to the law. Statutes of this class must be construed to be parts of all contracts made when they are in existence, and therefore cannot be held to impair their obligation."[2]

Sec. 343. *States May Change or Regulate the Remedy.*— The state may change the remedy, or change the statute of limitations and the mode of proof, though it may not substantially

[1] "State legislatures may pass insolvent laws, provided there be no act of congress establishing a uniform system of bankruptcy conflicting with their provisions, and provided that the law itself be so framed that it does not impair the obligation of contracts. Certificates of discharge, however, granted under such a law cannot be pleaded in bar of an action brought by a citizen of another state in the courts of the United States, or of any other state than that where the discharge was obtained, unless it appear that the plaintiff proved his debt against the defendant's estate in insolvency, or in some manner became a party to the proceedings. Insolvent laws of one state cannot discharge the contracts of citizens of other states, because such laws have no extra-territorial operation, and consequently the tribunal sitting under them, unless in cases where a citizen of such other state voluntarily becomes a party to the proceeding, has no jurisdiction of the cause." Gilman v. Lockwood, 4 Wall. 409.

[2] Brandenburg on Bankruptcy, 7, 8.

impair the obligation of a contract, or deny entirely all remedy;[1] but the state may not, under the guise of affecting the remedy, substantially affect the right.[2]

It follows that the state cannot pass an act which entirely discharges a party from liability on a contract entered into before the passage of the act;[3] but the state may refuse to allow the further enforcement of imprisonment for debt,[4] for a law abolishing imprisonment for debt does not impair the obligation of a contract.

[1] Cooley's Const. Lim. 445. Also Board of Education v. Blodgett, 155 Ill. 441. "In Bronson v. Kinzie, 1 How. 317, Chief Justice Taney quotes the language used in Green v. Biddle, 8 Wheat. 75: 'It is no answer that the acts of Kentucky now in question are regulations of the remedy and not of the right to the lands. If these acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they directly overturned his rights and interests.' (The compact referred to was the Ordinance of 1787.) On page 317 he says: 'And no one, we presume, would say that there is any substantial difference between a retrospective law declaring a particular contract or class of contracts to be abrogated and void, and one which took away all remedy to enforce them, *or incumbered it with conditions that rendered it useless or impracticable to pursue it.* Blackstone, in his Commentaries on the Laws of England (vol. 1, p. 55), after having treated of the declaratory and directory parts of the law, defines the remedial in the following words: "The remedial part of the law is so necessary a consequence of the former two that laws must be very vague and imperfect without it. For in vain would rights be declared, in vain directed to be observed, if there were no method of recovering and asserting those rights when wrongfully withheld or invaded. This is what we mean properly when we speak of the protection of the law."' He then instances where the law declares that the field of inheritance which belongs to the father shall go to the son, and forbids any other to enter upon it. If a third will afterward presume to take possession, the remedial part of the law will then interpose its office and will make him restore the possession. We have quoted the entire paragraph, because it shows in a few plain words, and illustrates by a familiar example, the connection of the remedy with the right. It is a part of the municipal law which protects the right and the obligation by which it enforces and maintains it. It is this protection which the clause in the constitution now in question mainly intended to secure. And it would be unjust to the memory of the distinguished men who framed it to suppose it was designed to protect a mere barren and abstract right, without any practical operation upon the business of life."

[2] Bronson v. Kinzie, 1 How. 317; Denny v. Bennett, 128 U. S. 489.

[3] Ogden v. Saunders, 12 Wheat. 213; Denny v. Bennett, *supra.*

[4] Sturges v. Crowninshield, 4 Wheat. 122; Mason v. Haile, 12 id. 370.

The rule does not, however, prevent the enactment of reasonable exemption laws.[1] It does inhibit the enactment of a statute, applicable to debts existing when the act was passed, which prohibits the sale of real estate on execution, unless there

[1] A Minnesota statute allowed a debtor whose property was seized on attachment or execution to make an assignment of all property not exempt for the benefit of all creditors *who would release their debts* on receipt of their dividends, and also provided for payment to the *assignor* of any surplus. It was held that the act did not impair the obligation of a contract. That the discharge provided for did not release the debtor from claims held by non-residents. The general principles of the law are clearly stated by Mr. Justice Miller in Denny v. Bennett, 128 U. S. 494: "With regard to the first of these, it may be conceded that, so far as an attempt might be made to apply this statute to contracts in existence before it was enacted, it would be liable to the objection raised, and therefore in such a case of no effect. But the doctrine has been long settled that statutes limiting the right of the creditor to enforce his claims against the property of the debtor, which are in existence at the time the contracts are made, are not void, but are within the legislative power of the states where the property and the debtor are to be found. The courts of the country abound in decisions of this class, exempting property from execution and attachment, no limit having been fixed to the amount — providing for a valuation at which alone, or generally two-thirds of which, the property can be brought to a forced sale to discharge the debt — granting stays of execution after judgment, and in numerous ways holding that, as to contracts made after the passage of such laws, the legislative enactments, regulating the rights of the creditors in the enforcement of their claims, are valid. These statutes exempting the homestead of the debtor, perhaps with many acres of land adjoining it, the books and library of the professional man, the horse and buggy and surgical implements of the physician, or the household furniture, horses, cows, and other articles belonging to the debtor, have all been held to be valid, without reference to the residence of the creditor, as applied to contracts made after their passage.

"The principle is well stated in the case of Edwards v. Kearzey, 96 U. S. 595, 603, in the following language: 'The inhibition of the constitution is wholly prospective. The states may legislate as to contracts thereafter made as they may see fit. It is only those in existence when the hostile law is passed that are protected from its effect'

"See also Railroad Co. v. Rock, 4 Wall. 177; University v. People, 99 U. S. 309; Knox v. Exchange Bank, 12 Wall. 379.

"The doctrine was very early announced in the case of Wales v. Stetson, 2 Mass. 143; and in the separate opinion of Mr. Justice Story in Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, 666, decided in 1819, it was suggested that in a grant of a charter to a corporation a reservation of the right to repeal it would be valid. This has been acted upon, and such action has been held in many cases to be valid.

"The later case of Greenwood v. Freight Co., 105 U. S. 13, contains a review of this whole subject, so far as contracts are concerned." Denny v. Bennett, 128 U. S. 489–494.

shall be bid for the same a certain designated portion of its value.[1]

Sec. 344. *Power of Congress.*— There being no inhibition in the federal constitution against the passing of laws by congress which have the effect of impairing the obligation of a contract, and the whole subject of bankruptcy being delegated to congress without reserve, it follows that congress has the right to pass a uniform bankruptcy act, even though it may impair the obligation of a contract.

The section of the constitution in reference to impairing the obligation of a contract relates only to laws of a state having that effect.[2]

Sec. 345. *Congress May Allow Voluntary Bankruptcy.*— The English bankruptcy laws in force when the constitution was adopted only contemplated what we now call involuntary bankruptcy, or throwing of the trader into bankruptcy by a creditor because of some act of bankruptcy committed by the debtor; and it became a question whether using the word *bankruptcy* in the constitution, without mentioning insolvency, did not impliedly limit the power of congress to the passage of a bankruptcy act similar in its principles to the English law upon that subject,[3] and the first bankruptcy law was by some courts adjudged void.[4]

It is now settled, however, that congress is not limited to the enactment of laws similar in principle to those that existed in England prior to the adoption of the constitution, and it is perfectly lawful for congress to allow voluntary bankruptcy; that is, to allow the debtor to make his own application to be adjudged a bankrupt and to be discharged from his debts.[5]

Sec. 346. *Who May Become Bankrupts.*—

(*a*) *Voluntary Bankrupt.*— "Any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt."[6]

[1] Bronson v. Kinzie, 1 How. 317; McCracken v. Hayward, 2 How. 608.

[2] New Orleans Water-works v. Louisiana Sugar Co., 125 U. S. 18.

[3] 2 Parsons on Cont., Part 2, ch. IX (three-volume edition, ch. XII).

[4] In Re Klein, a district court case noticed by Judge Catron, and reported *sub.* Nelson v. Carland, 1 How. 265, an interesting history of the subject is given. See also Sturges v. Crowninshield, 4 Wheat. 122.

[5] Ibid.

[6] United States Bankruptcy Act, 1898, ch. 3, sec. 4.

(*b*) *Involuntary Bankrupt.*—"Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing or mercantile pursuits, owing debts to the amount of $1,000 or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. Private bankers, but not national banks or banks incorporated under state or territorial laws," are not within the privilege.[1]

SEC. 347. *Acts of Bankruptcy.*—The present law provides what acts shall be deemed acts of bankruptcy in order to allow the filing of a petition of *involuntary* bankruptcy against the debtor.

The provision is as follows: "Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground."[2]

SEC. 348. *When the Act of 1898 Became Operative.*—The act provided that it should go into full force and effect upon its passage, but that no petition for voluntary bankruptcy should be filed within one month, and no petition for involuntary bankruptcy within four months from its passage.[3]

It has been held under this act that it was effective from the date of its passage to supersede the insolvency laws of the several states.[4]

[1] Id., clause *b*.

[2] United States Bankruptcy Act, 1898, ch. 3, sec. 3.

[3] United States Bankruptcy Act, ch. 7.

[4] In re Rouse, Hazard & Co., C. C. A.,

SEC. 349. *Effect Upon State Proceedings Under State Insolvency Laws.*—The act of congress provided that proceedings commenced under state insolvency laws before the passage of the act should not be affected thereby, notwithstanding the provision that petitions should not be received in one instance within one month and in the other within four months after the passage of the act. Nevertheless all proceedings under the state insolvency laws were superseded by the passage of the United States bankruptcy act.

The circuit court of appeals, in *In re Rouse, Hazard & Co.*, held that:

"The power of congress to enact a general bankruptcy statute is secured by constitutional provision. In the absence of such congressional enactment the states are free to provide for insolvency relief of limited extent; but when congress exercises its authority by a general enactment, all state action is suspended from such time, and subject only to such limitations as may be prescribed in the act.[1] As remarked in *Platt v. Archer*,[2] this authority is 'paramount and exclusive, and so is the jurisdiction of the district court thereunder.' The doctrine thus stated is well established, and is unquestioned upon this motion, except that it is contended (1) that the act of July 1, 1898, was not intended to go into effect in cases of involuntary bankruptcy until November 1; and (2) even if so intended, that no remedy was provided for the intervening four months, leaving the state enactments unimpaired, so that in actions commenced meantime for their enforcement jurisdiction is retained of the subject-matter, without interference by proceedings under the bankruptcy act.

"'These various provisions affecting the rights and conduct of debtors and creditors are different from those previously existing in most of the states, and perhaps different from those found in the laws of any state, and they supersede all conflicting provisions.

"'The only limitation upon the full and complete operation

Jan. 3, 1899; 31 Chicago Legal News, 165. Citing Parmenter v. Hamilton, 51 N. E. Rep. 529. See also Blake, Moffitt and Towne v. Francis Valentine Co., 89 Fed. Rep. 691; In re Bruss-Ritter Co., 90 Fed. Rep. 651.

[1] Tua v. Carriere, 117 U. S. 201, 209, 210.

[2] 9 Blatchf. 559; Fed. Cas. No. 11,213.

of the act upon its passage is that the right to begin proceedings is postponed one month in the case of voluntary petitions and four months in the case of involuntary petitions. Whenever the proceedings are commenced, the conduct of the parties after the passage of the act is to be tested by its requirements. The only saving clause affecting the jurisdiction of state courts provides for cases commenced in those courts before the passage of the act.

"'The plain implication is that proceedings commenced in the state courts after the passage of the act are unauthorized. This is in accordance with the earlier language giving the statute full force and effect from the time of its passage, except that the filing of petitions is to be postponed for a short time.

"'We are of opinion that the language was chosen to make clear the purpose of congress that the new system of bankruptcy should supersede all state laws in regard to insolvency from the date of the passage of the statute.'"[1]

Sec. 350. *Effect of Bankruptcy Proceedings on Suits in a State Court.*— The act provides that "a suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition. If such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or if within that time such person applies for a discharge, then until the question of such discharge is determined."[2]

Under former bankruptcy acts it was held that such a suit must be stayed, even though an attachment had been sued out in the proceeding more than four months before the commencement of the proceedings in bankruptcy, and has been dissolved by giving bond with sureties to pay the amount of the judgment which might be recovered, and the decision of the Illinois supreme court refusing the stay was reversed by the supreme court of the United States;[3] and in a later case it was held that a discharge in bankruptcy might be set up in a state court to stay the isssue of execution on a judgment recovered against

[1] In re Bruss-Ritter Co., Chicago Legal News, Dec. 17, 1898, p. 139; 90 Fed. Rep. 651.

[2] United States Bankruptcy Act, 1898, ch. 3, sec. 11.

[3] Hill v. Harding, 107 U. S. 631.

the bankrupt after the commencement of the proceedings in bankruptcy and before the discharge, although the defendant did not before the judgment ask for a stay of proceedings, which he might have obtained under the bankruptcy proceeding pending before judgment.

It was there said that the defendant was not obliged to make application for the stay, and did not waive his right to the stay by virtue of his discharge by neglect to ask for a stay at the earliest possible moment pending the question of his discharge.[1]

Boynton v. Ball, 121 U. S. 457.

Procedure under the Bankruptcy Law.— An examination of the act, and a consideration of the subject from a legal standpoint, indicate that the objects effected by the bankruptcy act are the transfer of ownership and the jurisdiction and procedure for the collection of debts; and it follows that the details of these subjects are more properly treated with the subject of property and procedure. We are here only concerned with the power of congress with reference to the passage of a uniform bankruptcy law, and the general principles governing the exercise of that power.

Plan of Treatment of Other Subjects Enumerated in the Constitution.— The method of treatment, as heretofore stated, is that subjects shall be arranged in accordance with the *object to be affected* by the law, without regard to whether the law has its sanction in a constitution, a treaty, statute, a custom, or the common law as evidenced by the decisions of the courts. This principle which dominates the method of this book permits and requires that the treatment of several subjects here mentioned in the constitution shall be postponed to later portions of the book. *Fortunately this permits an order of subjects* conforming with the traditions of the profession, e. g.:

Naturalization, art. 1, sec. 8, cl. 4. With private persons.

Counterfeiting, art. 1, sec. 8, cl. 6. Criminal law.

Patents and trade-marks and copyright, cl. 8. Things. (Personal property.)

Judicial Department, cl. 9. The law of action or procedure. (Courts and their jurisdiction.)

Conduct of foreign war, cl. 10. International law.

The Bill of Rights, Habeas Corpus, sec. 9, cl. 2. Bill of Attainder, Ex Post Facto, sec. 9, cl. 3,— with the liberties of individuals, including the amendments affecting that subject.

CHAPTER XIX.

WAR AND MILITARY POWER.

SEC. 351. *Constitutional Provisions Granting Power.*— The provisions of article 1 of the constitution, together with the second and third amendments to the constitution, are the sources and limitations of the power of congress over the subject.[1]

The tenth clause of section 8 is as follows: "To declare war, grant letters of marque and reprisal, and make rules concerning captures for a longer term than three years."

Eleventh clause. "To raise and support armies; but no appropriation of money to that use shall be for a longer term than two years."

Twelfth clause. "To provide and maintain a navy."

Thirteenth clause. "To make rules for the government and regulation of the land and naval forces."

Fourteenth clause. "To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions."

Fifteenth clause. "To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by congress."

Second amendment. "A well-regulated militia being necessary to the security of a free state, the rights of the people to keep and bear arms shall not be infringed."

Third amendment. "No soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war, but in a manner to be prescribed by law."[2]

[1] The authority of the executive must be considered in connection with the power of congress.

[2] See Baker's Annotated Constitution for decisions under these clauses.

Second clause of section 10. "No state shall, without the consent of congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state or with a foreign power, or engage in war unless actually invaded or in such imminent danger as will not admit of delay."

Sec. 352. *The Army, Navy and Militia.*— The student of American institutions who has followed the work thus far cannot fail to have been impressed with the unifying and centralizing force of the constitution, and with the immense power combined in the several departments of the national government.

The power over foreign and interstate commerce lays the traffic of the people under the control of the national government.

The power over the coinage of money as interpreted by the courts adds to this power.

The construction of the constitution which subordinates the police power of the state to the powers of the government under the commerce clause completes the subordination of all individual and state interests, except a remnant of personal liberty, to the authority of the general government.

These matters have developed from time to time, sometimes in the courts, sometimes in conflicts actually bringing the citizen in collision with the officers and agencies of the general government, sometimes in fierce conflicts between the state and national executive, several times in armed collision, and once in a great civil war; but in the end the result has been declared by the adjudication of the courts.

Perhaps the most startling revelation to the rank and file of the citizens of the United States would be a realizing sense of the extent of the military power of the national government in times of peace as well as in times of war.[1]

[1] Our presidents have spoken plainly on the subject: "The organization of the militia is yet more indispensable to the liberties of the country. It is only by an effective militia that we can, at once, enjoy the repose of peace, and bid defiance to foreign aggression; it is by the militia that we are constituted *an armed nation, standing in perpetual panoply of defense,* in the presence of all the other nations of the earth." John Q. Adams' Message, March 4, 1825. . . . "The bulwark of our defense is the national militia, which, in the present state of our intelligence and population, must render us invincible. . . So long as it (the constitution) is worth defending, a patriotic militia will cover it with an impenetrable *ægis.* Par-

The regular military force of the United States is not bound in any sense by the *standing army*[1] which the government has under its control, but it may extend to the enrollment of every able-bodied citizen in the militia organizations which congress may require to be maintained in every hamlet and village throughout the United States, drilled, armed and equipped and ready for the call of the president, whose command is as absolute and imperative as the call of the minute-men which the patriots had agreed to obey. It may take the teacher from his school, the professional man from his profession, the farmer from his plow, the mechanic from his machine, with the same imperious requisition that any czar or king of Europe might issue. That such an establishment has been in peaceful existence during all the time since the establishment of the constitution of the United States, and yet has rested so lightly upon the people, been maintained with so little friction, and rendered so efficient service in the protection of the people and the preservation of the constitution, speaks volumes for the wisdom of the framers of the constitution, the sagacity, prudence and moderation of those in whose hands the reins of government have been intrusted, and the efficacy of the system of checks and balances against absolute power.[2] The great distinction between the power of officers under the constitution and similar powers invested in a personal monarch consists that in one the authority is delegated or intrusted, in the other exercised of right. Herein lies the reason for the different spirit with which it is exercised.

tial injuries and occasional mortifications we may be subjected to, *but a million of armed freemen*, possessed of the means of war, can never be conquered by a foreign foe." Jackson's Inaugural Message, March 4, 1829.

[1] The militia force, according to the message of President Monroe, December 2, 1817, was eight hundred thousand men, most of them armed.

[2] Chief Justice Story says: "It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the constitution itself. In a free government the danger must be remote, since, in addition to the high qualities which the executive must be presumed to possess, of public virtue and honest devotion to the public interest, the frequency of elections, and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation or wanton tyranny." Martin v. Mott, 12 Wheat. 18. See also opinion of Jay, C. J., in Chisholm v. Georgia, 2 Dall. 416.

Sec. 353. *The Separation of Power — Checks and Balances.* There have been those who argue that, because of the vast discretion which is vested in the executive and the great power plainly lodged in congress, the power of the president is absolute, and is as imperious as that of the czar of Russia under his constitutional powers; but it is submitted that the constitution is not open to such criticism, nor have the results which have attended instances of the arbitrary exercise of power justified the conclusion.

The military power, the control of the army and navy, the power of plunging the nation in war, or of restoring peace, is not committed solely to the hands of the president or of congress, and the acts of the president in every department are subject to the control of congress, and may even be arrested by that body. He may exercise his powers arbitrarily, no doubt; but, being answerable for them, it cannot in any appropriate legal sense be said that his power is absolute.

Under his orders, either through malice or misinformation, the rights of the citizen may be disregarded and the citizen wronged, but the arresting hand of the law is still open to preserve and redress that wrong; and the instances under which the power of the president has been checked and rebuked and punishment has been inflicted upon those who undertook to justify under his commands are sufficient to vindicate the dignity of the law and warn others against like transgression. The ever-menacing power of congress is a constant admonition and check upon any semblance of the arbitrary exercise of authority by the president himself.[1]

Sec. 354. *Congress Has Power to Raise and Support Armies,* with the single restriction that no appropriation of money should be made for a longer term than two years; indicating thereby that the policy was at that time against the institution of a settled and fixed fund for the support of a large standing army.

Congress is also given the power to provide and maintain a navy, which power is not coupled with a limitation with reference to the appropriation of money, as in the grant of the power to support the army.

[1] See Johnson v. Jones, 44 Ill. 142; Ex parte Milligan, 4 Wall. 2–143.

Further powers are granted to congress in reference to the organization of a standing equipment and organization of men ready to be called into the service of the United States as follows:

"To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States; reserving to the states respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by congress."

"To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions."

Sec. 355. *The Army of the United States.*— The insignificant number of troops which have been heretofore enrolled in the regular army of the United States has been the occasion of much comment at home and abroad, and it has been a matter of wonder to many how a great nation, occupying so vast a territory, with so large a sea-coast, could afford to risk the ever-present possibility of foreign war, with a standing army of a less number of men than were on several occasions slain on the battlefields of the late war during a single battle;[1] but unlike other governments, and particularly European governments, the military strength and equipment, ready and at hand awaiting the call to arms, is by no means measured by the regular army of the United States.

The Regular Army.— The regular army of the United States is that body of men permanently enrolled in the military service of the United States under arms and under pay of the government and actually engaged in the service, either in garrisoning of ports or in any other department wherein the government may need or use the military arm.

Sec. 356. *Standing Military Forces.*— Congress is expressly given power to provide for organizing, arming and disciplining the militia, and for governing such parts of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers and the authority of training the militia *according to the discipline prescribed by congress.*

[1] The regular army prior to the late Spanish war was approximately twenty-five thousand men.

"To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions."

The foreigner traveling through the United States sees here and there a garrisoned fortress, perhaps, occasionally a company of federal troops traveling from post to post, and smiles at the apparently inefficient preparations to execute the laws of the Union, to suppress insurrection, to repel invasion, and, if we add the words of the constitution, "to prosecute a foreign war."

Perhaps he may occasionally see a militia company out for drill, or visiting the state encampments, which in modern times have been established, and the periodical visit to which and subjection to military discipline during the time of the visit has become a prescribed part of the organization of the militia. There is here little to suggest that this is a part of the standing army of the United States and much which leads to the view that these are merely state organizations, established to execute the whim of the state executive and gratify the desire of the citizens of the states for military display. Indeed, there is a suggestion that the state militia may be an instrument in the preservation of the autonomy of the states.

Unless restrained by congress, the state may have a militia organization independent of that provided for by the laws of the Union, but this must always be subject to the duty of every citizen to become a part of the militia.[1]

[1] *Every Citizen May be Impressed into the Service.*— "It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the states, and, in view of this prerogative of the general government, as well as of its general powers, the states cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms so as to deprive the United States of their rightful resource for maintaining the public security and disable the people from performing their duty to the general government."

A State May, However, Prohibit Military Organizations Not Acting Under Federal Authority.— "The right voluntarily to associate together as a military company or organization, or to drill together as a military company or organization, or to drill or parade with arms, without and independent of an act of congress or law of the state authorizing the same, is not an attribute of national citizenship. Military organization and military drill and parade under arms are subjects especially under the control of the government of every country. They cannot be claimed as a right independent of law. Under our political system they are subject to the regulation and control of the state and federal govern-

Sec. 357. *State and Federal Authority Over the Militia.*— It is to be observed that congress has power to provide by law for the organization and disciplining the militia, and for governing them when actually employed in the service of the United States.

To the states is reserved the appointment of the officers and the authority of training the militia. If the constitution had stopped there, it might have been contended that the militia was under the authority of the states; but the clause is added that such training shall be according to the discipline prescribed by congress, which is the same as saying that the whole militia of the United States shall be trained in such a manner as to co-operate as one trained army at the behest of congress.[1]

These articles of the constitution not being self-executing require the passage of laws to give them force and efficacy, and in accordance therewith congress has from time to time passed laws for the governing of the regular army, the navy, and the militia to be organized in the several states.

As might have been anticipated from the conflicting views which were held with reference to the relative powers of state sovereignty and the national union, conflicts of opinion early arose as to the rights of the United States in reference to the control and management of the state militia.

The government of Connecticut, for example, held that the militia could not be called out except in a case declared and founded on the existence of one of the specified exigencies, and that the integrity of the company must be preserved and its organization maintained under the officers appointed by the state.[2]

So says Chancellor Kent: Some difficulties arose between the general government and Massachusetts, and both Connecticut and Massachusetts refused to furnish detachments of militia for the maritime frontier.

ments, acting in due regard to their respective prerogatives and powers. The constitution and laws of the United States will be searched in vain for any support to the view that these rights are privileges and immunities of citizens of the United States independent of some specific legislation on the subject." Presser v. Illinois, 116 U. S. 252–267.

[1] Id.

[2] 1 Kent's Com. 262.

The governor of Connecticut claimed to have the right to determine when the exigency existed, and it was argued that, as the constitution did not in express terms authorize the president or congress to decide when the militia might be called to the service of the United States, the power belonged to the state under the reserved power, and that a different construction would place the militia in effect at the will of congress and produce a military consolidation of these states, and that construction in fact placed the militia under the president's control.[1]

The question then squarely presented was the same which was made the test of so many other questions, namely: Are we one people in war as well as in peace? Does the reciprocal bond of protection and obedience extend from the general government to each individual so far as to require of him the military service usually exacted by a nation from its citizens?[2]

The questions which thus early arose in many quarters and in various shapes have reached final solution, not by the declaration of the president, not by the passage of acts by the legislature, but by the declaration of the appropriate tribunal established by law to assure the citizens that no arbitrary power should be exercised by any branch of the government, namely, the supreme court of the United States.

The general government had occasion, at the time of the Pennsylvania whiskey insurrection, to call upon the militia as well as the armed forces of the nation; but it was not until the

[1] 1 Kent's Com. 264.

[2] "Among the incidents to the measures of the war, I am constrained to advert to the refusal of the governors of Massachusetts and Connecticut to furnish the required detachments of militia towards the defense of the maritime frontier. The refusal was founded on a novel and unfortunate exposition of the provisions of the constitution relating to the militia. The correspondences which will be before you contain the requisite information on the subject. It is obvious that, if the authority of the United States to call into service and command the militia for the public defense can be thus frustrated, even in a state of declared war, and of course under apprehensions of invasion preceding war, they are not one nation for the purpose most of all requiring it; and that the public safety may have no other resource than in those large and permanent military establishments which are forbidden by the principles of our free government, and against the necessity of which the militia were meant to be a constitutional bulwark." Message of President Madison, 1812.

case of *Martin v. Mott*,[1] in the year 1827, that the relative rights of the states and the United States were finally put at rest, it being held in that case that every militiaman, whether he was actually employed in the service of the United States or not, was subject to the call of the president, and for a refusal of obedience might be subject to trial by court-martial, and that the judgment of the president as to whether the exigency for the call existed was conclusive upon all persons.

It is within the power of congress to determine who shall compose the militia, and the state legislature may not provide other qualifications.[2]

Sec. 358. *The Paramount Allegiance is to the United States.* A question of equal delicacy arose in South Carolina in 1832. The legislature claimed the right to nullify the acts of congress, not merely through legislative enactment, but by calling a state convention and having the people of the state repudiate the action of congress by an ordinance or declaration of sovereign will and intended to secure immunity from the United States. The legislature passed an act to provide for the military organization of the state, and prescribed in addition to the oaths already required by law that every officer of the militia shall, before entering upon the duties of his office, take and subscribe the oath that "I will be faithful and true allegiance bear to the state of South Carolina," without the addition of any reference to the constitution and laws of the United States.

One McCready, who was elected a lieutenant in the infantry, refused to take the oath, but offered to take that prescribed in the state constitution, which embodied allegiance to the general government.

The officer who was delegated by the government to issue commissions in such cases refused the commission and *mandamus* was brought.

After the most elaborate arguments which have been made in any court in the United States concerning the nature of the allegiance or governmental bond which exists between the individual and his state and the United States, the supreme court of South Carolina held that the paramount allegiance was to

[1] 12 Wheat. 18.

[2] Opinions of the Justices, 14 Gray, 416. See Presser v. Illinois, 116 U. S. 252.

the United States, and that the oath must not exclude allegiance to the general government.[1]

Sec. 359. *Military Law of the Militia Service.*— Being enrolled in the militia service does not subject the citizen to military discipline and law, except during the time he is actually engaged in the service, or for disobedience of such rightful calls and commands as may require him to engage therein, or to exercise his duties;[2] but such militiamen are subject to court-martial under the jurisdiction of the *state authority* or under the United States military code for a refusal to obey the call of the president, and they remain under such jurisdiction until they have actually placed themselves within the jurisdiction of the United States under such call.[3]

There is no doubt at the present time of the supremacy of the general government in all matters pertaining to war and the military and naval forces, and the right of the nation to compel every able-bodied citizen to render military service if required, and to prepare himself therefor by the proper exercises and drilling in times of peace.[4]

Sec. 360. *Jurisdiction of Courts-martial Exclusive.*— State courts have no jurisdiction to annul by *habeas corpus* or by any other means the judgments and decrees of the courts-martial. They may, however, inquire into the jurisdiction in such cases, and if the courts-martial are proceeding without jurisdiction they may be restrained.[5]

[1] State v. Hunt, 2 Hill (S. C.), 1; State v. M'Meekin, 2 Hill (S. C.), 1. The arguments of these cases by Mr. Grimke and Mr. Pettigru for the relator, and the attorney-general for the state, and Mr. Findley for the defendant, who were assisted by Mr. Blanding and Mr. McWilley, are perhaps the most exhaustive examination of the nature of allegiance and sovereignty, and the idea of states' rights as they were understood at that time, to be found in the books. Certainly there is nothing in any of the discussions of Mr. Hayne, Mr. Calhoun or Mr. Webster which is not to be found in these arguments, and their value is enhanced by the historical references and the abundant citation. The result reached by the decision was favorable to the national cause, and reflects great credit upon the learning and wisdom and the stern integrity of the judge. The whole case is worthy of the study of any one desiring to understand the foundation principles of our government.

[2] Martin v. Mott, 12 Wheat. 18; Mills v. Martin, 19 John. 7.

[3] Houston v. Moore, 5 Wheat. 1; McCall's Case, 5 Phil. 259; Gould & Tucker's Notes, title 16, p. 433 *et seq.*

[4] Cooley on Torts, 344; Griner's Case, 16 Wis. 423; Presser v. Illinois, 116 U. S. 252.

[5] Johnson v. Sayre, 158 U. S. 109; Dynes v. Hoover, 20 How. 65. See

Neither can the superior courts by writ of prohibition control the exercise of power by regularly established courts-martial.[1]

The writ of prohibition is not a proper writ in such cases for the reason that the courts-martial are not inferior to, and in fact are not within the same department with, the judicial establishment of the state.[2]

SEC. 361. *Military Law.*— The individual, when he becomes properly enrolled as a member of the military or naval establishment of the United States, takes on a new capacity or *personæ*, and subjects himself to a new jurisdiction, a new body of rules and regulations, and new methods of procedure and punishment.[3]

The members of the military and naval organization of the United States are *at all times* subject to what is known as military law and discipline,[4] consisting of the articles of war, the

also Ex parte Milligan, 4 Wall. 2; Ex parte Reed, 100 U. S. 13.

[1] Smith v. Whitney, 116 U. S. 167.

[2] High on Extraordinary Leg. Rem. (3d ed.) 720–732.

[3] "As the phrases 'martial law' and 'military law' are sometimes carelessly used as meaning the same thing, it is proper to point out the broad distinction between them. The constitution authorizes congress to raise and support armies, and to make rules for the government thereof. Acting under this authority, congress has passed divers acts prescribing the rules and articles of war, and providing for the government and discipline of the troops. These rules constitute the military law, and are directly sanctioned by the constitution, but they apply only to persons in the military or naval service of the government.

"What is called martial law, however, has a far wider scope and application. When once established, it is made to apply alike to citizen and soldier. To call this system by the name of law seems something of a misnomer. It is not law in any proper sense, but merely the will of the military commander, to be exercised by him only on his responsibility to his government or superior officer. Sir Mathew Hale said (Hist. C. L. 54): 'It is in truth and reality no law, but something indulged rather than allowed as law; and the principle was re-asserted in the bill of rights of 1688. In the case of Grant v. Gould, 2 H. Blk. 99, decided in the year 1792, Lord Loughborough said that martial law, in the sense in which we are now considering it, did not exist in England, was contrary to the constitution, and had been for a century totally exploded. We make these references merely to illustrate how odious this system is to the spirit of liberty and good government." Johnson v. Jones et al., 44 Ill. 142.

[4] A retired army officer so long as he is drawing pay and in the organization (Classon v. Armes, 7 App. Cas. Dist. Col. 460; United States v. Fletcher, 148 U. S. 84), and a paymaster's clerk in the naval service, are within the jurisdiction. Johnson v. Sayre, 158 U. S. 109.

rules and regulations of congress and the ancient usages and practices of military tribunals. The militiaman may be called out by the order of the president, or by the order of the governor on a requisition of the president, and when called (and from that time only) he is subject to the military law, and for refusal may be tried and fined or imprisoned, either under the procedure established by the state or by the United States, and his property seized on execution to pay the penalty, or he be imprisoned or subjected to degradation, deprivation of pay, or any of the usual punishments inflicted by military authority.[1]

Over this jurisdiction the civil courts have no authority or supervision, and they have no means of arresting the progress or execution of the decrees of the military courts except only where there is a want of jurisdiction in the tribunal attacked.[2]

Sec. 362. *Due Process of Law.*— Due process of law, in cases arising under offenses against the military code, does not require the same formalities which are guarantied under the civil and criminal laws of the state.

The jurisdiction of the military tribunal is to enforce the military law and punish its infractions. It has nothing to do with the punishment of crimes against the municipal law, although the same act may be an infraction of both.[3] The military tribunal is confined in its jurisdiction, and must leave the punishment of offenses against the municipal law to the municipal courts.[4] The military authorities must, however, keep within their jurisdiction and proceed according to the regular requirements of the express law and recognized usages or their acts will be void, and all persons performing them may be but trespassers.[5]

[1] Martin v. Mott, 12 Wheat. 18.

[2] Wales v. Whitney, 114 U. S. 564.

[3] Classon v. Armes, 7 App. Cas. Dist. Col. 460. See also Winthrop's Military Law, vol. 1, p. 137.

[4] People v. McLeod, 25 John. 483.

[5] "Courts-martial derive their jurisdiction and are regulated with us by an act of congress, in which the crimes which may be committed, the manner of charging the accused, and of trial, and the punishments which may be inflicted, are expressed in terms; or they may get jurisdiction by a fair deduction from the definition of the crime that it comprehends, and that the legislature meant to subject to punishment one of a minor degree of a kindred character which has already been recognized to be such by the practice of courts-martial in the army and navy services of nations, and by those functionaries in different nations to whom has been confided a revising power over the sentences of courts-

SEC. 363. *War.*[1]—Congress is given the exclusive power of declaring war, and this power is not confined to declaring foreign war. It has the same power to levy war to suppress a rebellion.[2]

It is obvious that a state of war may be brought about without any action being taken on the part of congress, and a war may be prosecuted without any declaration of war actually existing; and it is equally obvious that every act which has been taken leading to this state may have been taken without the consent of congress and the president, or acts of war may have been committed by our naval or military forces.

It is not customary for the original government, in case of insurrection, to declare a state of civil war to exist, the reason

martial. And when offenses and crimes are not given in terms or by definition, the want of it may be supplied by a comprehensive enactment such as the thirty-second article of the rules for the government of the navy, which means that courts-martial have jurisdiction of such crimes as are not specified, but which have been recognized to be crimes and offenses by the usages in the navy of all nations, and that they shall be punished according to the laws and customs of the sea. Notwithstanding the apparent indeterminateness of such a provision, it is not liable to abuse; for what those crimes are, and how they are to be punished, is well known by practical men in the navy and army and by those who have studied the law of courts-martial and the offenses of which the different courts-martial have cognizance. With the sentences of courts-martial which have been convened regularly and have proceeded legally, and by which punishments are directed, not forbidden by law, or which are according to the laws and customs of the sea, civil courts have nothing to do, nor are they in any way alterable by them. If it were otherwise the civil courts would virtually administer the rules and articles of war irrespective of those to whom that duty and obligation has been confided by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts. But we repeat, if a court-martial has no *jurisdiction over the subject-matter of the charge* it has been convened to try, or shall inflict a punishment *forbidden by the law,* though its sentence shall be approved by the officers having a revisory power of it, *civil courts* may, on an action by a party aggrieved by it, inquire into the want of the court's jurisdiction and give him redress. (Harman v. Tappenden, 1 East, 555. As to ministerial officers, Marshall's Case, 10 Cr. 76; Morrison v. Sloper, Wells, 30; Parton v. Williams, B. & A. 330; and as to justices of the peace, by Lord Tenterden, in Basten v. Carew, 3 B. & C. 653; Mules v. Calcott, 6 Bins. 85.)" Dynes v. Hoover, 20 How. 65.

[1] It is not the intention to here enter upon the subject of foreign war, or war as a question of international law, but to limit the treatment to a question of power under these sections of the constitution.

[2] Tyler v. Defrees, 11 Wall. 331.

being to avoid the recognition of a state of war by foreign powers rather than a state of insurrection.[1]

Declarations of congress, whether express declarations of war or acts in recognition of it, are ultimate and conclusive upon the question as to whether war actually exists.[2]

Sec. 364. *The Effect of Civil War on Civil Laws.*— The effect of a civil war is to throw all of the territory within which hostilities are raging within the dominion of the military power, and it is within the recognized customs of war for those who have, or claim to have, the authority, to dispense with the municipal law and establish in its stead what is called martial law.

This martial law is not a law governing those actually engaged in the army, but extends to all persons and all property within the territorial jurisdiction.

Under the sanction of war military governments may be established over the conquered or subdued territory, and such governments may be prosecuted and maintained until a regular state of municipal law can be organized and established.

This idea of martial and military government proceeds from the necessities of the case, but it is not without bounds; neither under the constitution of the United States is it an arbitrary power, nor are the rights of the citizens beyond the control of the courts.[3]

[1] Prize Cases, 2 Black, 667.

[2] Talbot v. Seeman, 1 Cr. 28. See also Bass v. Tingey, 4 Dall. 37.

[3] The power to declare martial law and to suspend the writ of *habeas corpus* and all other civil process and jurisdiction is a power which has received able discussion, and the decisions of our highest tribunals have fixed safe and certain bounds upon its exercise, even if the instances cannot be communicated by any general expression of opinion or definition. Among the ablest of these expositions is that of Johnson v. Duncan, 3 Mart. (La.) 500; 6 Am. Dec. 674. The case arose by reason of General Jackson's proclamation of military law in Louisiana during the war of 1812. In Luther v. Borden, 7 How. 1–83, the court recognized the doctrine established by this case, that a state of war may exist on principles of national law, whereby a commanding officer may be justified in extending certain rights of war, not only over his camp and its environments, but the near field of his military operations; but even then they do not supersede the regular operations of the courts upon citizens not actually engaged in the strife. The student can be given nothing which will be a substitute for the perusal of this case and Ex parte Milligan, 4 Wall. 2.

CHAPTER XX.

POSTOFFICE, POST ROADS—INTERNAL IMPROVEMENTS.

Sec. 365. *A Postal Service.*—The direct power to organize, manage and control the postal service of the United States has, as a matter of course, never been the subject of question because of the express power given by the seventh clause of section 8, article I, of the constitution.

The incidental powers supposed to be proper and necessary to protect and render efficient this department of the service are the only ones which have occasioned any disagreement and controversy.

Under the designation of "post roads" are included all the avenues or means of travel which may be utilized in the carrying of the mails. All the streets in the cities which are designated as mail routes or letter-carrier routes are post roads, as are all railroads which are appropriated or used for this purpose.[1]

The United States has the power to establish by indicating what routes are post roads, to construct by actually condemning and building of post roads, consisting of artificial highways or water-ways, or it may lease of the owners; but the authority confided in the postoffice department, which at this time is exercised by the postmaster-general, does not authorize him to make a lease for a long term of years, in the absence of an appropriation by congress for that purpose.[2]

[1] St. Louis v. Western Union Tel. Co., 148 U. S. 92. Also United States v. Union Pacific Ry. Co., 160 U. S. 40. In Pennsylvania v. Wheeling & Belmont Bridge Co., 18 How. 421, the bridge which had been condemned as an obstruction to navigation was by act of congress declared to be a post road, and it was held that this act changed its character and made it lawful. The same act provided that boats must lower their chimneys and be so constructed that they might pass under it. In a later case a similar act was held to abate a suit brought to enjoin the construction of a bridge. The Clinton Bridge, 10 Wall. 454.

[2] Chase v. United States, 155 U. S. 489. President Monroe, in his message of December 2, 1823, says that "there is established, by law, eighty-eight thousand six hundred miles of post roads, on which the mail is now transported eighty-five thousand seven hundred miles."

Incident to the power to establish and regulate the postal system of the United States is that of prescribing the manner of the use and prohibiting the improper use of the mails; and so congress has exercised the power to prohibit the improper use of the mails for fraud and improper communications, obscene literature, etc.[1]

Congress has the right to, and does, require that communications between individuals located at distant points from each other shall not be carried by private carriers without compensation, and may and does require that the same shall be deposited in the postoffice and pay the public charge.

Sec. 366. *Internal Improvements.*— The power of the general government to erect and maintain public highways, water-ways and such public improvements as are incident thereto in the interests of commerce or the public postal or military service became at an early period the subject of sharp difference of opinion between statesmen. Notwithstanding the doubts expressed by the executives, the prevailing sentiment *of congress* seems always to have been in favor of the power, and a liberal spirit has been exhibited in its exercise.

President Monroe, in his message of December 2, 1817, stated that in his view congress had not the power to establish a system of internal improvements, but on account of the immense importance to the Union of such a power, he felt constrained to suggest the propriety of recommending to the states the adoption of an amendment to the federal constitution conferring such power upon the general government. This suggestion has never been acted upon.

Five years later, while adhering to the same opinion, he recommended that congress should maintain and repair the Cumberland road, which had already been constructed under an act of congress of 1806; and in his message of December 2, 1823, he recommended that a commission be appointed to investigate the feasibility of connecting the waters of the Chesapeake Bay and the Ohio river by one continuous canal, which in his opinion might be constructed at an expense far short of the value and importance of the object to be attained.[2]

[1] In re Rapier, 143 U. S. 110. Also Horner v. United States, id. 207; Dunlop v. United States, 165 U. S. 286.

[2] President John Quincy Adams, in his inaugural address of March 4, 1825, approached the topic in no uncertain terms. He says: "To the

From this time whatever scruples had existed as to the general power to construct internal improvements seem to have disappeared, and, as shown by the message of President Adams of December 4, 1827, the government had embarked upon extensive operations in improving the means of communication in various parts of the United States.[1]

topic of internal improvements, emphatically urged by him (Monroe) at his inauguration, I recur with peculiar satisfaction. It is that from which I am convinced that the unborn millions of our posterity, who are in future ages to people this continent, will derive their most fervent gratitude to the founders of the Union; that in which the beneficent action of its government will be most deeply felt and acknowledged."

[1] The light in which such objects were regarded and the extent to which they were pushed may be gathered from the following extract from that message:

"Of the surveys which, before the last session of Congress, had been made under the authority of the act of 1824, reports are made:

"1. Of the board of internal improvement on the Chesapeake and Ohio canal.

"2. On the continuance of the national road from Cumberland to the tide waters within the District of Columbia.

"3. On the continuation of the national road from Canton to Zanesville.

"4. On the location of the national road from Zanesville to Columbus.

"5. On the continuation of the same road to the seat of government in Missouri.

"6. On a post road from Baltimore to Philadelphia.

"7. Of a survey of Kennebec river (in part).

"8. On a national road from Washington to Buffalo.

"9. On the survey of Saugatuck harbor and river.

"10. On a canal from Lake Pontchartrain to the Mississippi river.

"11. On surveys at Edgartown, Newburyport and Hyannis harbor.

"12. On survey of La Plaisance Bay, in the territory of Michigan.

"And reports are now prepared, and will be submitted to Congress:

"On surveys of the Peninsula of Florida, to ascertain the practicability of a canal to connect the waters of the Atlantic with the Gulf of Mexico, across that peninsula, and also of the country between the bays of Mobile and of Pensacola, with the view of connecting them together by a canal.

"On surveys of a route for a canal to connect the waters of James and Great Kenawha rivers.

"On the survey of the Swash and Pamlico Sound, and that of Cape Fear, below the town of Wilmington in North Carolina.

"On the survey of the Muscle Shoals in the Tennessee river, and for a route for a contemplated communication between the Hiwassee and Coosa rivers in the state of Alabama."

He mentions "the appropriations for the repair and continuation of the Cumberland road, and for the construction of various other roads, for the removal of obstructions from the rivers and harbors, for the erection of light-houses, beacons, piers and buoys, *and for the completion of canals undertaken by individual associations, but needing the assistance*

President Jackson recognized that the question of power had passed beyond the pale of discussion by uniform usage, but suggested the dangers of fraud, dissension and local prejudice which would arise by making local improvements in harbors and streams and by the erection of short roads wholly within a state; but all these views have given way to the evident and imperative demands of commerce, convenience of the general government, military operations, and the necessity for making the postal service efficient.

The question, however, has been taken from the public view, in a way never anticipated by those who were exercising these powers before the invention of the steam railway and the modern use of that means of communication, through the medium of railroad corporations.

SEC. 367. *Government Aid to Corporations Incident to this Power.*— President Jackson expressed his approbation of direct appropriations in any way calculated to advance the interests of commerce, navigation, the postal service or public improvements, the direct object of which was the public benefit; but he refused his assent to all bills introduced into congress authorizing subscriptions to stock incorporations owned, or in part controlled, by private persons.[1]

of means and resources more comprehensive than individual enterprise can command, may be considered rather as treasures laid up from the contributions of the present age, for the benefit of posterity, than as unrequited applications of the accruing revenues of the nation. To such objects of permanent improvement to the condition of the country, of real addition to the wealth, as well as to the comfort, of the people, by whose authority and resources they have been effected, from three to four millions of the annual income of the nation have, by laws enacted at the three most recent sessions of congress, been applied, without intrenching upon the necessities of the treasury."

[1] "The act now returned does so in several particulars, but it also contains appropriations for surveys of a local character, which I cannot approve. It gives me satisfaction to find that no serious inconvenience has arisen from withholding my approval from this bill; nor will it, I trust, be cause of regret, that an opportunity will be thereby afforded for congress to review its provisions, under circumstances better calculated for full investigation than those under which it was passed.

"In speaking of direct appropriations, I mean not to include a practice which has obtained to some extent, and to which I have, in one instance, in a different capacity, given my assent — that of subscribing to the stock of private associations. Positive experience, and a more thorough consideration of the subject, have convinced me of the

The history of the legislation of the United States since the beginning of the governmental aid to the Pacific Railway shows the wisdom of these objections of President Jackson, and the result has proven how great has been the loss to the general government pecuniarily, and to the people of the United States in the problem of self-government, by the creation of the system of patronage to private corporations engaged in enterprises essentially public in their nature.

The power of the general government to establish internal improvements is no longer an open question. The practice of granting to private persons the funds or property of the United States, or mingling them with the funds promised (but seldom furnished) by private persons, is too well established to be any longer questioned upon constitutional grounds. The history of land grants, bond issues and government loans to the railroads of the country, under the power to establish post roads and provide for the general defense, is a part of the political and judicial history of the nation.[1]

impropriety as well as inexpediency of such investments. All improvements effected by the funds of the nation for general use should be open to the enjoyment of all our fellow-citizens, exempt from the payment of tolls, or any imposition of that character. The practice of thus mingling the concerns of the government with those of the states or of individuals, is inconsistent with the object of its institution, and highly impolitic. The successful operation of the federal system can only be preserved by confining it to the few and simple, but yet important, objects for which it was designed.

"This mode of aiding such work is also, in its nature. deceptive. and, in many cases conducive to improvidence in the administration of the national funds. Appropriations will be obtained with much greater facility, and granted with less security to the public interest, when the measure is thus disguised, than when definite and direct expenditures of money are asked for. The interest of the nation would doubtless be better served by avoiding all such indirect modes of aiding particular objects. In a government like ours, more especially, should all public acts be, as far as practicable, simple, undisguised and intelligible, that they may become fit subjects for the approbation or animadversion of the people. The bill authorizing a subscription to the Louisville and Portland canal affords a striking illustration of the difficulty of withholding additional appropriations for the same object, when the first erroneous step has been taken by instituting a partnership between the government and private companies. It proposes a third subscription on the part of the United States, when each preceding one was at the time regarded as the extent of the aid which government was to render to that work." Jackson's Message, December 7, 1830.

[1] See Green Bay & M. Co. v. Patten Co., 19 Sup. Ct. Rep. 97.

SEC. 368. *Grants to States to Assist Them in Public Improvements.*— Very early a practice obtained of granting to states and territories a certain part of the public domain to aid them in improving navigation or in the construction of roads. So on the 8th of August, 1846, a grant of land was made to the territory of Iowa for the purpose of aiding said territory in improving the Des Moines river, and on the same day a similar grant was made to Wisconsin to aid it in improving the Wisconsin and Fox rivers, connecting the same by a canal; and in 1852 congress granted seven hundred and fifty thousand acres of land to the state of Michigan for the improvement of the Saint Marie river by constructing a canal around the rapids thereof.[1]

SEC. 369. *Grants to States to Aid Private Enterprises.*— In 1850 grants were made by the United States of land lying within several states for the benefit of constructing a railway from some point in southern Illinois to the Gulf of Mexico.[2]

[1] Dubuque & Pac. R. R. Co. v. Litchfield, 23 How. 66. In 1841 congress passed an act granting half a million acres of land to several of the states for public improvements. Wolsey v. Chapman, 101 U. S. 755.

[2] The policy of the state of Illinois in the matter of the Illinois Central Railroad is worthy of remark. It reserved seven per cent. of the gross earnings of the road. The road has not perished, and the result to the state may be gathered with the lesson in political science from the following extract from Cook's "The Corporation Problem," p. 202:

"The report of the Illinois railroad commission for the year 1875 shows that the corporation received from the government 2,595,000 acres of land, of which it had up to 1875 sold $31,000,000 and had remaining over 200,000 acres.

"In exchange for this and its franchise the state of Illinois reserved an interest in the profits of seven per cent. on the gross earnings.

"The following is an extract from the message of the governor of Illinois to the legislature in 1891:

"'Under the wise provision which retained to the state an interest to the extent of seven per cent. of the gross earnings of the road, to be paid annually into the state treasury, there has been paid to the state, all told, for the years from 1855 to 1890, inclusive, the sum of $12,365,618. Upon the $40,000,000 of capital stock of the company paid in, there was paid as dividends in the same period the sum of $64,782,357, showing that an amount slightly exceeding nineteen per cent. of the total paid as dividends has been turned into the state treasury, or a sum equal to sixteen and three-hundredths per cent. of the whole sum paid both to the state and upon stock. The last year the state's seven per cent. of gross earnings paid amounted to $486,281, and on said $40,000,000 of stock were distributed as dividends $2,400,000, the state's portion being nearly seventeen per cent. of the whole amount so paid. The showing for the last

In 1853 a similar grant was made to Missouri to aid in the construction of a railway.[1]

In 1856 a similar grant was made by the United States to the state of Michigan in aid of another railroad;[2] and in the same year a similar grant was made to the state of Wisconsin in aid of the construction of the Chicago Northwestern Railroad.

The supreme court, in speaking of this grant, characterizes this action as a new policy adopted by congress to aid states by grants to build railroads; and say further that the grant in question was an ordinary one to build a road in Wisconsin, for which a change of route was desirable, after the line had been located. This change was authorized by congress.[3]

Sec. 370. *Direct Grants of Financial Aid to Private Corporations in Aid of Enterprises of Great Public Interest.*— At a later period a new policy was inaugurated in reference to the encouragement of public improvements and the carrying out of the great design of the framers of the constitution in connecting all parts of the country by systems of communication for post and military roads and avenues of commerce.

This was the policy of granting directly to private corporations or individuals large portions of the public domain, and of extending financial aid and assistance directly to them. Typical of all others are what are known in the history of the United States as the Pacific Railway grants.[4]

six months ending October 31, 1890, gives the state as its seven per cent. of earnings $257,219, or at a rate which would make the income of the state from this source over half a million per year, exceeding in amount any other half year in the history of the road. On the whole, I think the rapid increase in the state's revenues from this source, in late years, rising as they have from $367,799 in 1885 to $486,281 in 1890, presents an encouraging prospect, and speaks well for the efficiency of the present management of the company. The further building of new competing lines of railroad having entirely ceased, there seems cause to hope for a gradual and healthy growth in the revenue of the lines, in which the state will share with the owners of the stock.'"

"A like grant was made in 1866 to the state of Kansas *for the use and benefit of the St. Joseph & Denver City Ry. Co.*, but in this case the title to the land was to go directly to the corporation on performing the conditions." Van Wyck v. Knevals, 106 U. S. 364.

[1] Chouteau v. Allen, 70 Mo. 290.

[2] Rogers v. Port Huron Ry. Co., 45 Mich. 460.

[3] Eldred v. Sexton, 19 Wall. 189.

[4] Out of these schemes grew the Credit Mobilier scandals, which, like

In 1862 one Walter S. Burgess and others obtained *a charter directly from the United States* to build a transcontinental road which should connect the Pacific ocean with some point on the Missouri river, and in consideration of the undertaking the corporation was to be given, as the work progressed, large donations of land out of the public domain, and also direct financial aid, and were to be the owners of the road when built; and in return therefor the company were obligated to do the government's transportation at rates not to exceed amounts paid private parties for transporting the mails, government supplies, government troops, etc.; and it was also provided that all charges to be made were to be applied to the payment of bonds which were to be given to secure the repayment of the advances made by the general government, and that after the completion of the road, and until the bonds and interest were paid, at least five per cent. of the net earnings should be annually applied to the payment thereof.

Two years later additional donations were made, and the privilege was given to the corporation to issue its bonds to private parties to ān amount not exceeding the amount issued to it by the United States, and allowing the execution of a mortgage which should be a paramount lien to the lien of the government.

In 1871 the requirement that the compensation for the government use of the road should be credited on the government obligations was changed and modified so that one-half of such compensation might be paid to the corporation.[1]

a storm, strewed the shore of the political sea with wrecks of great names, and seems to have destroyed the crop of patriots.

[1] United States v. Union Pac. R. R. Co., 91 U. S. 72. That the obligations due to the government have not been paid need not be expressly stated. Mr. Justice Davis says: "The Union Pacific Railroad Company, conceding the right of the government to retain one-half of the compensation due it for the transportation of the mails, military and Indian supplies, and apply the same to reimburse the government for interest paid by it on bonds issued to the corporation to aid in the construction of its railroad and telegraph line, seeks to establish by this suit its claim to the other moiety. The United States, on the other hand, having paid interest on these bonds in excess of the sums credited to the company for services rendered by it, insist upon their right to withhold payment altogether. One of the grounds on which this right is sought to be maintained is by reason of the general right of set-off, which, as a general proposition,

As remarked by Mr. Justice Davis, the provisions of the original act of 1862 were entirely outside of the usual course of legislative action concerning grants to railroads, and was introduced and excused on account of conditions altogether extraordinary, which consisted in the war-threatening attitude of Great Britain and the imperative necessity of connecting and binding together all parts of the nation by public highways, affording the greatest possible facility for rapid communication.

The effect was to afford the required protection to the Pacific states, and the public servants professed to act in the performance of an imperative duty which could not justly withhold the necessary aid for so great an enterprise; and so strong and pervading was public opinion that it is by no means certain that the people would not have justified congress if it had departed from the then settled policy of the country regarding works of internal improvement and charged the government itself with the direct execution of the enterprise.[1]

exists in the government, and is commonly exercised by it when settling with those having claims against it. But, manifestly the rules applicable to ordinary claimants for services rendered the United States do not apply to this controversy. The bonds in question were issued in pursuance of a scheme to aid in the construction of a great national highway. In themselves they do not import any obligation on the part of the corporation to pay; and whether, when the United States have paid interest on them, a liability to refund it is imposed on the company, depends wholly on the conditions on which the bonds were delivered to and received by it. These conditions are embodied in the legislation of congress on the subject; and if, on a fair interpretation of it, the corporation is found to be now a debtor to the United States, the deduction for interest paid on the bonds can be lawfully made. But, if the converse of this proposition is true, the government cannot rightfully withhold from the corporation one-half of its earnings." . . . "The act itself was an experiment. It must be considered in the nature of a proposal to enterprising men to engage in the work, for, with the untried obstacles in the way, there was no certainty that capital could be enlisted. If enlisted at all, it could only be on conditions which would insure, in case of success, remuneration proportionate to the risk incurred." It was held that under the acts of congress the corporation was not required to pay any interest until the maturity of the bonds, and consequently the government could not set off or compensate interest paid by it against charges against it for services. United States v. Union Pac. Ry. Co., 91 U. S. 72, 78, 79, 82.

[1] It is conceived that the direct performance of this great public service by constructing this great internal improvement by the government, although at one time warranted only by the liberal construction of the constitution, would have

The great objects of the enterprise were sufficiently indicated by the title of the act, "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military and other purposes."

been in harmony with the well-established authority as admitted even by President Jackson. By no construction ever before indulged could the public domain of the general government, held in trust for the benefit of the people, be donated to a private corporation. Much less had the general government any power to pledge its credit for such a purpose.

Mr. William W. Cook, the author of the noted treatise on Stock and Stockholders, speaking of municipal and government aid, gives the following facts, and cites the following cogent facts on this subject:

"The lament of Judge Dillon on this subject reminds one of the thoughts of Macaulay's New Zealander overlooking the ruins of London from the London Bridge. In his great work on Municipal Corporations, the author says: 'If it be allowable to judge of a legal principle by its fruits, the dissenting and minority judges on this question (the general question of public aid to private corporations) will find much to confirm the conviction that their views were sound. But it is useless to fight that battle again; it has been fought and lost. All that is left is the contemplation and contrast of what might have been and what is.' Dillon on Municipal Corporations (3d ed.), p. 508, n. See also Cooley's Const. Lim. (5th ed.), 265, etc.

"'The cities, towns and states have not been alone in granting aid to railroads. The federal government some twenty-five years ago commenced making grants of land to trunk lines of railroad to be constructed to the Pacific coast. The total grant made to the Union Pacific Railway was 13,000,100 acres; to the Kansas Pacific, 6,000,000; to the Central Pacific, 12,100,100; to the Northern Pacific, 47,000,000; to the Atlantic & Pacific, 42,000,000; to the Southern Pacific, 9,520,000. Great subsidies of money exceeding $60,000,000 were also granted by congress to the first transcontinental lines. The land grants by congress consisted of alternate sections; in the earlier cases, of five to the mile along the line.' See Bryce's American Commonwealth, vol. II, p. 507, n.

"The Encyclopedia Britannica, page 254, states that 200,000,000 acres of land and $13,000,000 [this is $130,000,000, the sum is vastly more] were given at one time and another by congress to the railroads between the Missouri river and the Pacific ocean.

"Adams on Public Debts, page 356, note, says that previous to 1880 congress had granted 215,000,000 acres of land to railroads and canals, of which titles were secured to 150,000,000 acres." Cook's Corporation Problem, pp. 97, 98.

The learned justice adds: "Although a free people, when resolved upon a course of action, can accomplish great results, the scheme for building a railroad two thousand miles in length, over deserts, across mountains, and through a country inhabited by Indians jealous of intrusion upon their rights, was universally regarded at the time as a bold and hazardous undertaking. It is nothing to the purpose that the

That there should remain no doubt as to the character of the act, however, the body of it contains a recital similar to an English preamble, containing the words, "And the better to accomplish the object of this act,— namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military and other purposes, congress may at any time, having due regard for the rights of said companies named herein, add to, alter, amend or repeal this act."

"Indeed," adds the learned justice, "the whole act contains unmistakable evidence that, if congress was put to the necessity of carrying on a great public enterprise by the instrumentality of private corporations, it took care that there should be no misunderstanding about the objects to be attained or the motives which influenced its action."[1]

Of the wisdom of the act, regarded from the standpoint of those who enacted it, there can be no doubt. Its unwisdom, viewed in the light of the results already consummated, is palpable. We who are looking backward, and with that advantage, may venture the opinion that had the policy suggested by Mr. Justice Davis been adopted, namely, the preservation to the public of the ownership, control, management and profit of the road, it would have been entirely feasible and would have eclipsed all other achievements in the domain of political and social economy.[2]

apprehended difficulties in a great measure disappeared after trial, and that the road was constructed at less cost of time and money than had been considered possible. No argument can be drawn from the wisdom that comes after the fact. Congress acted with reference to a state of things believed at the time to exist, and, in interpreting its legislation, no aid can be derived from subsequent events. The project of building the road *was not conceived for private ends*, and the prevalent opinion was that it could not be worked out by private capital alone. It was a national work, originating in national necessities and requiring national assistance." United States v. Union Pac. R. R. Co., 91 U. S. 72–81.

[1] United States v. Union Pac. R. R. Co., 91 U. S. 82.

[2] The colossal proportions to which this system of public aid to private corporations engaged in public enterprises for private gain has been carried may be gathered from a contemplation of the great land grants, some of which have been noticed, but only a few of which, however, can be here enumerated:

To the Atchison, Topeka & Santa

Sec. 371. *The Power is a Limitation on State Power.*— Whatever instrumentality brings itself within, or shields itself under, the commerce clause of the United States, or the power of congress over postoffices and post roads, or both, cannot be excluded from the use of any national post road by the action of the states; and although under ordinary circumstances a state may exclude a corporation of any other state from doing business within its boundary, and while it is also true that corporations are not within the clause of the constitution that the citizens of each state shall be entitled to all immunities and privileges in the several states,[1] yet a state cannot grant to a particular person or corporation exclusive rights to transact business properly within the control of the state: *e. g.*, the business of telegraphing or common carriage. Yet such an exclusive state franchise granted to a person or corporation cannot prevent a foreign citizen or corporation from transacting all business falling legitimately within the provisions of an act of congress regulating the postal service or post roads or interstate commerce, and a corporation is within the privileges granted by such an act of congress unless expressly excluded.[2]

Fe Ry. Co.: Neer v. Williams, 27 Kan. 1; 10 Am. & Eng. Dec. 561.

Burlington & Missouri River land grant: Hunnewill v. Cass Co., 3 Dill. 313, 22 Wall. 464; United States v. B. & M. Ry. Co., 98 U. S. 334; Wood v. Railway Co., 104 U. S. 329.

To the Central Pacific road: Ryan v. Central Pac. Ry. Co., 99 U. S. 382.

St. Joseph & Denver City Ry. Co.: 106 U. S. 360.

Des Moines river grants: 101 U. S. 755.

Iowa Central Ry. Co.: 21 Wall. 310.

Rock Island & Pacific Ry. Co.: 103 U. S. 739.

See Lacey's Railway Digest, title Land Grants.

[1] Art. IV, sec. 2. See Paul v. Virginia, 8 Wall. 168.

[2] Pensacola Tel. Co. v. W. U. Tel. Co., 96 U. S. 1. This privilege does not exempt the individual or corporation from proper taxation. W. U. Tel. Co. v. Taggart, 169 U. S. 1. Nor grant any privilege to take or occupy property or a highway without compensation. St. Louis v. W. U. Tel. Co., 148 U. S. 92.

CHAPTER XXI.

FEDERAL EXECUTIVE.

SEC. 372. The office of president of the United States is created by constitutional provision.[1]

Standing alone, this provision seemingly vests the entire executive power in a single individual, and it results that all subordinate officers in the executive department are mere deputies of the president. This is true, except where the office is created by congress, *e. g.*, the Interstate Commerce Commission.

The constitution makes no reference to any subordinate executive office or department, excepting that provision which empowers the president "to require the opinion in writing of the principal officer in each of the executive departments."

The granting part of article I, section 8, clause 17, authorizes congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this constitution *in the government* of the United States *or in any department or officer thereof*."

In the debates in the convention, Colonel Mason said that "in rejecting a council to the president we were about to try an experiment on which the most despotic government had never ventured. The grand seignior himself had his divan."

Franklin and Wilson both favored the motion for a council, but the express provision therefor was negatived.

The intention seemed to be to vest in a single individual the whole power of executive magistracy and to render him personally responsible for the execution of that high office.

There is an express injunction in the constitution that the president shall take care that the laws shall be faithfully executed,[2] a provision which many of our presidents have had occasion to acknowledge.

In accordance with the policy to depart from the English

[1] Sec. 1, art. II: "The executive power shall be vested in a president of the United States of America."

[2] Art. II, sec. 3, cl. 3.

principle that the king can commit no wrong, and that his ministers were responsible for all miscarriages in the executive department, the president had no stated counselors appointed for him by the constitution.[1]

Sec. 373. *Eligibility, Tenure and Election.*— The constitution creates the office and prescribes the qualifications and mode of election.

It also provides for the election of two persons who may be the president: one to the office, the other called a vice-president, who may, or may not, be called upon to exercise the duties of that office; and who, in order that he may be present and exercise some office of dignity, is, as we have seen, invested with the presidency of the senate. These persons must be natural-born citizens.[2]

To be eligible, they must have attained the age of thirty-five years and have been fourteen years a resident of the United States.

Sec. 374. *Election.*— The election of the president and vice-president was a question of no little difficulty.

The constitution provides that the election shall be by an electoral college chosen by the states. Each state shall appoint, in such a manner as the legislature shall direct, a number of electors equal to the whole number of senators and representatives in the state; but no incumbent of the office of senator or representative in congress may be appointed elector.

The methods of conducting elections of the president are provided for in the constitution and amendments thereto, have been

[1] "In the United States," says Wilson, "our first executive magistrate is not obnubilated behind the mysterious obscurity of counselors. Power is communicated to him with liberality, though with ascertained limitations. To him the provident or improvident use of it is to be ascribed. For the first, he will have and deserve undivided applause. For the last, he will be subject to censure; if necessary, to punishment. He is the dignified but accountable magistrate of a free and great people. The tenure of his office, it is true, is not hereditary; nor is it for life; but still it is a tenure of the noblest kind; by being a man of the people, he is invested; by continuing to be a man of the people, his investiture will be voluntarily and cheerfully and honorably renewed." 1 Wilson's Works, 400.

[2] Or, at the time of the adoption of the constitution, citizens of the United States — a qualification now, of course, no longer operative.

changed from time to time, and are subject to change at any time.

So far as the actual conduct of the elections is concerned they are under the supervision of the states; but the general government has had occasion, during and since the reconstruction period, to interfere in the conduct of elections.[1] The power of the state is not abrogated, and the state may regulate the conduct of elections and punish fraudulent voting for electors.[2]

Messrs Gould and Tucker point out that "The second clause of article II of the constitution was not amended by the fourteenth and fifteenth amendments, and under it the state legislatures have exclusive power to direct the manner in which the electors of president and vice-president shall be appointed."[3]

SEC. 375. *Relation of the Executive to the Law-making Power.*— The veto power of the president is a common instance of the influence which the president may exert upon legislation.

The veto is qualified to the extent that a bill returned by the president to congress must be passed by a two-thirds vote of that body. He has an important part in the making of amendments to the constitution.[4]

Direct Participation of the Executive.— The vice-president, who is an incumbent of the executive branch of the government, presides over the deliberations of the senate, and in case of a tie his vote may decide whether an act shall become a law or not. Thus the executive branch has an indirect and a direct influence on legislation.[5]

The president, however, has a far greater and more direct influence in the making of the laws than either of the two methods above noticed. He has the power, by and with the advice and consent of the senate, to make treaties. Under our constitution a treaty is a part of the supreme law of the land;

[1] See R. S. U. S., title XXVI; Ex parte Yarbrough, 110 U. S. 651.

[2] In re Green, 134 U. S. 377. "The congress may determine the *time of choosing* the electors, and the day on which they shall give their votes; which days shall be the same throughout the United States." Art. II, sec. 1, cl. 4.

[3] 2 Gould and Tucker, 9. See McPherson v. Blacker, 146 U. S. 1.

[4] See Virginia v. West Virginia, 11 Wall. 62.

[5] Art. I, sec. 3, cl. 4: "The vice-president of the United States shall be president of the senate, but shall have no vote *unless they are equally divided.*"

so much so that acts of congress contrary to those treaties are void, and even existing laws must give way to the provisions of a treaty.[1]

Sec. 376. *President's Military Powers.*— The president is the commander-in-chief of the army and navy of the United States, and of the militia of the several states when they are called into actual service, and in that capacity has all of the powers of a military commander.

He may declare martial law. He may confiscate property in the prosecution of a war. He may confiscate and cause to be condemned and forfeited the property of belligerents and enemies, subject to the constitution and the usages of nations.[2]

He has, however, no more right to declare martial law than has any other military commander, and martial law cannot be declared arbitrarily.[3]

He has no power to appoint a military commission to try persons not members of the militia, and all acts performed by such officers under the command of the president are null and void, subjecting them ordinarily to actions for damages; and persons unlawfully restrained of their liberty may be released on *habeas corpus*.[4]

Sec. 377. *Anomalous Powers — Reconstruction.*— An anomalous state of affairs was brought about in the United States by the rebellion; and while it was the prevailing sentiment that the existence of the state and the private law of the state were not destroyed and abrogated, civil government was destroyed and abdicated, excepting in so far as there was a *de facto* government and execution of the laws.[5]

President Johnson declared that state institutions were prostrated, and that they must be taken up and adapted to the progress of events.[6]

[1] Foster v. Neilson, 3 Pet. 314; Ware v. Hylton, 3 Dall. 372; *ante*, sec. 199.

[2] Brown v. United States, 8 Cranch, 110; Conrad v. Waples, 96 U. S. 279.

[3] These subjects have been sufficiently noticed elsewhere.

[4] Ex parte Milligan, 4 Wall. 2; Johnson v. James, 44 Ill. 142.

[5] Texas v. White, 7 Wall. 700; White v. Hart, 13 Wall. 646. See also The Grapeshot, 9 Wall. 129.

[6] "They were in an abnormal condition, without civil government, without commercial connections, without national or international relations, and subject only to martial law. By withdrawing their representatives in congress, by renouncing the privilege of representation, by organizing a separate government, and by levying war against the United States, they destroy their state constitutions

He directed his military governor of Georgia to recognize the people of the state as having resumed the relations of loyalty to the Union, and recognized that it was his duty to assist in the establishment, gradually, if necessary, but as quickly as possible, of a government republican in form, and in the meantime to protect each and all persons against foreign or domestic violence.

Under these powers the president acted in establishing new governments, and, while arbitrary acts may have been performed, they were the natural outgrowth of the necessity of acting without the guide of an established rule or the light of precedent.

It was held by the supreme court that the judiciary had no power to restrain the president in the exercise of this power over the conquered states.[1]

It was also held that the courts had no power to hear and determine allegations which involved the existence of a state organization; that this was a political question to be determined by the president, or at least by other branches of the government.[2]

This was but an application of the doctrine thoroughly established by the decision of the court upon the facts involved in Rhode Island rebellion case.[3]

Sec. 378. *President's Power of Appointment and Removal.*— The president is invested with the power of appointment, which includes the right to nominate, and, by and with the consent of the senate, to appoint ambassadors, foreign ministers, consuls, judges of the federal courts, and heads of departments; in fact, a great majority of the officers of the government are appointed, either directly by him or by other officers appointed

in respect to the vital principle which connected their respective states with the Union and secured their federal relations; and nothing of those constitutions was left of which the United States were bound to take notice. For four years they had a *de facto* government, but it was usurped and illegal. They chose the tribunal of arms wherein to decide whether or not it should be legalized, and they were defeated. At the close of the rebellion, therefore, the people of the rebellious states were found, as the president expresses it, 'deprived of all civil government.'" Report Joint Com. on Reconstruction, 1866, p. viii.

[1] State of Mississippi v. Johnson, 4 Wall. 475.

[2] State of Georgia v. Stanton, 6 Wall. 50.

[3] Luther v. Borden, 7 How. 1.

by him.[1] He has the power to fill vacancies caused by death, removal or resignation; but it is doubtful whether he can fill an office which has never had an incumbent.[2]

Sec. 379. *Power of Removal.*— The power of appointment has by some been held to incidentally carry with it the power to remove, and the distinction has not at all times been kept in mind between the appointing power conferred upon the president by the constitution in matters pertaining to the United States, and the same power when applied to the District of Columbia, or other territories to which the constitution does not extend.

The decision of the case of *Marbury v. Madison*[3] involved facts which pertained only to the District of Columbia, and such remarks as the chief justice indulged in as to the right of a person who had been appointed to hold an office created by and for a term fixed by congress must be confined strictly to a territory over which congress has complete control.

It is now firmly established that the president has the right to remove from office all executive officers appointed by him whose term of office is not fixed either by the constitution or by the law of congress creating the office. This would seem to be a necessary and reasonable correlative of the president's responsibility to the people for the conduct of the executive branch.[4]

Sec. 380. *The President's Council — The Cabinet.*— The councils of the king, as we have heretofore seen, were the great parliament of the nation, which in executive session had the customary jurisdiction to take up and discuss and deliberate upon the great affairs of the nation. He had also his cabinet or privy council.

In the United States the affairs of the executive are carried out by assistants and what are known as the departments. These include the department of state, the department of war, the treasury, of justice, postoffice, navy, interior, and agriculture.[5]

[1] See Marbury v. Madison, 1 Cranch, 137.

[2] See McCrary on Elections (4th ed.), § 364.

[3] 1 Cranch, 137.

[4] Parson v. United States, 167 U. S. 324. See Modern Political Institutions, by Simeon E. Baldwin, p. 89.

[5] See Mo., K. & Tex. Ry. v. Haber, 169 U. S. 613–22.

The heads of these departments, together with the attorney-general, constitute what is called the president's cabinet. All of these departments have been created by acts of congress.

Attached to and working under some one or other of these departments are various commissions, the interstate commerce commission and the commission of public improvements being examples.[1]

Sec. 381. *Pardoning Power.*— The president has full pardoning power for all crimes and offenses committed against the United States. Such a pardon relieves a party from all penalties, and restores all rights forfeited under the act on account of which the pardon is granted.[2]

A pardon may be absolute or conditional,[3] or it may be a partial pardon in the way of a commutation of sentence.[4]

A pardon restores an offender who has forfeited his civil rights to his original *status*, but it will not revest him with property which has vested in others, nor entitle him to reclaim the proceeds of property sold under confiscation.[5]

Sec. 382. *Civil Liability of the President.*— An impression prevails that the president of the United States is not amenable to the courts by civil suits for acts performed by him professedly in his official capacity, even though they are beyond his jurisdiction and constitute an unlawful interference with personal liberty or private property; but it is apprehended this

[1] The powers delegated by congress to these heads of departments are frequently of great importance, *e. g. postmaster-general.* It has been held that the postmaster-general may be authorized to direct a postmaster to refuse the delivery of mail matter because of its improper character, or its being engaged in prohibited business, such as lotteries, or used as a means to defraud, and the decisions of the postmaster-general, in the absence of fraud or malice, cannot be reviewed by the state or federal judiciary. Enterprise Sav. Ass'n v. Zumstein, 67 Fed. Rep. 1000.

As we have seen, however, in commenting upon the interstate commerce commission, the decision of these departments is not generally conclusive of the rights of persons in regard to property and personal rights. A familiar example is the right to test the validity of a patent granted by the commissioner of patents, as an agency of the interior department. Neither is a patent to land in all cases conclusive, and in that regard it has been held that a decision of one secretary of the interior may, on application for rehearing, be revised and reversed by a subsequent secretary. Beley v. Naphtaly, 18 Sup. Ct. Rep. 354.

[2] Carlisle v. United States, 16 Wall. 147; Lapeyre v. United States, 17 Wall. 191; Armstrong's Case, 6 Wall. 766.

[3] Ex parte Wells, 18 How. 307.

[4] Id.

[5] Ex parte Garland, 4 Wall. 333; Knote v. United States, 95 U. S. 149.

impression fails to distinguish between the performance of his political duties, which result in loss and damage to private individuals, and direct cases of the invasion of private property or personal liberty.[1]

In 1808 Thomas Jefferson was sued by Edward Livingston for an alleged trespass to real property committed in the territory of Orleans, in the city of New Orleans. The action was brought at the city of Richmond, in the county of Henrico, Virginia.

The case was disposed of by Marshall as circuit justice, and Tyler, the father of President Tyler, as district judge.

No question was made as to the jurisdiction of the court to entertain such a suit, but the territorial jurisdiction of the court was denied because the action was a local one and could only be entertained in the jurisdiction wherein the land lay.[2]

[1] Mechem, Public Officers, sec. 607.

The question as to the liability of the president directly for acts directly committed by himself or committed under his direct and specific orders must in the nature of the case arise very infrequently. In the case of Mississippi v. Johnson the question arose in reference to a political matter clearly within the executive department. The court there said: "We shall limit our inquiry to the question presented by the objection, without expressing any opinion on the broader issues discussed in argument, whether, in any case, the president of the United States may be required, by the process of this court, to perform a purely ministerial act under a positive law, or may be held amenable, in any case, otherwise than by impeachment for crime.

"A ministerial duty, the performance of which may, in proper cases, be required of the head of a department by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law.

"The case of Marbury v. Madison, Secretary of State (1 Cr. 137), furnishes an illustration. A citizen had been nominated, confirmed, and appointed a justice of the peace for the District of Columbia, and his commission had been made out, signed and sealed. Nothing remained to be done except delivery, and the duty of delivery was imposed by law on the secretary of state. It was held that the performance of this duty might be enforced by *mandamus* issuing from a court having jurisdiction.

"So, in the case of Kendall, Postmaster-General, v. Stockton & Stokes (12 Pet. 527), an act of congress had directed the postmaster-general to credit Stockton & Stokes with such sums as the solicitor of the treasury should find due to them; and that officer refused to credit them with certain sums so found due. It was held that the crediting of this money was a mere ministerial duty, the performance of which might be judicially enforced" by *mandamus*. State of Mississippi v. Johnson, 4 Wall. 475, 498–99.

[2] Livingston v. Jefferson, 1 Brock. 203; 15 Fed. Cas. 660.

In the case of *Marbury v. Madison*,[1] Justice Marshall, speaking of the accountability of the president for his official and political action, uses the language so often made the basis of the opinion that the president is not liable to be called to an account in the courts for acts done as president;[2] but that language does not apply to his liability for a direct invasion of the civil and property rights of an individual.

Upon that question the opinion of the chief justice seems to be explicit. He there says: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court."[3]

He continues: "The government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right."[4]

SEC. 383. *Subordinate Officers.*— It seems apparent that if the president was above the law, those who acted under his direct personal order were equally so, and might justify under that order; but individuals authorized by the president under his supposed right as military commander have been held responsible in an action of trespass for unlawful imprisonment of the citizen.

There seems no reason why, for any action in which the president directly participates or which is committed under his direct order, he may not be held liable in an appropriate civil action in the ordinary courts.[5]

[1] 1 Cranch, 137.

[2] Id. 170.

[3] Id. 163.

[4] Marbury v. Madison, 1 Cranch, 135–163.

[5] Johnson v. Jones, 44 Ill. 142. In this case the attempt was made to justify under the direct order of the president. The court held that the executive order under which the defendant attempted to justify was illegal and void; and it was held in the same case that congress could not, by subsequent legislation, legalize the act or take away the right to sue for it. The writer knows of no other similar case. There is no reasoning which can constitute a void act, even of the president of the United States, a protection to him for the consequences directly flowing from that act.

The liability of department officers and subordinate executive officers to actions for injury to private right is fully settled.[1]

A case involving in some degree the question of justification under martial law arose in the supreme court of the United States in 1851. During the war with Mexico, Colonel Mitchell, acting under the orders of Colonel Doniphan, had seized the private property of Harmony, for the service of the expedition commanded by the latter officer. Harmony, who had been following the march of the army as a trader, after arriving in the Mexican province of Chihuahua, desired to stop there, but was compelled by the commander to accompany the expedition with his wagons, mules and goods. The property was eventually lost, and an action was brought against Colonel Mitchell to recover its value. The defendant urged that it was seized and impressed into the public service from necessity, also to prevent it from falling into the hands of the enemy. The court held the plaintiff entitled to recover.[2]

The distinction must always be observed between an act *arbitrarily* performed within *a power actually existing* and one beyond the power to perform; for example, a military officer or the president may exercise a discretion arbitrarily to order the military officer to interfere for the purpose of protecting private property at home or abroad.

The functions exercised are peculiarly executive, and the courts cannot afford any remedy because the matter is *damnum absque injuria* (Durand v. Hollins, 4 Blatch. C. C. 451, 8 Fed. Rep. 111); but a military order does not justify an act performed *beyond the military power.*

[1] Tracy v. Swartwout, 10 Pet. 80; Little v. Barreme, 2 Cranch, 170; Wise v. Withers, 3 Cranch, 331; Elliott v. Swartwout, 10 Pet. 137. In the latter case the right of action is discussed. It was held in that case that if money is unlawfully collected without protest, the money cannot be recovered from the collector *after* he has paid it over.

[2] Mitchell v. Harmony, 13 How. 134. The case of Smith v. Shaw, 1 Cow. 429, decided by the very able bench that constituted the supreme court of the state of New York in 1815, was a suit brought by a citizen against an army officer for false imprisonment during the war of 1812. The defense set up was that the plaintiff was a spy. The court said: "If he was an American citizen he could not be charged with such an offense. He might be amenable to the civil authority for treason, but could not be punished under martial law as a spy." The plaintiff recovered. Cited in Johnson v. Jones et al., 44 Ill. 142–159.

CHAPTER XXII.

STATE LEGISLATIVE DEPARTMENT.

Sec. 384. *Unity and Dependence of State and Federal Systems.*— The student of American constitutions, or the lawyer who undertakes to apply the principles of American law, must obtain a clear grasp of the system of American law as a whole.

This system of law is one wherein each of the members performs a given function; each has a distinct department and orbit of service, but after all each branch or member articulates upon another. The joining of this whole constitutes the body of American law, and the combined will of the whole people constitutes the soul and spirit of the national law, as the will of the people of the state does that of the smaller locality.

"Organization," says Amos, "implies a relation of the parts of each constituent group or component element of the community with every other group, and with the whole as an integral body. This relation is of such a nature that each group contributes to the efficiency of every other group and of the whole, and the whole, strengthened by such general contribution, increases the efficiency of every separate group."[1]

Sec. 385. *Inherent Limitations on Legislative Power.*— When considering the attributes of state legislatures, their position in this great body and system of jurisprudence as a subordinate instrument and not as a creating constituent element must be kept in mind.

The early tendency of encroachment by the states and the

[1] Amos, Science of Law, 122. The learned author adds: "Government implies the conscious superintendence of the fortunes of the community, both present and future, and involves the manipulation of the physical strength latent in all parts of the community, for the purpose both of controlling recalcitrant members of the community and of protecting the community from assailants from without. The main instrumentality by which government operates is law or bodies of general rules declaring the acts which members of the community are to do and not to do in order to facilitate the accomplishment of the general purposes for which the government exists."

assertion of a doctrine of legislative sovereignty and omnipotence tended for a time to obscure the true view which was earlier declared and established, and which is again asserting itself.[1]

The early opinions were clear and explicit that state legislatures did not possess the omnipotence and all the legislative attributes which were claimed as a possession of the British parliament, if such claim is measured by the exposition of the great commentator on English law.

Mr. Pinckney, arguing the case of *McCulloch v. State of Maryland*,[2] says: "The authority of the legislature in state government is not unlimited. There are several limitations to their legislative authority. First, from the nature of all government, especially of republican government, in which the residuary powers of sovereignty, not granted specifically, by inevitable implication are reserved to the people. Secondly, from the express limitations contained in the state constitutions. And thirdly, from the express prohibitions to the states contained in the United States constitution."

The British constitution knew no such a thing as a division

[1] For example, the language of the chief justice in Thorp v. Rutland & B. R. R. Co., 27 Vt. 140, is typical of a view found expressed in similar language, but finding no sanction in its broadest sense from the decisions of the United States supreme court, and is contrary to many well-considered opinions of state judges. Judge Redfield says: "It has never been questioned, so far as I know, that the American legislatures have the same unlimited power in regard to legislation which resides in the British parliament, except where they are restrained by written constitutions. That must be conceded, I think, to be a fundamental principle in the political organization of the American states. We cannot well comprehend how, upon principle, it should be otherwise. The people must, of course, possess all legislative power originally. They have committed this in the most general and unlimited manner to the several state legislatures, saving only such restrictions as are imposed by the constitution of the United States or of the particular state in question. I am not aware that the constitution of this state contains any restriction upon the legislature in regard to corporations, unless it be that, where 'any person's property is taken for the use of the public, the owner ought to receive an equivalent in money;' or that there is any such restriction in the United States constitution, except that prohibiting the states from 'passing any law impairing the obligation of contracts.'" Compare with this, People v. Draper, 15 N. Y. 532, and pp. 105–7, Cooley's Const. Lim. (6th ed.); People v. Albertson, 55 N. Y., at pp. 55–66.

[2] 4 Wheat. 316.

of the exercise of legislation between parliament and the people. They knew no such thing as a constitutional convention.

Political legislation — that is, legislation by which the constitution of the state is changed — must emanate from the people. This results from the establishment of a republican form of government.

Judge Cooley quotes without dissent the opinion of Chief Justice Denio, that to the state legislatures is committed the whole law-making power which the people did not expressly or impliedly withhold. The frame of the government, the grant of legislative power itself, the organization of the executive authority, the erection of the principal courts of justice, create implied limitations upon the law-making authority, as strong as though a negative were expressed in each instance.[1]

And the same great jurist himself announced the salutary principle that, although no express prohibition can be found, he entertained no doubt that, should state legislatures undertake to abolish the whole system of local self-government, it would be the duty of the judiciary to hold the act void.[2]

The case of *Wilkinson v. Leland*[3] was a case arising under the law of Rhode Island, which had no written constitution other than the principles and usages which had been observed from time immemorial, and which might be said to include the British constitution, but certainly nothing stronger than the limitations imposed upon the British parliament.

Mr. Webster argued that it was of no importance whether there were any restrictions to the power of the legislature imposed by the constitution; for if at this period there was not a general restraint on legislative power, there was an end to private property. He insisted that without prohibitions in the constitution the legislature were restrained from committing flagrant acts — acts subverting the great principles of republican liberty and of the social compact.

Mr. Justice Story, delivering the opinion, held that even if an absolute authority could be ascribed under the English constitution and that of Rhode Island before the revolution, it

[1] Cooley's Const. Lim. (6th ed.), 105. See People v. Draper, 15 N. Y. 532.

[2] Regents v. Williams, 9 Gill & Johns. 365; People v. Hurlbut, 24 Mich. 44. See also People v. Albertson, 55 N. Y. 55.

[3] 2 Pet. 654.

could scarcely be imagined that that great event could have left the people of that state subject to its uncontrolled and arbitrary exercise; and also, that as to the absolute power of legislation, it could not be imagined that it lurked under any *general grant* of legislative authority. The people ought not to be presumed to part with rights so vital to their security and well-being without very strong and direct expressions of intention.[1]

Sec. 386. *State Legislature is Not Limited to Subjects Except by Express Words.*— While the extent of the power of the legislature is clearly limited by general principles of republican government, irrespective of express prohibitions, there is no limitation or enumeration of the subjects of state legislation; but all proper subjects of legislation may be exercised by this agency of the people.

The State Constitutions Are Not Enumerations of Subjects.— A proposition universally acceded to is that the state constitution is not a grant of power to the legislative department.

This statement of the proposition involves a misleading implication. If regarded in connection and contrasted with the United States constitution, the proposition states a principle distinguishing between the nature of the different instruments, namely, that the federal constitution is a grant of power over *enumerated* objects, while the state constitution does not attempt to enumerate the objects of state legislation; but, as we have seen, the state legislature is not a creative body having original sovereignty, but exists, when regarded from the standpoint of a question between an individual of a state or of the people of the state, by the grant to this designated body of the legislative power; and this grant is the only warrant or authority which the legislature has for performing legislative acts.

The practical point to be observed by the student and jurist

[1] See Smith's Com. on Const. Law, pp. 283–84. Other cases have been equally explicit. In Terrett v. Taylor, 9 Cranch, 43, an act of the legislature was held void as against common right, although in fact the circumstances of the case anticipated the Dartmouth College case, and it was claimed by Webster that this case left nothing to argue. In Bonaparte v. Camden & A. R. R. Co., Mr. Justice Baldwin held that, aside from any express prohibition, the state legislature could not take private property for private purposes. 1 Bald. C. C. 223.

is not to allow the general expression to convey the conclusion that there rests in the legislature of the state any such supreme and absolute authority as was claimed for the British parliament by parliament itself and by the most ardent advocates of its extreme omnipotence.[1]

Sec. 387. *Organization of the Legislature.*— Assemblages of individuals can exercise the legislature power of a state only when they are created and established by the constitution and organized in accordance therewith.[2]

All of the state constitutions have in them a provision in substance that the legislative power shall be vested in a general assembly consisting of a senate and house of representatives.

These legislative bodies are not the creators, but the creatures of the constitution. They are not the sovereign, but the trustees or agents of the sovereignty.

As is well said by Chief Justice Story: "The legislature of Massachusetts is, as I have already said, in no just sense the sovereign of the state. The sovereignty belongs to the people of the state in their original character as an independent community, and the legislature possess those attributes of sovereignty, and those only, which *have been delegated* to it by the people of the state, under its constitution."[3]

[1] "The legislature possesses no inherent power of making laws; and no powers but such as are derived from the constitution, subject to its limitations and restrictions; the leading one being that it shall make no law contrary to the constitution. Beyond this, it no more represents the sovereignty of the people than either of the other branches of government does; and when it assumes to pass an act contrary to the constitution, it is not a legislative act, and cannot have the force of law. Charles River Bridge v. Warren Bridge, 11 Pet. 644." Bailey v. P. W. & B. R. R. Co., 4 Harr. (Del.) 389; 44 Am. Dec. 593–604; Taylor v. Porter, 4 Hill, 140; 25 Am. Dec. 155; Regents v. Williams, 9 Gill & J. 365; 31 Am. Dec. 72; People v. Hurlbut, 24 Mich. 44; *ante*, ch. XII; *post*, p. 442, note 3.

[2] State v. Cunningham, 81 Wis. 482.

[3] Charles River Bridge v. Warren Bridge, 11 Pet. 644. In some early constitutions the grant to the legislature or general court was broad and indefinite, but even these were limited by the nature of the grant. "As to the thirty-first article of the bill of rights, it merely provides that 'the legislature shall assemble for the redress of public grievances, and for making such laws as the public good will require.' Yet 'the grievance' attempted to be redressed by the act under consideration was not a 'public' one; and if it were the obvious meaning of the article is, that such grievance should be redressed by

If the body which assembles and assumes to act has not been created according to the constitution, it is a usurping body and cannot rightfully exercise the powers of legislation;[1] and in such case it belongs to the judicial branch to protect the sovereignty of the people and the rights of individuals which may be affected thereby.

Many instances have occurred where legislatures, dominated by a faction, have undertaken to perpetuate their power by apportioning the state in such a manner as to give an advantage to parties holding a particular political view, disregarding the principles upon which representation in that body is obviously intended — that is, representation by counties or townships; and in such cases the courts have exercised the jurisdiction to interfere to preserve the rights of sovereignty in the people at large and the liberties of the individuals.[2]

Sec. 388. *Basis of Representation.*— The principles of representation do not differ very materially in the different states. In some of the states the unit of representation is the town, in

'laws,' and not by proceedings which are in their nature judgments. The constitution afterwards confers upon the legislature only legislative power, for the purpose of effecting that 'redress.'" Merrill v. Sherburne, 1 N. H. 199; 8 Am. Dec. 59 (1818).

[1] In many cases acts of a *de facto* legislature might be binding.

[2] State v. Cunningham, 81 Wis. 502. In this case the court says: "One of the first cases of this kind brought in this court was Attorney-General v. Blossom, in *quo warranto* (1 Wis. 317), in which the court said: 'Contingencies might arise wherein the prerogatives and franchises of the state in its sovereign character might require the interposition of the highest judicial tribunal to preserve them. Other departments might need its intervention. Indeed, various emergencies may have been conceived in which this branch of the government, and this arm of the judiciary alone, might be adequate to preserve the balance of powers, to arrest usurped powers, franchises and prerogatives, to quell resistance to constitutional authority, to preserve the liberty of the individual citizen, and shield the sovereignty of the state itself from violation.' These broad grounds of the court's original jurisdiction in matters *publici juris* would seem to embrace every possible matter of great public interest. . . . We may be permitted to make an extended extract from the opinion in Houston v. Moore, 5 Wheat. 1, because it fully expresses, once for all, the jurisdiction of this court: 'By a course of judicial decisions reaching from the earliest history of American government to the present day, without a dissenting voice, it has been adjudged that courts of justice have the right and are in duty bound to test every law by the constitution as the fundamental and paramount law of the land, governing all derivative power and the exercise thereof.'" State v. Cunningham, 81 Wis. 440, 472, 478.

others the county, and in still others the representation is based upon the apportionment of numbers in contiguous territory.[1] These will be noticed in connection with the subject of local self-government.

It will be sufficient here to direct attention to a few of the decisions from which the reasons for this contrariety of view may be gathered.

Township Organization.— In Massachusetts and Connecticut the first organization was entirely local, and it was only after the towns sent representatives to a general court that there existed any state legislature;[2] and the same may be said of most of the New England states. In these localities the county was not taken into consideration as a local division in the scheme of legislative representation;[3] but even in New England and the eastern states there is some diversity of opinion as to whether the locality of the town is the unit,[4] or whether the policy of the state was formerly to apportion the representation among the inhabitants according to numerical ratio.[5]

Wherever the latter view is allowed to prevail it opens the door for that obnoxious form of legislative tinkering which passes under the familiar name of "gerrymandering" a state.[6]

County Organization.— The scheme of organization which contrasts with the town organization passes under the name of county organization and prevailed in the southern portion of

[1] The apportionment for congressional representation in the house may be adjusted upon such principle as the state may adopt. It is not to be understood that the members when elected represent the locality only, and may be instructed by it. There is no practical way to instruct representatives, and no binding force on such instructions, and such a practice has not been sanctioned. See 1 Swift's System of Law, 35.

[2] Swift's System of Laws of Conn., pp. 151–52. See Webster v. Township of Harwinton, 32 Conn. 131; Proprietors v. Kendrick, Smith's N. H. 270.

[3] Hampton v. Franklin, 16 Mass. 87; Story's Misc. Writings, 516.

[4] People v. Rice, 135 N. Y. 473–498.

[5] Baird v. Supervisors, 138 N. Y. 95.

[6] State v. Cunningham, 81 Wis. 440; People v. Supervisors, 147 N. Y. 1; Supervisors v. State, 92 Mich. 638. Mr. Foster, in his Constitutional Law (vol. 1, 398, n. 6), shows us the ancient, if not venerable, origin of the name and practice, stating that "it was so named because the Essex senatorial district was so irregularly shaped as to resemble a salamander; and Elbridge Gerry was the governor who signed the bill." Citing The Political Depravity of the Fathers, by John Bach McMaster, Atlantic Monthly, vol. lxxv, p. 631. Here again only the judiciary can save the people.

the colonies, and for that reason more generally prevails in those states constructed out of territory ceded by Virginia and other southern states.[1]

Whatever the difference in these fundamental schemes of local self government and city and village organization, it is safe now to assert that the control of the legislature does not extend any further than to regulate and not to wipe out and abolish.

Sec. 389. *The Legislature Must be Regularly Organized.*— The members of the state legislature, although they are duly chosen by the people, cannot meet at such time, and in such place and manner, as the whim of a majority of the members may direct.

They are not collectively sovereigns exercising original authority, but are strictly trustees or agents exercising a delegated authority; and they can perform no acts unless they are performed at the time and in the manner specified by their power of attorney — the constitution.[2]

Whether the constitution is called a grant of power or a limitation upon power matters very little, but in substance it is a document which delegates the exercise of legislative power, and prescribes the manner and extent of state legislation.[3]

[1] Cooley, J., in People v. Hurlbut, 25 Mich. 44; State v. Cunningham, 81 Wis. 457, 478, 525.

[2] Patterson, J., says: "What is a constitution? It is the form of government delineated by the mighty hand of the people. What are legislatures? Creatures of the constitution; they owe their existence to the constitution; they derive their powers from the constitution; *it is their commission;* and therefore all their acts must be conformable to it or else they will be void. The constitution is the work of the people themselves in their original, sovereign and unlimited capacity. Law is the work or will of the legislature in their derivative and subordinate capacity. The one is the work of the creator and the other of the creature. The constitution fixes limits to the exercise of legislative authority, and prescribes the orbit within which it must move. In short, gentlemen, the constitution is the sun of the political system, around which all legislative, executive and judicial bodies must revolve." Van Horne v. Dorrance, 2 Dall. 304–308.

[3] The supreme court of Illinois, speaking of criticism upon the rule that a method prescribed excludes a resort to other methods, said: "The decisions are also criticised by counsel for defendant under the rule that what is expressed is exclusive only where it is creative, and that the maxim applies only to a provision which grants originally a power, but does not limit or destroy a pre-existing right. It is contended that the power to apportion does not originate

The regular organization of the state legislature is accomplished by meeting at the time and place fixed by the constitution and choosing the officers who are designated in that instrument as the necessary presiding and ministerial officers.

Ordinarily speaking, a quorum is necessary for the purpose of organization, but a less number may meet at the time and place and adjourn, and ordinarily, issue notices and requisitions for absent members. When this quorum has met and organized, business may be transacted under ordinary circumstances by a majority vote of this quorum.[1]

Sec. 390. *Legislatures Must Observe Prescribed Forms of Procedure.*— The legislative body, when assembled and duly organized, must conform to the requirements of the constitution in reference to the manner of the enactment of laws[2] and the mode of evidencing their proper enactment.

with the provisions of the constitution, but is a pre-existing right independent of the provision, and that therefore the rule is not to be applied. To this we cannot assent. The legislature is the creature of the constitution, and the provisions in respect to the two houses, the division of the state into senatorial districts by a particular plan, and the membership of each of the houses, are creative in their nature. They relate to the framework, the membership and the organization of the legislative department of the government created by the constitution for the exercise of legislative powers. They prescribe the manner in which districts shall be created, that a senator and three representatives shall be elected in each district, and provide for the constitution and organization of the department which shall exercise legislative power." People v. Hutchinson, 172 Ill. 486–500.

[1] State v. Ellington, 23 S. E. Rep. 250; United States v. Ballin, 144 U. S. 1. See also an article in 42 Cent. Law Jour., p. 25.

[2] In an Illinois case involving the validity of municipal bonds issued in supposed accordance with a law of the state, and held by an alleged innocent purchaser, the court say: "In this case the only power or authority in law justifying the issuing of the bonds is the act of 18th of February, 1857, which we have seen was not read on three different days, nor was it passed by a vote of the ayes and noes in the senate. Article 3, section 21, Constitution of 1848, requires that 'on the final passage of all bills the vote shall be by ayes and noes, and shall be entered on the journal; and no bill shall become a law without the concurrence of a majority of all the members-elect in each house.' And the twenty-third section of the same article requires that 'every bill shall be read on three different days in each house, unless, in case of emergency, three-fourths of the house where such bill is so pending shall deem it expedient to dispense with this rule.' The bill, therefore, never became a law, and the act conferred no power or authority whatever to issue the bonds. It was as completely a nullity as if it had been the act or declaration of an unauthorized assemblage of individuals. Spangler v. Ja-

Notwithstanding the jealousy which seems to exist toward the judicial and executive departments of the state, the legislative department is the one which should be the most closely watched and hedged about by the greatest constitutional safeguards.

The liberties of the people have been preserved by the courts and have been protected by the executive, but the history of American state legislation is a disgraceful history of the bartering away of the people's rights by venal and senile legislation.

Perpetual franchises, practical monopolies and liberal gifts of other people's money have been the practice of American legislative assemblies, until the people have been loaded with bonded indebtedness and the common people goaded to desperation at the unequal conditions brought about entirely by legislative manipulation. The opinion is growing that we are burdened with too much legislation.[1]

coby, 14 Ill. 298; People, etc. v. Starne, 35 Ill. 121." Ryan v. Lynch, 68 Ill. 160, 165.

[1] The Hon. W. L. Hornblower of New York says: "A well-ordered, well-reasoned, symmetrical, logical and just jurisprudence is a boon; as a distorted, confused, inconsistent, arbitrary jurisprudence is a curse to any community. It is not the lawyer but the layman who suffers from confusion and uncertainty in the law. The more confusion and uncertainty, the more litigation and the greater the lawyer's emoluments.

"Much criticism has been heaped by theorists upon the system of judge-made law. Sarcasm and logic have been brought to bear upon it to show its apparent absurdity. . . .

"Yet even that arch enemy of the common-law system and advocate of statutory law, Bentham, whose caustic pen revels in savage epithets of denunciation of 'unwritten' or common law, which he designates by the terrible word impostrous, whose perpetual fruits he declares are 'uncertainty, uncognoscibility, particular appointments without end, and general sense of insecurity,'—even he is forced in a moment of frankness to admit, 'Traverse the whole continent of Europe, ransack all the libraries belonging to the jurisprudential systems of the several political states, add the contents all together,—you would not be able to compose a collection of cases equal in variety, in amplitude, in clearness of statement—in a word, all points taken together, in instructiveness—to that which may be seen to be afforded by the collection of English reports of adjudged cases, on adding to them the abridgments and treatises, by which a sort of order, such as it is, has been given to their contents.' . . .

"So it has come about that, in spite of logic and sarcasm, the great bulk of the Anglo-American race still adhere to their system of so-called 'unwritten' or judge-made law, rather than have our laws formulated for us by the legislature. Of course the legislature does exercise its law-mak-

The constitutional directions to the state legislatures are not merely directory — they are commands; and it is not allowable to apply the distinction sometimes made between statutes, that some are directory and some mandatory. These constitutional enactments, the requirements of the constitution, are always mandatory and must be obeyed.[1]

Whenever a question arises as to the existence of a statute or the time when it took effect, or the terms of the statute, the court called upon to decide has, in the absence of specific direction, the right to avail itself of any information which in its nature is capable of conveying to the judicial mind a clear and satisfactory solution of such question; always seeking first that which is best and most appropriate evidence, and following the pursuit according to the rules of evidence, unless the positive law has established some prohibitory rule.

The people, by the constitution, may prescribe what shall be conclusive or *prima facie* evidence of the existence or non-existence of a statute; but the legislature cannot, by its own declaration, control the court in examining and weighing the evidence of the due and regular passage of laws.[2]

The constitutions of most of the states require that each house must keep a journal of its proceedings and preserve the same, and that there shall be enrolled the yeas and nays, and other provisions tending to fix the responsibility for votes. An act not passed in accordance therewith is not a law; and it is a well-established rule that evidence of the contents of these journals may be admitted, and these being the best evidence, must, in the first instance, be produced before another grade of evidence can be heard.[3]

ing powers from time to time, but generally in a way to make us thankful that it does not exercise these powers more frequently. On the whole, we are well satisfied with our judge-made laws, because our courts pass upon questions presented to them, and lay down the rules of law applicable thereto, after full discussion by counsel, after opportunity for careful, patient and calm examination and consideration by the courts. On the other hand, law-making by the legislature means too frequently a careless, perfunctory examination of a proposed bill by a committee, and a passing of the bill without any understanding of its contents. The more important and far reaching it may be, the more it affects the general jurisprudence of the state, the less interest does it command."

[1] State v. Cunningham, 81 Wis. 510.

[2] In re Duncan, 139 U. S. 449; Santa Clara Co. v. So. Pac. Ry. Co., 18 Fed. Rep. 385–427.

[3] Id.; Gardner v. Collector, 6 Wall. 499.

These requirements as to form and method of procedure are likewise binding upon the people, and an act of the legislature which is made the basis of a constitutional amendment, submitted to the people and admittedly receiving a large majority vote, is nevertheless null and void and no amendment, unless it has been passed in conformity with the requirements of the constitution.[1]

Majority.— In public legislative assemblages it is generally sufficient, in the absence of contrary direction, that a majority of any designated quorum may transact business and enact laws, and it is frequently required that in some species of legislation a division of the house shall, or may, be required.[2] By this is meant, in modern times, that the yeas and nays shall be called and enrolled.

Formerly it is said that in such cases those voting in the affirmative divided themselves from the balance of the house by actual removal, but in modern times the division is affected by the calling of the roll. In such cases, although the journal of the house should show that there was a quorum of the house present, it is essential that the roll-call show that there were voting upon the proposition, one way or the other, a quorum of the legislative assembly.[3]

Sec. 391. *General Legislative Power Cannot be Delegated.*— The legislative power and duty which is devolved upon the

[1] Koehler v. Iowa, 60 Iowa, 543; Trustees v. MacIver, 72 N. C. 76. See Cooley, Const. Lim. (6th ed.) 43.

Joint resolutions of the two houses are laws. Cush. Leg. Assb., sec. 2403; Swan v. Buck, 40 Miss. 493; State v. Bailey, 16 Ind. 46; 79 Am. Dec. 405.

[2] United States v. Ballin, 114 U. S. 1.

[3] State v. Ellington, 117 N. C. 158. The court says: "We think it is undoubtedly true that the quorum will be presumed until it shall appear there is not one. Cush. Elect. (2d ed.) 369. This is usually made to appear by what is called a division; and this is usually had after a vote by yeas and nays, when the presiding officer announces the vote and some opposing member doubts the correctness of the announcement and demands a division — a call of the body. Id., sec. 1798. And, strictly speaking, this is what is called a 'division.' Cush. Parl. Law, sec. 1814. This brings us to the consideration of what is a quorum. They are of two kinds,— one fixed by the constitution or power creating the body or assembly. In this way a majority of a majority may constitute a quorum and do business. But, where the quorum is not fixed by the constitution or the power that creates the body, the general rule is that a quorum is a majority of all the members (Cotton Mills v. Commissioners, 108 N. C. 678; Cush. Elect., sec. 247; United States v. Ballin, *supra*), and a majority of this majority may legislate and do the work of the whole."

legislative department by the constitution cannot be evaded or transferred to any other department or recommitted to the people at large. General laws which affect the whole state and all the inhabitants thereof, or all such as naturally fall within its provisions, must emanate from the legislative department. Not only is this true, but the legislature have no power to confer what is now spoken of as the referendum; that is, they have no power to devise and fix the terms and provisions of an act, and then make the question whether such an act shall become a law, or not, depend upon the people at large. This is among the well settled propositions, admitting of no exception.[1]

It is not, however, to be understood that all legislation which the general assembly has a right to enact must be enacted by it.

So Chief Justice Marshall says it will not be contended that congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. But congress may certainly delegate to others powers which the legislature may rightfully exercise itself, and he instances the delegation to the judiciary department of the fixing of the rules of practice and process of the various courts.[2]

Sec. 392. *Local Government May be Provided for and Regulated.*— Our whole system of law is based upon the proposition that, to as large an extent as practicable, local regulations shall be committed to local authority; and before our constitutions existed, the system of local organization was prevalent in America, and in fact had existed in the mother country from time immemorial.

The town meeting antedates the general court, and the county system is coeval with, if not older than, any general assembly having general powers of legislation; and to such assemblages as township commissioners, county commissioners, or supervisors, village boards and city councils, the power of local legislation has been universally committed, and the authority is not to be doubted.[3]

Not only may this general power of local self-government

[1] Barto v. Himrod, 8 N. Y. 483; Clark v. City of Rochester, 28 N. Y. 605; Houghton v. Austin, 47 Cal. 654; Tugman v. City of Chicago, 78 Ill. 410; O'Neil v. Am. Ins. Co., 166 Pa. St. 72.

[2] Wayman v. Southard, 10 Wheat. 1-42; Bank of U. S. v. Halsted, id. 51.

[3] Clark v. City of Rochester, 28 N. Y. 605; Tugman v. Chicago, 78 Ill. 410.

exist in the local tribunals, but the legislature may, as to such questions, formulate the provisions of the law and submit to the localities the option of accepting or rejecting them; and the power of the legislature to enact such local-option laws is no longer an unsettled question.[1]

In fact, as we have seen, it would be entirely beyond the traditions and customs of the American people to deny this right or admit the converse of the proposition, which would be to allow the legislature to arrogate to itself the whole legislative power of the state and dispense with the principles of self-government.[2]

[1] Id. The power to allow local option has been denied in some states, but is generally upheld. Cooley, Const. Lim. (6th ed.) 145, notes. "But, while general statutes must be enacted by the legislature, it is plain the power to make local regulations, having the force of law, in limited localities, may be committed to the other bodies representing the people in their local divisions, or to the people of those districts themselves. Our whole system of local government in cities, villages, counties and towns depends upon that distinction. The practice has existed from the foundation of the state, and has always been considered a prominent feature in the American system of government. It is recognized in the constitution itself, in the section which prescribes to the legislature the duty to provide for the organization of cities and incorporated villages, etc., restricting their power of taxation and borrowing. It contains an irresistible implication that the authority to lay local taxes and to borrow money for local objects may be constitutionally committed to local boards or councils within the cities and villages. And if such power may be conferred, to be exercised according to the judgment of such boards or councils, and without the condition that the electors shall concur in the measure, it is plain that it may be granted upon that condition, or with any other reasonable safeguards which may be prescribed. I do not say that it can be submitted to the electors of a city or village to determine what powers its local legislature shall possess, but only that these bodies may be made the depositories of such powers of local government as the legislature may see fit to prescribe, and the exercise of which is not repugnant to any of the general arrangements of the constitution." Clark v. City of Rochester, 28 N. Y. 605–34. The principles of local option were denied in Pennsylvania, but are now firmly established. O'Neil v. American Ins. Co., 166 Pa. St. 72.

[2] Against the tendency to grant away local right to govern and to draw every power to the legislature, the constitutional principle cannot be too often alluded to or too strenuously insisted upon, that ancient customs and usages of the people are a part of the framework of the constitution, just as, for a long time, Connecticut and Rhode Island existed without written constitutions. So in a recent Minnesota case the court well said: "It is a well-established principle that the constitution will be interpreted with reference to the laws and customs prevailing at the

Sec. 393. *May Create Subordinate Tribunals With Quasi-legislative Powers.*— A constitution being framed for the general supervision of the people must be construed in connection with all the circumstances and conditions surrounding its enactment.

New conditions will constantly arise, and must be met and disposed of by the application of old principles so far as applicable, and the creation of new rules for new cases.

That special subordinate tribunals — boards of public works,[1] boards of equalization, state boards of health, boards of education, etc.— may be created and invested with a degree of power in matters not only ministerial, but partaking somewhat of the legislative and judicial, is now thoroughly established.[2]

The explanation for this seeming exception will generally be found in the fact that such boards, or similar ones exercising this mixed power, are recognized at the common law, or when the constitution was adopted.[3]

time of its adoption; and the distinction between what is a delegation of power to adopt a charter or charter provisions, and what is a delegation of power to adopt a by-law or ordinance, must be determined largely by ascertaining what had usually been the custom in this state up to and at the time this constitutional amendment was adopted. Undoubtedly, the line of this distinction is somewhat ill-defined. But, if there is a doubt as to the constitutionality of a law, that doubt must be resolved in favor of its constitutionality. Therefore, if, by reference to the practice heretofore prevailing, it is doubtful whether the delegation of power is one to adopt charter provisions or one to adopt mere by-laws or ordinances, that doubt must be resolved in favor of holding the law delegating such power constitutional. There is another distinction between what the legislature can practically do and what it cannot. The main reason for the existence of ordinances and by-laws has always been that they regulated local subjects and matters of detail which the legislature could not directly or properly regulate by the passage of permanent laws, either general or special. This old principle must be applied to new instances which will continually arise under the constitutional amendments prohibiting special legislation. The regulation of such matters may always be delegated in general terms to local bodies, and it necessarily follows that more limited powers may be thus delegated by the passage of local-option laws for the regulation of these matters. These are distinctions which have sometimes been overlooked in the decisions of those states having similar constitutional provisions." State v. Copeland, 66 Minn. 315.

[1] Ryan v. Mayor, 91 Hun, 470; In re Board of Street Opening, 91 Hun, 477.

[2] State v. State Medical Ex. Board, 32 Minn. 324; Ex parte Spinney, 10 Nev. 325; Williams v. People, 121 Ill. 84; People v. Hurlbut, 24 Mich. 44; 9 Am. Rep. 103; People v. Albertson, 55 N. Y. 50.

[3] Houghton v. Austin, 47 Cal. 654.

These boards do not depend upon the principles of local self-government, but are really based upon the necessities of the case. The extent and limitation upon this power is to be found in the regulations separating the three departments, and it is generally conceded that such boards cannot be the final arbiters; that any law which provides that private rights or private property may be divested finally by the action of such boards is unconstitutional, because not accompanied by the requirement of due process of law; but if the general supervision of the courts is retained, or a final appeal to the judicial tribunals is provided for or allowed, the citizen may not say that he has not had his day in court and has been arbitrarily divested of his rights.[1]

Sec. 394. *Cannot Exhaust Legislative Power.*— It is beyond the power of one legislature to pass an act which in effect renounces the right of future legislatures to pass laws upon the same subject;[2] and while this general principle is universal, it must be qualified by the right of the legislature to grant property and franchises and to make contracts which will be binding. A legislative grant cannot, on principles of the common law, as well as on account of the inhibition of the constitution against the state legislature impairing the obligation of a contract, be abrogated by a subsequent legislature.[3]

So a corporate franchise is a contract, and cannot be divested or impaired by subsequent acts of the legislature; and within the power to create corporations and grant franchises is the power to annex conditions in reference to exemptions from taxation and granting certain special privileges and immunities,

See People v. Reynolds, 5 Gilm. 12; People v. Board of Met. Police, 48 Barb. 524; Owens v. People, 113 Ill. 309, 310; Cooley on Torts, 375; Weimer v. Bunbury, 30 Mich. 201.

[1] Emerick v. Harris, 1 Binney, 420; Flournoy v. Jeffersonville, 7 Ind. 172. "An act which is intended to effect a uniform policy of insurance, and which provides that commissioners of insurance shall prepare and file such forms of fire insurance policies as in their judgment are proper, and which prohibits the use of any other form of policy, was unconstitutional and void, as a delegation of the legislative power to a subordinate tribunal." O'Neil v. American Fire Ins. Co., 166 Pa. St. 72; Ex parte Grace, 12 Iowa, 208; 79 Am. Dec. 529; Wynehamer v. People, 13 N. Y. 378.

[2] 1 Blk. Com. 90; Cooley, Const. Lim., 146, 147. These contracts must not be a mere shift to cover a matter governmental, as distinguished from private, for the functions of government and police cannot be tied up. See New Orleans v. Houston, 119 U. S. 265; Thorp v. Rutland B. Ry. Co., 27 Vt. 140.

[3] Fletcher v. Peck, 6 Cranch, 87.

and these, when adopted and acted upon, are contracts, and are binding until the rights are forfeited by judicial process.

It is impossible to fix any exact limitations upon the power of the legislature. In matters purely governmental, however, future legislatures cannot be restricted; and such instances as those above noted, and similar ones, are not really restrictions upon the legislative power, but proceed upon the binding quality of a state contract and are to be treated therewith.

Sec. 395. *Retroactive or Retrospective Laws.*— It has often been said that law is a rule for the guidance of future action and conduct, but it cannot be said that the legislature cannot affect that which is passed; neither can it be said that a law has no operation upon events which took place prior to the passage of the law.[1]

[1] Bronson v. Kinzie, 1 How. 317; Hosmer v. People, 96 Ill. 58; Kenyon v. Stewart, 44 Pa. St. 177.

"It is a principle in the English law, as ancient as the law itself," says Chief Justice Kent in Dash v. Kleeck, 7 Johns. 477, "that a statute, even of its omnipotent parliament, is not to have a retrospective effect. *Nova constitutio futuris formam imponere debet, et non præteritis.* (Bracton, lib. 4, fol. 228; 2 Inst. 292.) The maxim in Bracton was probably taken from the civil law, for we find in that system the same principle, that the law-giver cannot alter his mind to the prejudice of a vested right. *Nemo potest mutare consilium suum in alterius injuriam.* (Dig., 50, 17, 75.) This maxim of Papinian is general in its terms; but Dr. Taylor (Elements of the Civil Law, 168) applies it directly as a restriction upon the law-giver; and a declaration in the code leaves no doubt as to the sense of the civil law. *Leges et constitutiones futuris certum est dare formam negotiis, non ad facta præterita revocari, nisi nominatim et de præterito tempore, et adhuc pendentibus negotiis cautum sit.* (Cod., 1, 14, 7.) This passage, according to the best interpretation of the civilians, relates not merely to future suits, but to future, as contradistinguished from past, *contracts* (technically, the word to use is *transaction*) and vested rights. (Perezii Praelec. t.) It is, indeed, admitted that the prince may enact a retrospective law, provided it be done *expressly;* for the will of the prince, under the despotism of the Roman emperors, was paramount to every obligation. Great latitude was anciently allowed to legislative expositions of statutes; for the separation of the judicial from the legislative power was not then distinctly known or prescribed. The prince was in the habit of interpreting his own laws for particular occasions. This was called the *interlocutio principis;* and this, according to Huber's definition, was *quando principes inter partes loquuntur, et jus dicunt.* (Praelec. Juris. Rom., vol. II, 545.) No correct civilian, and especially no proud admirer of the ancient republic (if any such existed), could have reflected on this interference with private rights and pending suits without disgust and indignation; and we are rather suprised to find that, under the violent and irregular

Retroactive laws may be passed legalizing past transactions or affecting remedies upon contracts executed long before the passage of the law and upon which a cause of action has arisen before the passage of the law;[1] but the legislature has no right by a retrospective act to declare how the court shall construe a prior act, or to fix the meaning of that which is already a law.[2]

The case of *Calder v. Bull* is a remarkable instance of legislative interference with a vested right, which took place, however, in the absence of any fixed restriction in the constitution, and was the granting of a new trial — an exercise of the judicial power by the legislature.[3]

No such power could now be exercised by any of our legislatures under the present system of partition of power.

As we have seen, statutes which cut off all the remedies which a person has for the violation of a contract or the commission of a tort, without giving any time for future prosecution, are not generally held to be constitutional.

The supreme court of Illinois, however, has recently held a statute which provided that a suit in equity might be brought to test the validity of a will at any time within two years after the probating of the will, applicable to all wills, whether probated more than two years before the act or not, notwithstanding the fact that the statute repealed by this act allowed three years for bringing the suit.

genius of the Roman government, the principle before us should have been acknowledged and obeyed to the extent in which we find it. The fact shows that it must be founded in the clearest justice. Our case is, happily, very different from that of the subjects of Justinian. With us, the power of the law-giver is limited and defined; the judicial is regarded as a distinct, independent power; private rights have been better understood and more exalted in public estimation, as well as secured by provisions dictated by the spirit of freedom, and unknown to the civil law. Our constitutions do not admit the power assumed by the Roman prince; and the principle we are considering is now to be regarded as sacred." See Trustees of Dartmouth College v. Woodward, 4 Wheat. 518–578, note.

[1] Welch v. Wadsworth, 30 Conn. 149; 79 Am. Dec. 236; 27 L. R. A. 696.

[2] Dash v. Van Kleeck, 7 Johns. 477. This of course does not apply to a constitution. The eleventh amendment of the United States constitution expressly directs the court as to the manner in which a former law should be considered. See Hans v. Louisiana, 134 U. S. 1; Hollingsworth v. Virginia, 3 Dall. 378.

[3] 3 Dall. 386; Cooley's Const. Lim. (6th ed.) 114; Commonwealth v. Warwick, 172 Pa. St. 140.

This decision proceeds upon the idea that both statutes were statutes of jurisdiction, conferring upon the chancery court a jurisdiction which it did not have at common law; but it is difficult to understand how a statute, which at the same time that it confers a jurisdiction cuts off a common-law remedy by ejectment, can be said not to destroy all remedy.[1]

The conclusion from all the authorities is, that notwithstanding the supposed principle that it is the duty of the legislature to enact laws for future guidance, the fact that an act is retroactive in its effect, and injuriously affects past transactions, will not invalidate it in all cases, even though by the act vested rights are divested.[2]

Sec. 396. *Bills of Attainder, Ex Post Facto Laws, Bills of Pains and Penalties.*— The nature of bills of attainder, *ex post facto* laws and bills of pains and penalties, although the first two are among the express inhibitions of the constitution of the United States, cannot be understood without comprehending the technical meaning of these words in the English law; so, in drawing the distinction between American and English law, sufficient was there said to point out the general nature of laws of this character and to distinguish them from retrospective laws in general.[3]

The lay reader and student would naturally understand that an inhibition against *ex post facto* laws would invalidate all laws which acted upon past transactions unless usage had affixed a technical sense to these words as used in English law.

Able counsel formerly argued that such was the meaning of

[1] Spaulding v. White, 173 Ill. 127. There is no evidence excepting the declaration in the opinion of the supreme court of Illinois that common-law courts of chancery did not exercise jurisdiction to contest a will; while on the other hand, Spence, in his History of the Equitable Jurisdiction of Courts of Chancery, an authority of far greater weight on this subject than the supreme court of Illinois, explains the obsolete jurisdiction which chancery exercised during that period which must be held to be the common-law period of Illinois, namely, prior to 1607, and several cases can be cited where the common-law courts exercised that jurisdiction. The decision of the court seems, therefore, to be based upon misinformation as to facts, namely, the existence of the common-law jurisdiction of the kind; and second, violates the principle of divesting the individual of all of his remedies by legislation, held to be applicable to past transactions. See Luther v. Luther, 122 Ill. 558; 1 Spence, Eq. Jur. 701, note.

[2] Watson v. Mercer, 8 Pet. 88; Freeborn v. Smith, 2 Wall. 160.

[3] *Ante*, sec. 38.

the words in our constitution, but the uniform adjudication of the courts confines the words to their technical meaning in English law.[1]

The bill of attainder which corrupts the blood and forfeits the estate of the individual and of his heirs is a thing unknown under the American constitutional system; no forfeiture can extend any further than to extinguish the right of the person offending.[2]

The bill of pains and penalties is one providing a penalty less than death for an act committed before the passage of the law.[3]

An *ex post facto* law in its technical sense is one fixing a penalty or disability on account of an act done before the passage of the law.

The particular technical idea which distinguishes the legal use of the term *ex post facto* from its popular use is that it is confined to acts affecting crimes, making an act criminally punishable.

The difficulty in applying this term lies in this expression, that it applies only to acts "*punishing a matter criminally*," and the uncertain part is as to what is intended by criminal punishment. This is a question which formerly divided the ablest minds, but is now well settled. In the Dartmouth College case it was argued not only that the act of the legislature impaired the obligation of a contract, but that it was an *ex post facto* act affixing pains and penalties.[4]

The difficulty of the question is apparent from a consideration of the cases of Cummings and Garland,[5] referred to in a former section.

In these cases no imprisonment was inflicted or provided for in the act. No tangible property was affected; there was no corruption of blood; but the acts which were held to fall

[1] The case of Blair v. Ridgeley, 41 Mo. 63, 97 Am. Dec. 248, is one of the great cases in the books on this subject, applied to laws affecting suffrage.

[2] Bigelow v. Forrest, 9 Wall. 339.

[3] *Ante*, sec. 38.

[4] Trustees v. Woodward, 4 Wheat. 518. Webster there said that attainder and confiscation are acts of sovereign power, not acts of legislation (pp. 558–589). In all of the early cases an attempt was made on the one side to extend the meaning of *ex post facto* laws to all retroactive laws. See Calder v. Bull, 3 Dall. 386.

[5] Cummings v. Missouri, 4 Wall. 277; Ex parte Garland, 4 Wall. 333.

within the inhibition against the infliction of criminal punishment for past action, not punishable when committed, consisted in depriving the parties of the right to follow their usual vocation or calling, except on certain conditions to be subsequently complied with; but when technically viewed, these cases fall quite clearly within the rule. Cases of even greater difficulty may arise.

Under a similar law which injured Cummings and Garland, the curators of a Missouri college were removed by an act of the legislature which recited that a majority of the members of the board of curators had failed to take the oath prescribed by the general assembly, being a similar oath to that involved in other cases. The curators brought a *quo warranto* proceeding and claimed that the act not only violated the obligation of the contract, but was an *ex post facto* bill of attainder, including a bill of pains and penalties.[1]

The penalty of the act, being a forfeiture of the right to longer continue as curators in this college, seems to fall within the reasoning of the Cummings cases, and it was so treated by the court, although the decision was founded upon other grounds.[2]

[1] "The oath referred to was what is commonly called the convention oath, and is an oath of loyalty in *disclaiming hostilities in the past* (if the persons had offended they could not take the oath), and promising future fidelity."

[2] The court in that case says: "Nor until the late opinions of the United States supreme court (referring to the Cummings and Garland cases) had I supposed that such disability as is involved in the requirements of the oath could be held, in the constitutional sense, an *ex post facto* law or a bill of pains and penalties, for it does not provide in any legal sense for a trial and punishment for crime, nor is it a legislative judgment. The history of the times shows that the requirement was not intended as a punishment, either judicial or legislative, but a disability imposed upon the enemies of the state, supposed to have been demanded by pressing public danger. It was no more considered as coming within the federal constitution than the many other disabilities which are imposed without question for the public good. But whatever our opinion of the power of the legislature over corporations as embodied in the act of March, the act of December 11, ousting the relators, cannot be sustained upon any principle known to our laws, for the reason that it is judicial in its character — a legislative judgment. Had vacancies been created by judicial proceedings so as to reduce the board below a quorum, or had the reduction been caused by death or otherwise by which the functions of the corporation had become suspended, the legislature might doubtless have restored them

These cases where grants, contracts and corporation charters are involved are distinguishable from the cases similar to Cummings and Garland by the presence of a charter or contract; but it would seem that where the legislative disfranchisement or forfeiture was made to depend upon the past act, the law involving such provisions would fall within the meaning of a bill of pains and penalties.

Sec. 397. *The Police Power.*— Among the maxims of our law is that "regard for the public welfare is the highest law."[1]

This maxim, coupled with the restrictive one against the individual that "you shall so conduct yourself and so enjoy your own as not to injure others,"[2] are the foundation maxims of the police power.

Definitions of police power are too numerous to recite or even to refer to, and as there is no distinct characteristic of such laws upon which jurists differ, no elaborate discussion of the nature of the police power is essential.[3]

by filling such vacancies. But this act assumes, without judicial finding, that the relators have forfeited their position; it cuts off any and all defense they might make upon a trial of their right, declares vacancies and proceeds to fill them. Its object and legal effect was to remove the relators by direct legislation. State v. Adams, 44 Mo. 570; 3 Am. Corp. Cases, 515–525." For a somewhat similar case, where the question of the act being *ex post facto* in its nature is only hinted at, see Regents v. Williams, 9 Gill & Johns. 365; 31 Am. Dec. 72.

[1] "*Salus populi suprema lex.*" Broom's Legal Maxims, 1.

Sumptuary Laws.—In England and America formerly there existed to some extent sumptuary laws, strictly so called. These laws were based upon public policy rather than the police. They were laws against luxury, extravagant expense in dress, diet, and the like. (Anderson's Law Dic.) Sumptuary laws, strictly speaking, are not allowable in America. Habits, occupations, extravagance are not controllable, unless in some sense they affect the public safety, public health or public morals. Mugler v. Kansas, 123 U. S. 623.

[2] Broom, Max. (6th ed.) 365. "*Sic utere tuo, ut alienum non lædas.*" See Munn v. Illinois, 94 U. S. 124.

[3] "Many attempts have been made in this court and elsewhere to define the police power, but never with entire success. It is always easier to determine whether a particular case comes within the general scope of the power than to give an abstract definition of the power itself, which will be in all respects accurate. No one denies, however, that it extends to all matters affecting the public health or the public morals. Beer Co. v. Massachusetts, 97 U. S. 25; Patterson v. Kentucky, id. 501." Stone v. Mississippi, 101 U. S. 814–18. Two great cases which should be read by every student for a general account of the police power are Plumley v. Massachusetts, 155 U. S. 461, and Holden v. Hardy, 169 U. S. 366. See In re Rahrer, 140 U. S. 545; Mugler v. Kansas, 123 U. S. 623.

"The state police," says Mr. Justice Clifford, "in its widest sense comprehends the whole system of internal regulation, by which the state seeks not only to preserve the public order and to prevent offenses against her authority, but also to establish for the intercourse of one citizen with another those rules of justice, morality and good conduct which are calculated to prevent a conflict of interests and to insure to every one the uninterrupted enjoyment of his own, as far as is reasonably consistent with a like enjoyment of equal rights by others."[1]

The great unsettled questions in reference to the extent of the state police power consist, as we have seen, rather in determining how far the state police must yield to the federal legislature in the exercise of its granted powers to regulate. The law of the subject will never be settled, nor can it be while change and development are the rule.[2]

No jurist would have the temerity to announce in express words that congress possessed any power to directly regulate the police of a state;[3] but indirectly, as we have seen, under the commerce clause, the police power of the state (the general welfare of the people of a state) is constantly being thrust aside at the behest of some mere trafficker. No matter how noxious the thing, if it can be bought and sold it cannot be prohibited.[4]

[1] Tennessee v. Davis, 100 U. S. 257–300. "Public police is in effect defined by the great commentator of the common law as the due regulation of domestic order, whereby the citizens of a state are bound to conform to the rules of propriety and good conduct, and to be moral, industrious and inoffensive in their respective stations." 4 Blk. Com. 162. "Police," says Bentham, "is a system of precaution, either for the prevention of crimes or calamities;" and he divides the subject into many heads, of which three only will be mentioned: 1. Police, for the prevention of offenses. 2. Police, for the prevention of calamities. 3. Police, for the prevention of endemic diseases. Bentham's Works, title "Offenses Against Police," vol. 3, p. 169 (Edinburgh ed.); Tennessee v. Davis, 100 U. S. 257–300.

[2] The adoption of the fourteenth amendment brought in a new ground for conflict and contention, but that has been fully disposed of. Bartemeyer v. Iowa, 18 Wall. 129; Mugler v. Kansas, 123 U. S. 623; In re Rahrer, 140 U. S. 545. See particularly, Holden v. Hardy, 169 U. S., at p. 382.

[3] In re Rahrer, 140 U. S. 555; Barbier v. Connolly, 113 id. 27.

[4] "The Tennessee act is an absolute prohibition of all commerce in cigarettes. There is no discrimination between cigarettes of domestic manufacture and those imported from another state. A sale by an importer in the original package is just as distinctly penal as would be a sale of an article which was of domestic manufacture. Limited to cigarettes of domestic origin, or cigarettes which, though imported from a for-

It is said that the national government may not, through any of its departments or offices, "assume any supervision of the police regulations of the states. All that the federal authority can do is to see that the states do not, under cover of this power, invade the sphere of national sovereignty, obstruct or impede the exercise of any authority which the constitution has confided to the nation, or deprive any citizen of rights guaranteed by the federal constitution."[1]

Generally speaking, the police power is the power to regulate the conduct of the citizen. It extends as well to the prohibition of many things which, except for their effect upon others than the individual restrained, would be lawful.

Police power is not unlimited and arbitrary, and when it is invoked as a reason for an act of the legislature which regulates the exercise of ordinary employment or business, the regulation must be a reasonable one; it must be beneficial to the public and must not be a general restraint of trade,[2] and, as an exer-

eign nation or another state, have lost their character as an import by a breaking of the original package, or by having once been sold in the state, the act would not conflict with any permission of the federal constitution. Powell v. Pennsylvania, 127 U. S. 678; 8 Sup. Ct. 992, 1257; Mugler v. Kansas, 123 U. S. 623; 8 Sup. Ct. 273; Plumley v. Massachusetts, 155 U. S. 461; 15 Sup. Ct. 154. . . . So in this case it must be recognized that the cigarette is equally a well-known subject of barter, sale, trade and commerce, so recognized in all the channels of commerce, and by the laws of congress which prescribe the original package for purposes of taxation. The question here, as in the Whiskey Case just cited, is: Whether, being an article of commerce, can the state of Tennessee, in the absence of legislation by congress, prohibit their importation from a sister state? Or, when imported, prohibit their sale by the importer? No important distinction can be drawn between this case and Leisy v. Hardin, 135 U. S. 100." Sawrie v. Tennessee, 82 Fed. Rep. 615.

An Iowa statute prohibiting the manufacture or sale of cigarettes is an interference with interstate commerce, as applied to sales in small boxes, containing ten each, of cigaretts, imported in that form from other states without being inclosed in other boxes or wrappers. Iowa v. McGregor, 76 Fed. Rep. 956.

The real error in all this reasoning consists in recognizing the noxious article as a commodity of commerce against the declaration of a state.

[1] Cooley's Const. Lim. (6th ed.) 706. The whole original-package fallacy consists in allowing the attribute of a commercial commodity to the noxious thing. If the people of a state say we want none of it, the United States should say you may transport *out* or *through*, but we give you no power to sell. See M., K. & T. Ry. Co. v. Haber, 169 U. S. 614.

[2] Munn v. Illinois, 69 Ill. 89–94; Munn v. Illinois, 94 U. S. 113; Barling v. West, 29 Wis. 307; 9 Am. Rep. 577.

cise of the police power, interferes with rights and regulates the conduct of individuals. The question whether the regulations are proper is for the courts to determine.[1]

Under the police power, it is lawful to regulate the exercise of any business for the general welfare or the public good; but it is not lawful, under the guise of licensing for the purpose of regulation, to entirely prohibit an individual in a class from engaging in a lawful business.[2]

The right to engage in lawful vocations, to gain a livelihood, is included within the word "liberty" as used in all constitutions,[3] and if it is not strictly property, it partakes of the nature of property and is an equally valuable and sacred right.[4]

The state has the power to prohibit the manufacture and sale of intoxicating liquors, but at the same time it cannot by legislative action destroy property and arbitrarily transform an innocent act into a crime.[5]

The state may regulate any *quasi*-public business, such as innkeepers, warehouses, common carriers, pawnbrokers, the practice of medicine, etc., but it cannot entirely prohibit their exercise. Those occupations which may be prohibited are such as are directly noxious and deleterious to public health, public morals, or distructive of private property.[6]

Sec. 398. *Freedom of Contract May be Restrained.*— Under the police power the state may recognize the actual discrepancy which exists between persons differently situated, and that one class of individuals may be measurably within the power of another, and so dependent upon them that they require the assistance of a state to prevent unjust oppression and ruinous burdens being placed upon them.[7]

[1] Atkinson v. Goodrich Transp. Co., 60 Wis. 141; 50 Am. Rep. 352; North Chicago Ry. Co. v. Lake View, 105 Ill. 211; Ritchie v. People, 155 Ill. 98; In re Jacobs, 98 N. Y. 109.

[2] Cummings v. State, 4 Wall. 277–321.

[3] Stevens v. State, 2 Ark. 291; 35 Am. Dec. 72; Ex parte Virginia, 100 U. S. 340; People v. Marks, 99 N. Y. 377.

[4] Braun v. Chicago, 110 Ill. 188; Hoke v. Henderson, 4 Dev. (N. C.) 1; 25 Am. Dec. 677; Stevens v. State, 2 Ark. 291; Ex parte Garland, 4 Wall. 333.

[5] Wynehamer v. People, 13 N. Y. 378–84; Bartemeyer v. Iowa, 18 Wall. 129; In re Rahrer, 140 U. S. 545.

[6] Holden v. Hardy, 169 U. S. 366–93, where many instances are enumerated.

[7] In 1862, in Archiv. v. James, 2 Best & Smith, 66, 83, it was said: "The truck act, when passed, was a practical deduction from a principle

The cry is loud and persistent that the freedom of contract must be preserved, and that the Anglo-Saxon principles of individual liberty prevented the imposition of any terms and regulations as to mere contracts; but the practical effect of this freedom, being to load the weak and helpless who were obliged to obtain their sustenance by labor with burdens grievous to be borne, has in some jurisdictions led to the adoption of regulations between the employer and employee, and it is now generally held that the hours of labor may be regulated, at least in certain lines of employment;[1] that conditions and circumstances under which labor shall be performed as to sanitary regulations may be controlled,[2] and in some localities the manner in which compensation shall be paid and received;[3] the age at which persons employed in certain lines of labor may be

still more general, pervading more or less all systems of law founded on experience; that is to say, that when two classes of persons are dealing together and one class is, generally speaking, weaker than the other, and liable to oppression, either from natural or incidental causes, the law should, as far as possible, redress the inequality by protecting the weak against the strong." The reader will not overlook the fact that there are no such constitutional limitations in England as here exist. The case is cited to show the policy of such enactments.

[1] Holden v. Hardy, 169 U. S., at p. 395; Comm. v. Hamilton Mfg. Co., 120 Mass. 383. *Cf.* Ritchie v. People, 155 Ill. 98; Low v. Rees Printing Co., 41 Neb. 127.

[2] Holden v. Hardy, 169 U. S. 366.

[3] These laws are known as the "anti-truck laws." It depends upon the "length of the chancellor's foot," so to speak, which is but another way of saying his views of the general police, as to whether the law is held valid. It will be found however, that in most of the cases there was some unjust discrimination or unreasonable regulation.

Where these anti-truck acts have been contested, without reference to any collateral questions, they have generally been held to be unconstitutional. The West Virginia court, in State v. Goodwell, 33 W. Va. 179, says such legislation is a species of sumptuary legislation. The general objection to them is the restriction on the freedom of contract.

Anti-truck laws have been upheld. In Shaffer v. Union Mining Co., 55 Md. 74, the law was sustained because the power to require a corporation to pay its employees in a certain manner was necessarily incident to the power which the legislature has to "amend or alter" the charter of the corporation. So in Peel Splint Co. v. State, 36 W. Va. 802; 17 L. R. A. 385. In Hancock v. Yaden, 121 Ind. 365, 16 Am. St. Rep. 396, the statute was upheld because it "protected and maintained the medium of payment established by the sovereign power of the nation," and was in aid of government to preserve the purity of the coinage. In many cases these laws have been held invalid.

restricted; and in various ways the absolute untrammeled freedom of contract may be controlled.[1]

Sec. 399. *Trusts, Combinations and Monopolies May be Prohibited.*— It is also well understood that the manner of conducting certain businesses which affect the general commercial interests may be regulated and thereby unjust charges,[2] monopolies and trusts and combinations, the natural result of which are injuries to the general prosperity, may be prohibited.[3]

Sec. 400. *Sunday Laws.*— While no law can be passed which in any manner coerces any citizen in his religious belief, still the sanctity of the Sabbath is recognized by the common law of England and by the laws of all of the states in the Union;[4] and in many states laws against the performance of unnecessary labor have been passed. In other states no attempt is made to prohibit individuals from their freedom of labor or of contract; but it is universally acknowledged that under the police power the state has the right, aside from any sentiment of religion, to require cessation of labor and to impose the duty of rest;[5] but regulations of this nature must not discriminate between different businesses all of which are perfectly lawful, and require an observance by one person which is not exacted of another.

The right and sanctity of religious worship is recognized as being one of the rights of American citizens, and in most, if not

[1] Ritchie v. People, 155 Ill., at p. 106; Holden v. Hardy, *supra*.

[2] This was the battle fought in the Granger Cases (Munn v. Illinois).

[3] United States v. E. G. Knight Co., the Sugar Trust, 156 U. S. 1. See the dissenting opinion for the principles of the right of the state also. People v. Gas Trust Co., 130 Ill. 268; People v. N. R. Sugar Refining Co., 121 N. Y. 582; 18 Am. St. Rep. 843.

[4] In other connections it will be seen that Christianity is recognized and protected. It was held to be a part of the common law. Walston's Case, 2 Strange, 384. See also Rex v. Carlisle, 3 B. & A. 161; Bloom v. Richards, 2 Ohio St. 390; Watson v. Jones, 13 Wall. 380. The crime of blasphemy is recognized as an offense at common law and in most of the criminal codes of the Union. Apart from the sentiment of religion, it is difficult to understand how those states can uphold a Sunday law of any character as a regulation of individual health and rights of the people, and at the same time refuse to sanction a public and general law regulating the hours of labor. Religious liberty and the separation of church and state do not mean the renunciation of Christianity by the people.

[5] Ex parte Burke, 59 Cal. 6. See also Commonwealth v. Starr, 144 Mass. 361; Soon Hing v. Crowley, 113 U. S. 710.

all, of the states, the statutes protect the quiet and peaceful exercise of this right, and prohibit any disturbance of the peace in the immediate neighborhood wherein persons have erected churches or established a place of public worship. The constitutionality of such statutes is nowhere questioned.[1]

Sec. 401. *The State Taxing Power is a Limited Power.*— Among the famous expressions of Chief Justice Marshall is the one made use of in the case of *McCulloch v. Maryland*,[2] that "the power to tax is the power to destroy." When viewed from the standpoint of a tax imposed by a legislative assembly upon the members of the community represented thereby, the power to tax can hardly be said to be the power to confiscate, appropriate or destroy. Like most other well-sounding phrases, it performs a useful function only when confined to specific subsequent instances closely analogous to the original one wherein it was used.[3]

The power to tax *as it exists* in America is by no means a power to destroy or to appropriate. The taxing power is

[1] State v. District Board, 76 Wis. 177–211.

[2] 4 Wheat. 316.

[3] The claim was that, there being no express limitation on the state's power to tax, none could be created by implication, so that in reality the phrase means that the *unrestrained* power to tax is the power to destroy. Mr. Justice Miller, while quoting the expression, says: "The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined powers. . . . Of all the powers conferred upon government that of taxation is most liable to abuse. Given a purpose or object for which taxation may be lawfully used, and the extent of its exercise is in its very nature unlimited. It is true that express limitation on the amount of tax to be levied or the things to be taxed may be imposed by constitution or statute; but in most instances for which taxes are levied, as the support of government, the prosecution of war, the national defense, any limitation is unsafe. The entire resources of the people should, in some instances, be at the disposal of the government. . . . The power to tax is therefore the strongest, the most pervading, of all the powers of government, reaching directly or indirectly to all classes of the people. It was said by Chief Justice Marshall, in the case of McCulloch v. Maryland, 4 Wheat. 431, that the power to tax is the power to destroy. A strong instance of the truth of the proposition is seen in the fact that the existing tax of ten per cent., imposed by the United States on the circulation of all other banks than the national banks, drove out of existence every state bank of circulation within a year or two after its passage. This power can as readily be employed against one class of individuals and in favor of another, so

hedged about by limitations important and certain, relating to the objects which may be taxed, the purposes for which taxes may be imposed, frequently the amount which may be imposed, and the manner of its imposition; and especially do the provisions of the constitution, which exempt all persons from unequal burdens, and other express provisions requiring uniformity of taxes, render the power to tax anything but an absolute power, either as to manner or extent.

The power to tax in America never extends any further than the execution of a duty by a representative legislative body to levy and assess upon the property within a state such impositions and burdens as are required by the public needs; and it would be an absurdity equaled only by a *felo de se* to suppose that such a body may *lawfully* so exercise the power against itself as to destroy the subject of taxation.

Indeed, it is hard to understand how, using the word *tax* in its English sense, which was that a tax is a voluntary contribution ascertained, levied and assessed by the commons of England as a free gift and grant of the people, and never to be imposed upon any person not represented in that body, can be called in America a power to destroy.

Sec. 402. *State Taxation Must be for a Public Purpose.*— There being in the theory of American law no personal right of government, and no one who had any rights over the person or property of another, the rule of the English law, that taxes are gifts for public use, is crystallized into an American maxim, that taxation must be for a public purpose.[1]

The principle is never denied in American jurisprudence. Its application has occasioned great discussions, and these have chiefly arisen by reason of the attempt of the legislature either to engage in some enterprise which was called a public one, and which was questioned because it incidentally benefited a particular locality more than some other, or where the government extended a bounty or aid to some business owned and controlled by individuals, but which it was claimed was of such universal benefit as to warrant public aid. In modern times it has been the practice to extend municipal aid in the

as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the use for which the power may be exercised." He then held that there was such limitation. Loan Ass'n v. Topeka, 20 Wall. 655-662.

[1] See Elliott's Mun. Corp., pp. 152-54.

building of railroads. The battle as to the power to tax for this purpose has been fought in every state in the Union. The question is no longer an open one in the courts, and has been put at rest partly by the decisions of the courts and partly by public opinion crystallized either in the shape of a constitutional inhibition or so strong a disapproval of the practice that it is now seldom attempted.

The right of the legislature to grant public aid directly, or to authorize municipal corporations and township authorities to vote money or bonds to aid in the building of railroads, is in most states held to exist, and the question of power is not an unsettled one. Jurists have been divided in opinion upon it, and the practical use of any discussion of the matter is to enable the student to know sufficient of the principles to apply them in dissimilar cases involving the same principles.

Two of our greatest jurists[1] each declared such legislation beyond the legislative authority. Each pointed out the danger and disaster which were to be the legitimate fruits of such legislation, and the prophecies have been uniformly fulfilled. In most of the states, however, such legislation has been upheld.

The supreme court of Iowa, after Judge Dillon's retirement from that bench, promptly overruled the decision, Mr. Justice Miller writing the opinion.[2]

Judge Cooley's opinion is one of the luminous expositions of the subject, but was equally impotent to stay the hand of the legislature except in that particular instance.

[1] The late Thomas M. Cooley, and Judge Dillon, the author of the justly famous work on Municipal Corporations. People v. Town of Salem, 20 Mich. 453; Hanson v. Vernon, 27 Iowa, 28; 1 Am. Rep. 215.

[2] Stewart v. Supervisors, 30 Iowa, 9; 1 Am. Rep. 238. He soon thereafter became one of the judges of the United States court and later a member of the federal supreme bench. He subsequently rendered the majority opinion in Loan Ass'n v. Topeka, 20 Wall. 655. It is evident from this opinion that his mind had undergone a change, and it is possible that, had he been called upon to decide again the case wherein he overruled Justice Dillon, he might have held differently. In the Topeka case he says: "We have referred to this history of the contest over aid to railroads by taxation to show that the strongest advocates for the validity of these laws never placed it on the ground of the *unlimited* power in the state legislature to tax the people, but conceded that, where the purpose for which the tax was to be issued could no longer be justly claimed to have this public character, but was purely in aid of private or personal objects, the law authorizing it was beyond the legislative power and was an unauthorized invasion of private right."

In the famous case of *Loan Ass'n v. Topeka*,[1] Mr. Justice Miller distinguished between governmental aid to private corporations engaged in public business and governmental aid to private enterprises. This opinion stands as the exposition of the true principles and extent of the taxing power, and contains the best exposition of the line of demarcation between public and private objects of a tax.

Sec. 403. *What May be Taxed.*— Every person within a state or having property therein has need of governmental protection, and in exchange therefor it is but equitable that he should bear some portion of the public burden to provide for the maintenance of orderly government.

It is therefore thoroughly established that a state has the power to tax everything in the nature of property having a *situs* within its limits.[2]

As we have seen in examining the question of interstate commerce, it is now settled that a state may impose a tax upon foreign corporations as a condition or compensation for the privilege of doing business within a state. It may also exact a tax upon resident corporations upon the business transacted, including that transacted outside the state.[3]

A franchise or privilege conferred upon an individual or a corporation may be taxed.[4]

So it is within the power of the state to enact income tax laws, or lay a tax on the privilege of receiving an inheritance, bequest or legacy.[5]

[1] 20 Wall. 655.

[2] Ficklen v. Shelby Co., 145 U. S. 1–22.

[3] New York v. Roberts, 171 U. S. 658. Here it should be borne in mind that the tax is upon the business transacted, and is not affected by the fact that the business consisted in importing in original packages only. Id. 664.

[4] California v. Pacific Ry. Co., 127 U. S. 41. See also Adams Express Co. v. Ohio, 165 U. S. 194.

[5] Mager v. Grima, 8 How. 490; In re Hamilton, 148 N. Y. 310; State v. Ferris, 52 Ohio St. 1; *ante*, sec. 283; Magoun v. Illinois T. R. & S. Bank, 170 U. S. 283; Pollock v. Farmers' Loan & Trust Co., 157 U. S. 578; Drake v. Kochersperger, 167 Ill. 122.

Mr. Justice McKenna, after stating the case, delivered the opinion of the court: "Legacy and inheritance taxes are not new in our laws. They have existed in Pennsylvania for over sixty years and have been enacted in other states. They are not new in the laws of other countries. In State v. Alston, 94 Tenn. 674, Judge Wilkes gave a short history of them as follows: 'Such taxes were recognized by the Roman law. (Gibbon's Decline and Fall of the Roman Empire, vol. 1, pp. 163–64.) They were adopted

Subject to the limitations in the United States statutes, the states have a right to tax owners of national bank stock upon the value of the stock.[1]

Sec. 404. *Exemptions.*— The states have a limited power to exempt property from taxation, but like all other powers this is not arbitrary and absolute.

Our constitution comprehends equality of right and equality of burden, and exacts the latter as strictly as the former; and the legislatures may not benefit private individuals by releasing them from the common burden, any more than by making them objects of direct pecuniary aid. These principles are so lucidly explained and rigidly enforced in the late income tax cases as to leave little for further discussion.[2]

It is common, however, to exempt property of religious, eleemosynary and educational societies from some of, or a portion of, the burdens, and this is recognized to be more than a compensation for the general benefit conferred upon the whole community.[3]

in England in 1870, and have been much extended since that date. (Dowell's History of Taxation in England, 148; Acts 20 Geo. III, ch. 28; 45 Geo. III, ch. 28; 16 and 17 Vict., ch. 51; Green v. Craft, 2 H. Bl. 30; Hill v. Atkinson, 2 Meriv. 45.) Such taxes are now in force generally in the countries of Europe. (Review of Reviews, February, 1893.) In the United States they were enacted in Pennsylvania in 1826; Maryland, 1844; Delaware, 1869; West Virginia, 1887; and still more recently in Connecticut, New Jersey, Ohio, Maine, Massachusetts, 1891; Tennessee in 1891 (ch. 25, now repealed by ch. 174, Acts 1893). They were adopted in North Carolina in 1846, but repealed in 1883. Were enacted in Virginia in 1844, repealed in 1855, re-enacted in 1863, and repealed in 1884.' Other states have also enacted them — Minnesota by constitutional provision.

"The constitutionality of the taxes has been declared, and the principles upon which they are based explained, in United States v. Perkins, 163 U S. 625, 628; Strode v. Commonwealth, 52 Pa. St. 181; Eyre v. Jacob, 14 Gratt. 422; Schoolfield v. Lynchburg, 78 Va. 366; State v. Dalrymple, 70 Md. 294; Clapp v. Mason, 94 U. S. 589; In re Merriam's Estate, 141 N. Y. 479; State v. Hamlin, 86 Me. 495; State v. Alston, 94 Tenn. 674; In re Wilmerding, 117 Cal. 281; Dos Passos, Collateral Inheritance Tax, 20; Minot v. Winthrop, 162 Mass. 113; Gelsthorpe v. Furnell, 20 Mont. 299; 51 Pac. Rep. 267. See also Scholey v. Rew, 23 Wall. 331." Magoun v. Illinois T. & S. Bank, 170 U. S. 283.

[1] Merchants' Bank v. Pennsylvania, 167 U. S. 461.

[2] Pollock v. Farmers' Loan & Trust Co., 157 U. S. 449.

[3] A legacy or bequest to a city is not exempt from taxation under the idea that the agencies of the government are not subject to taxation, for in that case this property is held in property rather than in sovereignty, that is, held as the private property

Exemption from taxation does not extend to special assessments or special taxation for local improvements.[1]

In the creation of corporations the payment of taxes is sometimes waived or exempted, in exchange for a payment of a portion of the gross receipts, as was done in the case of the Illinois Central Railroad Company, heretofore noticed;[2] and in such cases the provisions of such a charter amounting to a contract may bind further legislation;[3] but an exemption of the corporation from taxation upon its capital stock does not necessarily exempt its shareholders from the payment of taxes upon the value of their shares.[4]

Sec. 405. *Eminent Domain.*— The original property right in all of the land in the English colonies was formerly in the crown, and upon the achievement of independence the right of the crown became vested in the people of the United States.[5]

Among the principles of government which we derive from the English law is that which passes under the name of eminent domain; that is, notwithstanding the feudal idea of tenure is abolished, and the grantee of land from the state or United States is vested with the absolute title, there is still recognized a right of paramount dominion, which enables the government

of the municipality. In re Hamilton, 148 N. Y. 310.

The exemption of purely public charities from taxation is held, in Philadelphia v. Overseers of Public Schools, 170 Pa. St. 257, to be inapplicable to a school conducted by a master as a business enterprise, under a lease by which he pays one-eighth of the gross receipts from tuition for the use of the property, although the corporation owning it pays the tuition of a small part of the pupils out of the income received from endowments and legacies, and was organized to conduct a school for the rich at reasonable rates, and for the poor gratuitously.

The school land granted by the United States to the states, and directed to be used for school purposes, cannot be burdened with taxation, either general or special, or be assessed for benefits on account of local improvements. People v. Trustees of Schools, 118 Ill. 52.

[1] Yates v. Milwaukee, 92 Wis. 352; County of McLean v. Bloomington, 106 Ill. 213. In this case the county court-house square was held to be subject to such tax.

[2] Sec. 368. A provision requiring a bank to pay one-half of one per cent. on each share of stock in lieu of all other taxes does not exempt the capital stock of the corporation nor exempt its surplus from taxation. Shelby Co. v. Union & Planters' Bank, 161 U. S. 149.

[3] New Orleans v. Citizens' Bank, 167 U. S. 371.

[4] Id. *Cf.* Shelby Co. v. Union & Planters' Bank, *supra.*

[5] Jay, C. J., in Chisholm v. Georgia, 2 Dall. 418.

to retake the property for the public good. It is the same thing as the *dominum eminens* of the civilians;[1] and the rule in America is, that while the private property of an individual cannot be divested without his consent for the benefit of any other person, the private property of all persons may be divested wholly, or partially, or subjected to damage for the public good — just compensation being made — subject to certain con-

[1] Gilmer v. Lime Point, 18 Cal. 229. "The revolution, or rather the Declaration of Independence, found the people already united for general purposes, and at the same time providing for their more domestic concerns by state conventions and other temporary arrangements. From the crown of Great Britain, the sovereignty of their country passed to the people of it; and it was then not an uncommon opinion that the unappropriated lands, which belonged to that crown, passed not to the people of the colony or states within whose limits they were situated, but to the whole people; on whatever principles this opinion rested it did not give way to the other, and thirteen sovereignties were considered as emerged from the principles of the revolution, combined with local convenience and considerations; the people nevertheless continued to consider themselves, in a national point of view, as one people. . . .

"Every state constitution is a compact made by and between the citizens of a state to govern themselves in a certain manner; and the constitution of the United States is likewise a compact made by the people of the United States to govern themselves, as to general objects, in a certain manner. By this great compact, however, many prerogatives were transferred to the national government, such as those of making war and peace, contracting alliances, coining money, etc." Chisholm v. Georgia, 2 Dall., at p. 470.

"To each and every sovereignty belong certain rights which are deemed essential to its existence. These are called by the civilians *jura majestatis*, or rights of sovereignty. Among them is the *jus eminens*, or the supreme power of the state over its members and whatever belongs to them. When applied to property alone, it is called the *dominum eminens*, or the right of eminent domain; that is, the right of the sovereignty to use the property of its members for the public good or public necessity. The word *necessity* in this connection is not to be used in too limited a sense; it means a want, an exigency, an expediency, for the interest or safety of the state. (Vattel, liv. 1, ch. 20, sec. 224; Cooper's Justinian, 456; Bowyer, Universal Pub. Law, 227, 372; Beekman v. Railroad Co., 3 Paige, 73; 3 Story on Const. 117.) Although the right of levying taxes upon private property generally in the state results from, and is part of, the right of eminent domain, that term, in its more modern acceptance, applies especially to the taking of some particular private property for some particular use." Gilmer v. Lime Point, 18 Cal. 229.

For the course of the English law, the student should read Ball v. Herbert, 3 Term R. 253; London Wharf Cases, 1 Wm. Blk. 583. Early American cases of interest are Respublica v. Sparhawk, 1 Dall. 362; Vanhorne v. Dorrance, 2 Dall. 304; Lindsay v. Commissioners, 2 Bay, 41, cited in Cooper's Justinian, p. 457.

stitutional limitations against the government and protection to the individual.

The constitution of the United States and of all the states contain substantially the same provision, that private property shall not *be taken* for public use without just compensation.[1]

In many of the states an additional provision exists, that property shall not be taken *or damaged* unless just compensation for the damage be made, and in the latter case there is no necessity that any part of the land be touched or taken; but if a public work, or a work falling under that designation, although conducted by private individuals, or the exercise of a franchise, damages an individual *more than it benefits him*, he is entitled to compensation for the damage.[2]

[1] As to what is taking and damaging, see Pumpelly v. Green Bay Co., 13 Wall. 166.

[2] The following from a leading Illinois case well states the correct view: "The question then recurs, what additional class of cases did the framers of the new constitution intend to provide for which are not embraced in the old? While it is clear that the present constitution was intended to afford redress in a certain class of cases for which there was no remedy under the old constitution, yet we think it equally clear that it was intended to reach every possible injury that might be occasioned by a public improvement. There are certain injuries which are necessarily incident to the ownership of property in towns or cities which directly impair the value of private property, for which the law does not, and never has, afforded any relief. For instance, the building of a jail, police station, or the like, will generally cause a direct depreciation in value of neighboring property, yet that is clearly a case of *damnum absque injuria*. So as to an obstruction in a public street — if it does not practically affect the use or enjoyment of neighboring property, and thereby impair its value, no action will lie. In all cases, to warrant a recovery, it must appear there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally. In the absence of any statutory or constitutional provision on the subject, the common law afforded redress in all such cases, and we have no doubt it was the intention of the framers of the present constitution to require compensation to be made in all cases where, but for some legislative enactment, an action would lie by the common law. The English courts, in construing certain statutes providing compensation for injuries occasioned by public improvements, in which the language is substantially the same as that in our present constitution, after a most thorough consideration of the question, lay down substantially the same rule here announced. Chamberland v. West End of London Ry. Co., 2 Best & Smith, 605; 110 E. C. L. 604;

Sec. 406. *Who May Exercise the Right.*— This right of eminent domain may be exercised as a matter of course by the state itself for the purpose of obtaining the title to land for direct use by the state.

It was formerly very seriously contended that the United States could not exercise this right within a state, but it is now settled that it may obtain the title by purchase or condemnation within a state, or within a municipal corporation, for the purpose of erecting public buildings or public works.[1]

It is also settled that this power may be exercised by the United States directly, or by the state for the benefit of the United States, although there is not entire harmony on the question.[2]

The right of eminent domain is now seldom exercised by individuals, firms or unincorporated associations, but is generally exercised by corporations engaged in some public enterprise; but this special privilege, franchise, or liberty, as it would be termed in the English law, may be granted to associations or individuals, provided the object is of a public character which warrants the exercise of the power.[3]

This right to exercise the power of eminent domain falls within the meaning of the term "franchises," and can be conferred only by legislative enactment.[4]

The property of the state or of the United States may be used for the public good, although private individuals may suffer damage thereby. Such damage is not in a legal sense an injury, and falls within the rule *damnum absque injuria.*

So in case of a navigable stream. Although the owners of the land adjoining the bank of the stream have certain riparian rights in the stream as against other private persons, the state, in such cases, owns the bed of the stream, and holds it,

id. 617; Beckitt v. Midland Ry. Co., L. R. 1 C. P. 241; on appeal, 3 C. P. 82; McCarthy v. Metropolitan Board of Works, L. R. 7 C. P. 508. These statutes required compensation to be made where property was 'injuriously affected,' which the English courts construe as synonymous with the word 'damaged.' Hall v. Mayor of Bristol, L. R. 2 C. P. 322; East & West India Docks Co. v. Gattke, 3 Macn. & G. 155." Rigney v. City of Chicago, 102 Ill. 64.

[1] Kohl v. United States, 91 U. S. 367.

[2] Gilmer v. Lime Point, 18 Cal. 229.

[3] In re Kerr, 42 Barb. 119. See also Ash v. Cumming, 50 N. H. 591; Tide Water Canal Co. v. Archer, 9 G. & J. 479. See argument in 22 Cal. 402–422.

[4] California v. Pacific Ry. Co., 127 U. S. 40, 41.

not merely in its right of eminent domain, but in actual propriety.[1]

The right of eminent domain extends properly to private property, and to private property only; but in the case of these navigable streams the state violates no proprietary interest by using them as it sees fit. Consequently, except as restrained by the acts of congress, the states may obstruct or use these streams as they please, without compensating individuals for damages.[2]

This proprietary ownership of the state is, however, an ownership for the public at large, and is not of such character as to allow the granting of it to a private person for private purposes.[3]

[1] The stream must be navigable in fact, and a non-navigable stream cannot be taken by a legislative declaration that it is navigable. Morgan v. King, 35 N. Y. 454.

"In the examination of any of the numerous questions relating to water-courses that may arise, no discussion would be complete which failed to refer to the ancient and learned treatise De Jure Maris, by Sir Matthew Hale, and which, after the lapse of two centuries, remains the most concise, comprehensive and reliable work on the subject of which it treats. As appears from the learned note of Judge Cowen to Ex parte Jennings (6 Cow. 537), under the following title, 'Of the right of prerogative in private or fresh rivers,' it reads: "The king, by an ancient right of prerogative, hath had a certain interest in many fresh rivers, even where the sea does not flow or reflow, as well as salt or arms of the sea, and those are these which follow:

"'1st. A right of franchise or privilege that no man may set up a common ferry for all passengers, without prescription time out of mind or a charter from the king.

"'2d. An interest, as I may call it, of pleasure or recreation.

"'3d. An interest of jurisdiction.

"'And another part of the king's jurisdiction in reformation of nuisances is to reform and punish nuisances in all rivers, whether fresh or salt, that are a common passage not only for ships and greater vessels, but also of smaller, as barges and boats, to reform the obstruction or annoyances that are therein to such common passage; for as the common highways on the land are for the common-land passage, so these kind of rivers, whether fresh or salt, that bear boats or barges are highways by water; and as the highways by land are called *altæ viæ regiæ*, so these public rivers for public passage are called *fluvie regales* and *streomes le Roy*, not in reference to the propriety of the river but to the public use.'" Per Ruger, C. J., in Smith v. City of Rochester, 92 N. Y. 463, 478, 479.

[2] Bailey v. Phila., W. & B. Ry. Co., 4 Harr. 384; 44 Am. Dec. 593. See Willson v. Blackbird Creek Marsh Co., 2 Pet. 245. The right which the individual has to the natural flow of the stream is not such a one as can be set up against the state. Lansing v. State, 4 Wend. 9; 21 Am. Dec. 89; Id., 8 Cow. 146.

[3] Lansing v. Smith, 4 Wend. 9–20.

Sec. 407. *The Purpose Must be a Public One.*—Upon the same principle that the burden of taxation may only be laid on the individual owner of property for public purposes, so his right of property can only be interfered with, damaged or divested for a public purpose; and the only questions now open for argument are as to what are considered public purposes.[1]

It was decided at an early day, upon reasons not altogether satisfactory and conclusive, that the land of one man might not be condemned for the purpose of making a private way for an individual, notwithstanding this way was a necessity for the individual;[2] but it is not necessary that the use which shall be made of the improvement shall be directly and primarily by the public: it is sufficient if there is appreciable advantage or benefit to the community.[3]

It is no objection that the improvement is local in its character, as confined to school, district or township, county or municipality. The question once asked by a distinguished statesman, What interest has North Carolina in a canal in Connecticut? has been answered by the settled rule that the public in general is interested in the advancement of every locality.

"The legislature is the sole judge of whether it is expedient to allow corporations to take land and property for a public use; but it is for the courts to decide whether or not the contemplated use is a public one.

"A public use is involved, and land and property may be

[1] "If the use for which the property is taken be to satisfy a great public want or public exigency, it is a *public use* in the meaning of the constitution, and the state is not limited to any given mode of applying that property to satisfy the want or to meet the exigency. The power which is authorized to take is also empowered to appropriate, or apply the thing taken to the use designed. Hence, it may itself make the application, or it may make it through the instrumentality of others. Where private property is taken for the purposes of railroads, aqueducts, canals, turnpikes, etc., the state usually makes the application through the agency of private corporations, to which she transfers the ownership of the property taken. And it seems not to be important whether the corporation through whose instrumentality the object is to be attained be a domestic or a foreign corporation. Varrick v. Smith, 3 Paige, 45; Railroad Co. v. Davis, 2 Dev. & Bat. 451; 2 Gibbs, 447; 2 Kent's Com. 339; Morris C. & B. Co. v. Townsend, 24 Barb. 665." Gilmer v. Lime Point, 18 Cal. 229.

[2] Taylor v. Porter, 4 Hill, 140; 40 Am. Dec. 274.

[3] McQuillen v. Hatton, 42 Ohio St. 202; Olmstead v. Camp, 33 Conn. 532.

taken under the power of eminent domain by railroads. This is the most common occasion for the use of that power. It may be used also by a mining company; by manufactories; also for booms; for a cemetery; for an aqueduct; for parks, schools, water-works, etc.

"In order to constitute a public use it is not necessary that the improvement should directly benefit the people of the whole state, but the benefit may affect only a particular community. It cannot, however, be for the benefit of a few individuals only. And the power of eminent domain may be exercised by individuals as well as by corporations if the statute so provides, and may be delegated to foreign corporations."[1]

Sec. 408. *Procedure — Jury Trial — Due Process of Law.*— Without attempting to treat the details of procedure in such cases, it may be said to be the established view that because the exercise of the right of eminent domain is the exercise of a sovereign right, well understood and established in English law, and with an established procedure in that system, and was adopted into American jurisprudence in conformity with the principles of the English law, the requirements of due process of law under that system of jurisprudence not providing a trial by jury in such cases, it is competent for the legislatures of the different states to establish a procedure for the ascertainment of damages and compensation without a jury trial.[2] Although such is undoubtedly the general rule, it is not uni-

[1] Cook, Stock and Stockholders (3d ed.), sec. 904.

[2] "I know these laws have been questioned, but it seems now to be settled that the legislature, in the assertion of its right of eminent domain, may not only take private property for public use, but prescribe the mode of assessing damages, even without trial by jury. Bonaparte v. Camden & Amboy R. R. Co., 1 Bald. 219; s. c., 3 Fed. Cas. 821. But, in truth, this is a trial by jury, such as was known and used in the administration of justice in this state on various occasions where the legislature conferred a special remedy, even before the present constitution, the requisition of which is simply that 'trial by jury shall be as heretofore.' Art. 1, sec. 4. Neither do we think the act is open to any constitutional objection on the ground, taken in argument, that it is a partial, if not a personal, remedy given to this plaintiff and certain other citizens to the exclusion of all others, and against these defendants only. The remedy is given to all who are liable to the mischief, and against those only who can do the injury." Bailey v. P., W. & B. R. R. Co., 4 Harr. 384; 44 Am. Dec. 593–608. The Bonaparte case, above cited, is one of the greatest discussions of the question.

versal, and has been changed in many states by constitutional enactments, which require that in some stage of the proceedings the party shall be entitled to a jury trial.[1] The legislature must follow some recognized procedure according to the course of the common law, or provide for a regular hearing with notice and a jury trial.[2]

A procedure without jury is not favored in this country; but the supposed injustice on account of the rule just mentioned is lessened when it is considered that the remedy provided by these statutes is cumulative of the common-law remedy, and that a party has the right to sue for his damages in the ordinary courts of justice, where he may have a jury trial.[3]

The construction of a work or conducting a business under a license given by virtue of this law does not warrant any unnecessary damage, but, on the contrary, implies the exercise of care as to means and methods, so that the least possible damage shall result; and for a failure to adopt and use them an individual may sustain an action.[4]

[1] Bailey v. Phila., W. & B. Ry. Co., 4 Harr. 384; 44 Am. Dec. 593; Kohl v. United States, 91 U. S. 376; Mills on Eminent Domain, sec. 91. See, on more modern rule, Mitchell v. Illinois R. R. Co., 68 Ill. 286; Paul v. Detroit, 32 Mich. 108; Brown v. Beatty, 34 Miss. 327; Trombly v. Humphrey, 23 Mich. 431.

[2] Santa Clara Co. v. Southern Pac. Ry. Co., 18 Fed. Rep. 385, 420–25.

[3] "The just compensation to be made for damage to land was, in our opinion, intended as an indemnity, not for successive, constantly accruing damages, recoverable as they may afterward be suffered, but for all the damage the land-owner may suffer from all the future consequences of the careful and prudent operation of a railroad; it being the immediate damage done to the land-owner's estate by changing its permanent condition and impairing its present value. See Heard v. Middlesex Canal Co., 5 Metc. 81. The action for damage may be regarded as in the nature of one kind of condemnation proceedings. Upon this point of estimation of damages it was said in the Maher case (91 Ill. 312), that the structure being permanent in its character, 'It could be determined, with a reasonable degree of certainty, how much it depreciated the value of the land as a permanent structure — how much less it was worth after the erection of the structure than before.'" Chicago & E. I. R. R. Co. v. Loeb, 118 Ill. 203–14.

[4] "But the providing of such compensation for unavoidable injuries to property was clearly never intended to license companies to overflow vast bodies of land which might be fully protected by the building and maintaining *proper* culverts. Now, in a case of this kind, when the company commences operating its road without having built such culverts or provided some other *efficient* means for the escape of the water, is it

Sec. 409. *Measure of Damages.*— The measure of damages in such cases is, that for the land actually taken its value must be paid, irrespective of any collateral benefits which may arise. As to land not taken, but simply damaged, the difference in value on account of the damage is the rule; and in ascertaining this, the benefit which the individual receives, *peculiar to himself*, may be taken into account.[1]

Sec. 410. *General and Special Legislation.*— In the absence of constitutional requirements the legislature has the right to exercise its power in any form which suits the desire of the law-maker, but in most of the states there are constitutional inhibitions against special legislation in reference to designated objects.

Generally it is required that objects of a public nature shall be effected by public and general legislation, while matters of a private nature may be accomplished without such limitation.[2]

It is therefore very important to distinguish between what is private and local and what is general legislation. Upon this subject Royce, J., in the Vermont court says: "It is frequently difficult to distinguish between a public and a private law. The definitions given by Blackstone are, that a public act is a universal rule that regards the whole community, and private acts are those that concern only a particular species, thing or person; as, acts relating to any particular place, or to divers towns or counties, or to a college or university. Applying the above definitions to this charter, it would no doubt have to be regarded as a private act. But in this country the disposition has been to enlarge the limits of the class of public acts, and to treat all acts of a general character, or which in any way affect the community at large, although affecting only a particular

thereby relieved of the duty of doing so altogether? To say this is to assert that one may discharge a legal duty by utterly disregarding it which is simply absurd. To maintain an embankment of a road in that condition is not only a violation of a public duty, but is a direct invasion of the private rights of the owners of the lands thus constantly menaced by overflows which could never reach them if the road-bed were properly constructed." O. & M. Ry. Co. v. Wachter, 123 Ill. 440–46.

[1] Comstock v. Clearfield & M. Ry. Co., 169 Pa. St. 582; Monongahela Nav. Co. v. United States, 148 U. S. 312, 327–28; Shoemaker v. United States, 147 U. S. 282; Rigney v. City of Chicago, 102 Ill. 64; Chicago & E. I. R. R. Co. v. Loeb, 118 Ill. 203.

[2] Sedgw. Stat. and Const. Law, 25, and cases cited.

locality, if they apply to all persons, as public acts. Hence, it has been held that the establishment of towns and counties and their boundaries, court-houses, jails, bridges and ferries, are all matters of public policy, and acts relating to them public acts. Judge Dillon, in his learned treatise on Municipal Corporations (vol. 1, p. 167), says that courts will judicially notice the charter or incorporating act of a municipal corporation without being specially pleaded, not only when it is declared to be a public statute, but when it is public or general in its nature or purposes."[1]

This question is not to be decided by any designation which the legislature may place upon the act, nor the fact that the law may be bound with special and private acts, but the nature and object of the act must determine its quality.[2]

Sec. 411. *Title of an Act.*—A suspicion or conviction in the minds of the people that individual legislators are prone to deceive the aggregate body by inserting innocent-looking provisions in a statute of general interest, thereby obtaining legislation which did not receive the full and proper deliberation of the aggregate body, led to the adoption in most of the states of the Union of a provision in the constitution that no act of the legislature should relate to more than one subject, and that this should be expressed in the title of the act.

This provision must receive a reasonable construction, and all that is required is that the general title of the act should be expressed, and all that follows in the act should be germane to and properly relate to the subject named in the act.[3]

[1] Village of Winooski v. Gokey, 49 Vt. 282–85.

[2] Bank of U. S. v. Smedes, 3 Cow. 362. Acts which can affect only one city in a state have occasionally been passed, and it depends upon the peculiar phraseology of the constitutional inhibition and the particular object to be accomplished by the act whether it will be held constitutional or unconstitutional. So in Devine v. Commissioners of Cook Co., 84 Ill. 590, such a law which could only apply to Cook county was held unconstitutional; while in Ohio v. Covington, 29 Ohio St. 102, such an act relating to the city of Cincinnati was held to be a special act, but other considerations excepted it from the constitutional defect. There is no general rule which can guide in such cases. The special provisions of the constitution, the terms and objects of the act, must be regarded. Cincinnati v. Steinkamp, 54 Ohio St. 284.

[3] People v. Hurlbut, 24 Mich. 44–57; Breeswick v. City of Brunswick, 51 Ga. 639; Williamson v. Keokuk, 44 Iowa, 88.

CHAPTER XXIII.

STATE EXECUTIVE.

Sec. 412. *Constitution a grant of executive and judicial power.* The executive power of the various states of the Union is exercised in much the same form and on the same principles.

Unlike the legislative power of the state, the power of the executive must be traced to the constitution, and in the same manner that the aggregate powers of the United States are to be so supported; and, as we have seen, so far as the executive and judicial departments are concerned, the constitution of a state is regarded as a grant of power.

In some of the states, and in the older unwritten constitutions, the whole power — legislative, executive and judicial — was in the legislature with no separation;[1] but in more recent times the constitutions of the different states contain a grant of the executive power to the governor, with the injunction that he shall see that the laws of the state are executed, in much the same form that the grant is made to the president of the United States. Still later, the tendency has been to separate the executive into departments created by the constitution.

[1] When the first republican constitution of North Carolina was framed at Halifax in 1776, a large element viewed with distrust the then untried experiment of a government of the people by themselves. As a consequence the whole government was vested in a legislature, to whose supposed superior wisdom was confided the selection of the entire executive and judicial departments; and, as a further check, one branch of the legislature was chosen, not by the people at large, but by those possessed of a certain amount of landed property. With the progress of ideas the constitution of 1835 intrusted the selection of the governor to the people. A subsequent amendment gave the senate to a popular vote. The constitution of 1868 gave the direct election of the judiciary and the heads of the several executive departments to the people without the intermediary of a legislative selection, and made the three departments of government co-ordinate, but independent of each other. Each of the three is now equally based upon the broad basis of the popular will. Herndon v. Imperial Fire Ins. Co., 111 N. C. 384. In Connecticut prior to the revolution the legislature exercised all the powers of government and elected the governor. State v. Bulkeley, 61 Conn. 287.

The unity of the executive powers in the single hand of the governor was in the early days of the states practical and expedient; but as the population increased and the magnitude of the affairs of the state grew and became more complex, it was found necessary to commit different departments of the state executive to different hands.

This was accomplished in the manner pointed out in the constitution of Illinois, which finds its counterpart in most of the states of the Union.[1]

There are now subordinate boards of public works, state boards of equalization, state boards of health, police and fire departments, boards of public parks, commissioners of the insane, boards for pardoning and managing criminals, and the state systems have become complex and elaborate.

Legal questions arising are frequent and most difficult, owing to the growing tendency on the part of the legislature and the executive to commit to the hands of these boards complete power over subjects, granting them powers scarcely distinguishable from judicial power, by which valuable vested rights of the people to local government are frequently affected and divested.[2]

Under our imperfect separation of the legislative, executive, and judicial departments, it is easy to understand the nicety of questions arising under such distribution of power.

Sec. 413. *The Governor.*— In the case of *Chisholm v. Georgia*, Justice Iredell, speaking of the nature of the chief executive of a state, said: "A governor of a state is a mere executive officer; his general authority very narrowly limited by the constitu-

[1] The first constitution of Illinois, article III, section 1, provided simply that the executive power of the state shall be vested in a governor. At the same time the office of lieutenant-governor was created, with powers similar to those of the vice-president, constituting him speaker of the senate, and governor during the absence of the governor, or in case of death or removal of that officer. In the last constitution it is provided: "The executive department shall consist of a governor, lieutenant-governor, secretary of state, auditor of public accounts, treasurer, superintendent of instruction, and attorney-general, who shall each, with the exception of the treasurer, be elected by the people, and hold his office for the term of four years."

[2] In the exercise of such powers, if upheld, the inhabitants of cities are in fact governed by the state executive from the central seat of government. See State v. Covington, 29 Ohio St. 102. *Cf.* People v. Albertson, 55 N. Y. 50; People v. Hurlbut, 24 Mich. 44; Rathbone v. Wirth (N. Y.), 45 N. E. Rep. 15.

tion of the state; with no undefined or disputable prerogatives; without power to affect one shilling of the public money but as he is authorized under the constitution or by a particular law; having no color to represent the sovereignty of the state so as to bind it in any manner to its prejudice, unless specially authorized thereto. And therefore all who contract with him do it at their own peril, and are bound to see (or take the consequences of their own indiscretion) that he has strict authority for any contract he makes."[1]

The analogies which might be supposed to exist between the executive of the national government and the executives of the states are not always safe and reliable.

His Corporate Capacity.— The governor of the state is, in the eye of the law, viewed not simply in his natural capacity, but partakes in some measure of the artificial character of a corporation sole.

The supreme court of Tennessee said of the state executive: "The governor of this state is the executive of it; it is one of his duties, among many others, to see that the laws of the state are executed and obeyed; this is a great and fundamental duty, without the proper observance of which society might and would necessarily be greatly distracted; and the proper security of life, liberty and property seriously endangered for the purpose of enforcing the execution of the laws and the protection of the state from rebellion and invasion; he is the commander of the forces of the state; to hold that there can be *an interregnum* in this office would be to hold to the temporary anarchy of the state; and in order to hold that there is no such *interregnum*, we must hold that the governor as such never dies; to do this he must be a corporation sole with succession in office."[2]

[1] 2 Dall. 418–446. This was, however, in 1792, and before he was elected directly by the people.

Lieutenant-governor.— The lieutenant-governor is, like the vice-president, chosen to meet the contingency of a vacancy in the office of governor, either temporary or permanent; and it is the habit of American governors, upon leaving the state, to call the lieutenant-governor to the seat of government and intrust to him the affairs of state.

[2] Governor v. Allen & McMurdie, 8 Humph. 176–181. "Blackstone, in the first volume of his Commentaries (p. 469), says: 'A corporation sole consists of one person only, and his successors in some particular station who are incorporated by law in order to give them some legal capacities and advantages, particularly that of

His Influence on Legislation.— In accordance with the modern idea of checks and balances, the governor checks legislation not only by his veto power, which is qualified, but by a provision, now commonly inserted in constitutions, providing for his assent and signature to bills, or requiring a larger vote in case of his disapproval.[1]

Sec. 414. *Power of Appointment and Removal.*— The executive department of the state being largely within the control of the governor, he is given a large discretion in the matter of

perpetuity, which in their natural persons they could not have had.' In this view the king is a sole corporation, so is a bishop, and so is every parson and vicar.

"Now the governor constitutes the executive department of the state; he is vested by the constitution of the state with great and important powers to be executed for the benefit of the state; and it is absolutely necessary that there should be no *interregnum* in his office, to avoid many and great inconveniences; this cannot be unless we apply to him the maxim of the common law, applicable to the king, that he never dies; this maxim of the common law (like most if not all of them) is based upon wise conceptions and not upon any foolish reverence for kings or belief in their sanctity or immunity from the common lot of mankind, but upon the necessary assumption that the state, which protects and cares for all, never ceases to exist, but that it is always alive and active in the performance of its duties to the citizen." Governor v. Allen & McMurdie, 8 Humph. 176–180.

[1] Article 4, section 14, of the constitution of Michigan, provides that "Every bill and concurrent resolution, except of adjournment, passed by the legislature shall be presented to the governor before it become a law. If he approve, he shall sign it; but if not, he shall return it, with his objections, to the house in which it originated, which shall enter the objections at large upon their journal and reconsider it. On such reconsideration, if two-thirds of the members elected agree to pass the bill, it shall be sent with the objections to the other house, by which it shall be reconsidered. If approved by two-thirds of the members elected to that house, it shall become a law. In such case the vote of both houses shall be determined by yeas and nays, and the names of the members voting for and against the bill shall be entered on the journals of each house respectively. If any bill be not returned by the governor within ten days, Sundays excepted, after it has been presented to him, the same shall become a law in like manner as if he had signed it, unless the legislature, by their adjournment, prevent its return, in which case it shall not become a law. The governor may approve, sign and file in the office of the secretary of state, within five days after the adjournment of the legislature, any act passed during the last five days of the session, and the same shall become a law." This must be construed as rendering valid an act of the legislature passed previous to the last five days of the session and approved by the governor after the adjournment of the legislature. City of Detroit v. Chapin, 108 Mich. 136.

the appointment and removal of his subordinates, but this does not extend to officers created by the constitution.[1]

In combination with the legislature the power of the governor is vast, and may even become threatening on account of the practice which has grown up of creating general commissions and boards, to whom are committed the control and management of certain objects of government, and also on the more questionable practice of creating police, park, sewerage and other local boards, to whom are committed to a large degree the control and management of the government of the people by officers created by the legislature and appointed by the governor.[2]

In some instances the power to appoint is absolute, in others by and with the advice of the legislature or of the senate; but

[1] "The disparity between the powers of the president and the governor is not greater in reference to appointment to office than it is in reference to their supervision and control of the officers of the executive department when appointed.

"The constitution of the United States and of this state contain the same declarations that the executive powers of the government shall be vested in the respective executives; and in the constitution of the first, this declaration is carried out by its other provisions. It creates no other officers in whom a portion of this power is vested or required to be vested by law. Those officers whom the president may remove are created by law, as aids and helps to him in the performance of his duties; but the declaration in our constitution, that the executive power of the government shall be vested in the governor, is to be understood in a much more limited sense, inasmuch as, by its other provisions, it is greatly circumscribed and narrowed down. Unlike the constitution of the United States, ours has created other executive officers, in whom a portion of this power is required to be vested by law, not to be assigned by the governor. He can assign no duties to the secretary. That idea is negatived by the constitution requiring all his duties, in addition to such as it has prescribed, to be assigned by law. He is therefore the officer of the constitution, and not of the governor." Field v. People, 2 Scam. 79–114.

[2] For example, we have a board of pardons, who pass upon how long a convict shall remain in the penitentiary (Miller v. State, 40 L. R. A. 109), state boards of health (France v. State, 57 Ohio St. 1), civil service commissioners, who shall determine who may hold office (People v. Kipley, 171 Ill. 44), park commissioners, to govern *local* parks, but who are held to be *general state officers* (Wilcox v. People, 90 Ill. 186). The decision of contested elections may be vested in the executive department, or the executive in combination with the judiciary, but the judge who sits in this capacity exercises an executive function rather than the judicial (Johnson v. Jackson, 99 Ga. 389); grain inspectors (Dutcher v. People, 11 Ill. App. 312); police boards controlling districts embracing several cities. People v. Albertson, 55 N. Y. 50.

in either event the vast power of the executive is apparent. His power of removal and suspension, unless restrained by the legislature, is absolute, and cannot be reviewed in the courts or by any other tribunal.[1]

Sec. 415. *The Governor's Discretion.*— It is essential to the proper administration of his office that the governor should be invested with a large measure of discretionary powers in matters pertaining to his office; and in such matters he is not accountable to any other tribunal or any other person, excepting for malfeasance in his office.[2]

So, in matters of contract which it is within his power to execute, matters of sale and management of public property and public office, and the expenditure of the public moneys committed to the executive department, he is not accountable.[3]

In the exercise of his political duties his power is absolute and beyond the control of the courts.[4]

Power to pardon is discretionary with the governor, and it follows that, irrespective of motive, there is no authority to correct the abuse of this power except by impeachment.

So where the governor has entered into a contract in reference to a subject committed to his control, the judiciary cannot inquire into the exercise of his discretion or relieve on account of his abuse.[5]

In all cases it may be said that the court will only inquire into the power and jurisdiction of the governor, and not into the wisdom or justice of its execution.[6]

As to ministerial acts, however, as is said by Mechem in his work on Public Officers: "There is a growing tendency on the part of the courts in other states to hold that where the duty of performing purely ministerial acts, in which private individuals have a special interest, is positively imposed upon the governor of a state by law, the performance of the duty may be enforced by *mandamus* as in other cases of ministerial action."[7]

[1] State v. Johnson, 30 Fla. 499; Wilcox v. People, 90 Ill. 186; State v. Doherty, 25 La. Ann. 119; Attorney-General v. Brown, 1 Wis. 513; Keene v. Perry, 24 Tex. 253.

[2] People v. Yates, 40 Ill. 126; People v. Lewis, 7 Johns. 73.

[3] State v. Boyd, 36 Neb. 60; Holmes v. Tenn. C. & I. Ry., 49 La. Ann. 1465.

[4] State v. Boyd, *supra.*

[5] Peeples v. Byrd, 98 Ga. 688.

[6] Wilcox v. People, 90 Ill. 186.

[7] Mechem on Public Officers, sec.

Sec. 416. *Secretary of State.*— The great recording and accounting officer of the state is the secretary. He is the keeper of the documents of state; bills enacted by the legislature pass through his hands, are enrolled by him, published by his authority, and his certificate passes as evidence of their genuineness.

Commissions, whether by appointment of the state or by election or choice of the legislature, are executed by him. He is the keeper of the great seal of the state. He certifies the incorporation of all companies, the granting of all charters and changes in them.

His duties are defined in the constitution and in the statutes passed by the legislature.

Sec. 417. *The State Auditor* is the chief accounting officer, naturally subordinate or ancillary to the secretary of state, and it is his principal duty to investigate the genuineness and validity and justness of accounts presented against the state and to issue warrants for their payment.[1] Other duties may be attached to the office by the constitution or the statutes, generally to report to the governor or attorney-general violations of the rights of the state. For instance, in Illinois, matters pertaining to insurance companies are committed to the care of the state auditor.[2]

In matters of this kind there is no uniform law. It depends entirely upon the provisions of the constitution, or legislative enactments which suit the convenience or desires of the legislature.

Sec. 418. *Superintendent of Public Instruction or Education.*— Wherever the common school system of education has been in vogue, great attention has been paid to the subject of

610, with citations. The neglect of his duties may defeat the will of the people or the legislature. Provision is made in the constitution for the authentication of bills; and although it is customary that a bill have the approval of the governor, its omission has no effect on its validity. See People v. Hatch, 19 Ill. 283. In the case of Wabash Ry. Co. v. Hughes, 38 Ill. 174, it was held that, notwithstanding the other conditions essential under the constitution to make it a law may have occurred, nevertheless, unless the passage of the act *has been authenticated* in such a manner as the constitution authorizes the courts to recognize, they cannot regard it as law for want of sufficient authentication. On account of a similar omission the prohibition amendment to the constitution of Iowa was defeated. Koehler v. Hill, 60 Iowa, 543.

[1] People v. Swigert, 107 Ill. 494.

[2] See Chicago Mut. Life Ass'n v. Hunt, 127 Ill. 257.

education, and in several of the states a public officer has been elected by the people, whose duty it is to have the oversight of the educational institutions of the state, particularly the common schools, and to see that the county superintendents of schools perform their duties. In fact the idea seems to be to systematize and render as efficient as possible the conduct of the schools, in order that they may attain that efficiency and method which entitle them to be called a system of education.

Sec. 419. *Attorney-General.*— Scarcely less important in the executive department of the state than the governor is the attorney-general. He is the great law officer of the state.

An extract from a report of the attorney-general of Illinois will perhaps best convey an idea of the importance of this high office:[1]

"The duties imposed by law on the attorney-general of this state are many and varied. Our laws[2] specifically point out many of the duties and powers devolving upon him; but the duties imposed by said chapter are few, in comparison with the many additional duties that are imposed upon him by almost every enactment of the legislature. The laws relating to the business of insurance in this state, in relation to building and loan associations, in relation to state banks, in relation to trusts and every species of corporations organized under our laws, impose, in one way or another, grave and important duties and trusts to be discharged by him.

"Nor is this all; for it has been expressly decided by the supreme court that the attorney-general of Illinois possesses all the powers of the attorney-general in England, and, in so deciding, our supreme court used the following significant language: 'The duties of such an office are so numerous and varied that it has not been the policy of the legislature to attempt the difficult task of enumerating them exclusively, but they have ordinarily been content, after expressly defining such as they deem the most important, to leave the residue as they exist at common law, so far as applicable to our jurisprudence and system of government.'"[3]

Practically speaking, even more than that of the chief executive himself is it the duty of the attorney-general to watch

[1] These observations are equally applicable to all the states.

[2] Ch. XIV, R. S. Ill.

[3] Rep. Atty. Gen. Ill., 1895.

over and protect the constitution of the state from encroachments by the government and violation by the people.

The numerous cases in the state courts entitled *State ex rel.* v. —— are the mediums through which the attorney-general attacks offenders against the constitution.

Gerrymandering, by which the legislature or some dominant party therein seeks to unlawfully perpetuate its power and destroy the true principles of representation, may be checked by the attorney-general;[1] great combinations and monopolies, by which the private and property rights of the citizen are destroyed, are restrained by the same law officer.

The abuse of corporate franchises and forfeitures therefor are within his jurisdiction;[2] and so through the varied and numerous processes of the law the attorney-general has the power, and it is his duty, to protect the state; and it is a matter of congratulation to the American people that the sense of high professional ethics existing among the members of that profession from which the attorney-general is chosen, which outweighs further consideration, has generally rendered the attorney-general of the state an officer who executes the law without fear or favor.

[1] The attorney-general may, without any relator, challenge the right of a public office to perform an act of a public political nature. Such was the Wisconsin case which held the apportionment act void. State ex rel. Atty. Gen. v. Cunningham, 81 Wis. 440. If he refuse, then a private citizen may invoke the jurisdiction. State ex rel. Lamb v. Cunningham, 83 Wis. 90. "That such prerogative writs, including injunction as a *quasi*-prerogative writ, can properly issue only at the suit of the state or the attorney-general in the right of the state; that 'in matters strictly *publici juris*, in which no one citizen has any right or interest other than that which is common to citizens in general, a petition by a private person for leave to commence an action in this court in the name of the state cannot properly be considered until the attorney-general has been requested to move in the matter, and has refused or unreasonably delayed to do so;' that in all cases in which an exercise of such original jurisdiction is sought, whether by such private citizen or the attorney-general, leave must first be obtained from this court upon a *prima facie* showing that the case is one calling for the exercise of such jurisdiction." Id. 121.

[2] The great Pullman Company was checked in its growth as a municipal corporation by this process, and it was compelled to sell all the town of Pullman. People v. Pullman Palace Car Co., 175 Ill. 125. The charter of the N. R. S. Ref. Co. was revoked because of its abuse of its power by entering into a trust. People v. N. R. S. Ref. Co., 121 N. Y. 582; 18 Am. St. Rep. 834. See also Chicago Mut. Ben. Ins. Ass'n v. Hunt, 127 Ill. 257.

CHAPTER XXIV.

LOCAL SELF-GOVERNMENT—PUBLIC CORPORATIONS.

Sec. 420. *The Subject Explained.*— Having examined the principles and outlines of the administration of the general government and the general state officers, the natural order is to direct attention to the lesser subdivisions of the states which are made for the administration and government of the local concerns of the people and to enable them to participate in the choice of state officers.

The subject is sometimes treated under the general designation of "municipal corporations," and sometimes under that of "public corporations," and a large portion of the subject consists of the law pertaining to public officers.[1]

There seems to be no real confusion in the treatment or conception of the distinctions between municipal corporations, properly so called, and the local subdivisions of the states not incorporated, which are treated under these heads; but the practice of segregating subjects which overlap each other has left something unexplained as to the real nature and relation of these different subordinate instrumentalities created by the state for the government of the people and which constitute the instruments of local self-government.

We have thus far designated the United States and also the states as a "person," that is, in the eye of the law as bodies politic, differing from the whole mass of persons in the additional element of organization and personality; but they have not been regarded as corporations, though occasionally mentioned as bodies politic and corporate; nor can they in any proper sense of the word "corporation," as used in English and

[1] Thus Elliott, in his Elements of Public Corporations, includes within that title the county, township, school district, and the American municipality. Dillon in bounding his subject states that the term "municipal corporation" has reference to *incorporated* villages, towns and cities, as distinguished from other public corporations, such as counties and *quasi*-corporations. 1 Dill. Mun. Corp. 10. See Mechem, Public Officers.

American law, be so designated, for the reason that they are original sovereign bodies, while corporations derive their existence from the creative power of the state.

The local subdivision of the state into counties, townships, villages, school districts, and lesser divisions into which the territory is divided, are often spoken of as municipal or *quasi*-corporations; but in a strict and proper sense, counties and towns differ essentially from and are clearly distinguishable from corporations, properly so termed.[1]

Before the scheme of local self-government or the nature of public *quasi*-corporations and their distinction from municipal corporations proper, and the difference between these and private corporations, can be understood, the fundamental principles underlying the subject must be grasped; and it will be our first endeavor to make these principles clear.

Sec. 421. *Local Subdivision of England.*— The antiquity and history of corporations belong rather to the historian than to the author of a legal treatise. A better reason for not entering upon an extended investigation of the origin of corporations is found in the fact that the English law as it existed at the period of the American Revolution throws but little light upon American *quasi*-corporations,[2] while the so-called corpora-

[1] Stermer v. Board of Com., 5 Colo. App. 398. The pure corporation has a charter and is really incorporated and possesses a franchise, whereas the local subdivisions merely exist at the legislative pleasure, subject to constitutional limitations.

That the inhabitants of a county, a hundred, a town or parish were not considered a corporation appears from the language of Mr. Kyd, who says: "One essential characteristic of a corporation is an indefinite duration, . . . *but this is not peculiar to corporations;* other aggregate bodies of men are capable of the same perpetual continuance, and for the same natural and intrinsic reason. Thus the inhabitants of a county, of a hundred, of a manor, of a parish, or of a town *not corporate* like Birmingham or Manchester, have perpetual succession as much as the corporation of the city of London. Even the voluntary association of private individuals for any of the most trifling purposes is capable of perpetual succession. 1 Kyd on Corp., Int., p. 3 (1794). It is not necessary to incorporate a collective body of men in order to confer upon them peculiar privileges. 1 Kyd, Int., 9.

"In M'Kinnon v. Penson, 8 Exch. 319, in the court of exchequer, Pollock, C. B., said that the only reason why the action would not lie in Russell v. Men of Devon, 2 T. R. 667, was because the inhabitants of a county *were not a corporation* and could not be sued." Hill v. Boston, 122 Mass. 361.

[2] Few if any English corporations were like our towns. Eustis v. Parker, 1 N. H. 276. See argument of Pinkney, J., in McCulloch v. Maryland, 4 Wheat. 383; also Paul v. Virginia, 8 Wall. 168. Corporations in

tion of mediæval and ancient history will be found upon investigation not to have the characteristics of our modern corporations.

Corporations existed and were recognized under the laws of the American colonies before the Revolution and during the period of the old confederacy, and they have always existed in the United States.

A brief reference to the local temporal division of England in the eighteenth century may aid somewhat in grasping the same subject in American law. (It will not be necessary to notice the ecclesiastical subdivision of Great Britain.)

England, says Wood in his Institutes (1722), is divided into several counties, every county into hundreds, every hundred into towns and villages. A county or shire (the two are the same) is a certain circuit or part of the kingdom governed by the sheriff. There are three counties palatine (that is, having certain privileges of local government and certain franchises) — Lancaster, Chester and Durham. Some cities and towns *corporate* are counties; of these the famous city of London is one — York, Chester, Canterbury, Norwich, Worcester, Kingston-upon-Hull, etc. A town was a precinct anciently containing ten families, upon which account they are sometimes called "tithings." It cannot be a town in law unless it hath or had a church, celebration of divine service, sacraments and burial.

Under the name of town or village, boroughs and cities are contained, for every borough or city is a town, though every town is not a borough or city. A borough is so called because it sendeth up burgesses to parliament,[1] and this maketh the difference between a village or town and a borough. Some boroughs are *corporate* and some not corporate. In old time the towns that are now called cities, or cities and counties, were boroughs, and the ancient boroughs were first of all towns.

A city is a corporate borough that hath had or at present hath a bishop, for if the bishopric is dissolved, yet the city remaineth. To have suburbs proveth it to be a city. Some cities are also counties, as before mentioned.[2]

England, as in fact all personal privileges and honors, were created by the king's royal charter, until the limitation of the king's prerogative. For the history of corporations, see Kent's Comm., vol. 2, lecture 33, 269.

[1] A privilege or duty conferred by the sovereign. See Webster's argument in Luther v. Borden, 7 How. 1.

[2] Wood's Institutes, 2–4.

The important points to be observed in this description are, first, the distinctions between particular counties called counties palatine, and the ordinary counties, and the distinction between cities, properly so called, and towns; the distinction not being in the fact that one contained a larger number of inhabitants than the other, but that the incorporation of the town constituted it a city, while the counties palatine had special privileges of local self-government.

It should also be observed that the subdivisions less than the counties were not arbitrarily fixed by *territorial* lines in the first instance, but the boundaries were fixed by the number of inhabitants. Thus, the hundreds were so called because there was a jurisdiction for ten tithings or a hundred families dwelling in some neighboring towns.[1]

The same author treats of corporations or bodies politic in an entirely different connection.[2] He says of corporations or bodies politic: What is a corporation? "A corporation is a *person*[3] in a political capacity created by law, and is a body-politic framed by policy or fiction of law, but to endure in perpetual succession. . . . It differs from a franchise or liberty[4] because they are estates of inheritance and may be granted over from one to another."

As instances of sole corporations he mentions the king, a bishop, and the chamberlain of London; aggregate corporations of many persons together (in the civil law called universities or colleges), as mayor and commonalty, dean and chapter, master and fellows of the college, master and brethren of a hospital, where all persons may be capable, or one person only. "The bodies natural of such a corporation may be seen, yet the body politic or corporate itself cannot be seen, nor do any act but by attorney."[5]

A city or borough may be incorporated, or part of the city or borough, as the freemen of the city or burgesses of the borough, or men of such a trade in a city; hence there may be many corporations in one city or borough, and one corporation may be made out of another corporation.[6]

From what has been said it is apparent that there was no

[1] Wood's Institutes, Int., 3.
[2] Ch. VIII, p. 111.
[3] Mark the expression.
[4] Granted to individuals.
[5] Wood's Institutes, 112.
[6] Id.

idea that the local subdivisions of England were in any sense considered corporations.[1] We frequently speak of counties and townships as involuntary corporations, but, according to the English view, there could be no such thing as an involuntary corporation. Thus, in Brownlow's Reports, 100, it is said that the inhabitants of a town cannot be incorporated without the consent of the major part of them, and an incorporation without their consent is void. In another case,[2] Holt, Justice, speaks of a new charter made to the city of Norwich by Henry IV. and affirmed by Charles II. The new charter would be void if the corporation refused it.[3]

It is plain from some observations of Mr. Kyd[4] that the inhabitants of a county, hundred, town or parish were not considered a corporation. Thus, he says the inhabitants of a county, of a hundred, of a manor, of a parish, or of a town not corporate, like Birmingham or Manchester, have perpetual succession, as much as the corporation of the city of London, arguing that perpetual succession was possessed by aggregations other than corporations.[5]

From what has been written it is apparent that the local subdivisions of England were not corporations, while nowadays it is very common to classify these local subdivisions as *quasi*-corporations, and sometimes they are even called municipal corporations.[6]

[1] People v. Purdy, 2 Hill, 41.

[2] Rex v. Larwood, Comberbach's Rep. 316.

[3] The consent of inhabitants of boroughs was necessary to make them corporations. Rutter v. Chapman, 8 M. & W. 36; 7 Eng. Rul. Cas. 179. These authorities are cited by Parker, C. J., to show that a township was not properly a corporation. Ellis v. Marshall, 2 Mass. 277.

[4] Kyd on Corporations was published the same year with Wood's Institutes (1722).

[5] 1 Kyd, Corp., Int., p. 3.

[6] People v. Purdy, 2 Hill, 41. Bronson, J., in this case says: "Although towns and counties have certain capacities as or like a body corporate, they are only *quasi*-corporations. They are not those artificial *persons* which either lawyers or laymen call corporations. The trustees of gospel and school lots, and the superintendent of the poor, are also spoken of as corporations (1 R. S. 498); but although they have certain corporate capacities, they are not corporations in the proper sense of the term. They have some of the attributes of a corporation."

Corporate power is the point of inquiry in all cases. As to the nature of the power involved, see opinion of Cowen, J., in same case, page 43.

As to incorporated town, see People v. Haney, 142 Ill. 573.

Another source of confusion is the designation sometimes made in statutes, resulting from loose and inaccurate use of language,[1] the meaning of which can only be ascertained by making a very free construction by the judicial power, so that a school district will in some instances be called a municipal corporation, although in no sense possessing any of the features of such a body. It is essential to our method of treatment, and to a clear comprehension of the distinguishing features of these bodies which pass under the name of corporations or *quasi*-corporations, that we obtain a clear notion of the distinguishing features of each.

Sec. 422. *Definitions of Corporations.*— What idea is conveyed in juridical language by the word "corporation?" How does a corporation sole differ from an individual? How does a corporation aggregate differ from a voluntary association of several individuals who issue shares and do business as a joint-stock association? How does a corporation or a joint association differ from a partnership, and what is the reason for the designation of one aggregation of individuals as a corporation and another as a *quasi*-corporation. A close investigation of these matters, it is believed, will facilitate very greatly the understanding not only of the distinctions involved, but of the rights and liabilities of the various bodies.

There is no lack of attempts at definition. Says Bouvier: "A corporation is a body consisting of one or more persons

[1] It must not be expected that a uniform designation will be found running through all the various enactments of the different legislatures; whether a township is held to be a municipal corporation *within the purview of a statute* may often depend upon the context and surroundings, and so these legislative designations constitute but little guide as to the nature of the association. Norton v. Bank, 3 Wis. 714; Stermer v. Board, 5 Colo. App. 379; Rathbone v. Hopper, 57 Kan. 240; 34 L. R. A. 674.

If it has the attributes of a corporation, whether the statute calls it one or not, it is a corporation; if it has not these attributes it is no corporation. Thomas v. Dakin, 22 Wend. 9.

"In Fargo, Pres't U. S. Exp. Co., v. L., N. A. & C. Ry. Co., 6 Fed. Rep. 787, Judge Gresham said: 'It is of no consequence that in the statute under which these companies are organized they are called unincorporated associations. In determining what such institutions really are, regard is to be had to their essential attributes rather than to any mere name by which they may be known. If the essential franchises of a corporation are conferred upon a joint-stock company, it is none the less a corporation for being called something else.'" Margolius v. State of Ohio, 1 Ohio N. P. 264; Folsom v. Township, 159 U. S. 611; 16 Sup. Ct. Rep. 174; Winspear v. Dist. Tp. of Holman, 37 Iowa, 542.

established by law, usually for some specific purpose, and continued by a succession of members."[1]

The same author, in his Institutes, says: "A corporation is an intellectual body politic, created by law, composed of one or more persons, who act under a common name, are endowed with perpetual succession, and with various other powers by its charter, or the law which created it, and which, for certain purposes, is considered as a natural person."[2] This language is followed by the expression: "It is, as is well observed by Chief Justice Marshall, an artificial body, invisible, intangible, and existing only in contemplation of law." This definition, coupled with the half-finished expression of Marshall, throws less light and more confusion over the subject.[3]

The definition of Angell & Ames approaches nearer to a description of a corporation, *i. e.*: "A body created by law, composed of individuals united under a common name, the members of which succeed each other, so that the body continues the same notwithstanding the change of individuals who compose it, and is for certain purposes considered as a natural person."

This definition is calculated to mislead the uninitiated by using the expression "a body created by law," and concluding, "as a natural person," because it conflicts with a portion of the accepted description of a corporation so often met with, namely, that of Chief Justice Marshall, that a corporation is "an artificial being, invisible, intangible, and existing only in contemplation of law," and it is untrue that, for any purpose, a corporation is considered as a natural person. It may have within certain limits (in fact within all the limits which it can have rights) the rights of natural persons.

As is well said by Walker, "Such expressions are calculated to throw darkness rather than light over the actual nature of corporations."[4]

After what has heretofore been said of definitions the author may be pardoned for not attempting an exact definition. How-

[1] Manifestly this is no definition.

[2] Bouvier's Inst., sec. 178.

[3] Anderson quotes Mansfield's statement under the title "Corporation:" "A creature of the crown created by letters patent." He also quotes Marshall's words, and this is the nearest attempt at defining on the part of these eminent lexicographers.

[4] Walker's American Law (5th ed.), 217.

ever, a conception of the nature of corporations must be conveyed by language, and a definition must be found or invented, or language which constitutes a complete description must be given.

Sec. 423. *The Legal Idea of a Corporation.*— Our classification and treatment assumes that corporations are, in legal contemplation, persons, and clothed with capacity to act as a person within certain limits. All the definitions agree upon this point, and the legal conception of the word "person," as heretofore explained, is that of a legal entity, capable of having and owning rights.[1]

Much of this confusion in reference to artificial creation and personality is occasioned by the changing sense in which courts, legislators and legal authors use the word "person." Strictly speaking, in *legal contemplation* there are no *natural persons* (the expression embraces a solecism); for, as we have seen, the word "person" or "personality" conveys the idea of capacity or *status*, which is an artificial attribute in which the law clothes a natural being, or an aggregate of natural beings. "*Unus homo sustinet plures personas.*"[2]

Here again we encounter the same difficulty which so often prevents exactness in juridical discourse, viz., the changing sense in which words are used. "Such," says Marshall, "is the character of human language that no word conveys to the mind, *in all situations*, one single definite idea, and nothing is more common than to use words in a figurative sense. Almost all compositions contain words which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended."[3]

[1] Judge Sharswood, who is generally a model of exact statement, says the object of making a corporation was to give it a legal entity, a "*persona standi in judicio.*" Philadelphia v. Fox, 64 Pa. St. 180. See Old Dict. by F. O. 1701. *Personable:* One who may maintain a plea in a court, *qui habet personam standi in judicio.*

"The great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men. This capacity is always given to such a body. Any privileges which may exempt it from the burthens common to individuals do not flow necessarily from the charter, but must be expressed in it, or they do not exist." Providence Bank v. Billings, 4 Pet. 514, 562; Cutshaw v. Fargo, 8 Ind. App. 691. See also S. P. Ry. Co. v. Orton, 6 Sawy. 187; 32 Fed. Rep. 458.

[2] Austin's Jur. 362.

[3] McCulloch v. Maryland, 4 Wheat. 414.

If we could by common consent never use the word "person" in any other sense than as indicating the capacity or *status* which the law conferred, and should designate what we now frequently call "natural persons" as "individuals," we would escape much unnecessary confusion.[1]

Walker says: "A corporation may be defined to be a body of persons, connected together by law, either contemporaneously or in succession, and endowed with the capacity of acting for various purposes as a single person."

Again: "It is sufficient to conceive of them as consisting of natural persons, united together in an artificial character by the force of law,[2] for the purpose of concentrating or perpetuating individual ability. They are purely creatures of the law; because, though the members may voluntarily form themselves into a society or association, the law only can erect them into a corporation."[3]

This definition is also inaccurate, and to the untaught very confusing, for the reason that a pure corporation is never constituted by force of law, but is always voluntary. A common fault with all of the definitions thus far quoted is that they throw out of view the idea that a corporation may be constituted by law out of either natural persons or artificial persons, or a mixture of both.

Mr. Justice Buchanan in a celebrated case says: "It is sufficient to say of a corporation aggregate, of which various definitions are to be found in the books, some fanciful and metaphysical, that it is an artificial, intellectual being, the mere creature of the law, composed generally of natural persons in their natural capacity. It may also be composed of persons in their political capacity, of members of other corporations, as in the case of Christ's Hospital of Bridewell, chartered by Edward VI., of which the mayor, citizens and commonalty of London are made the governors of the Hospital of Edward VI. of England, of Christ Bridewell; and so in the case of the universities of Oxford and Cambridge, of which the many colleges (distinct and separate corporations) within these

[1] Austin's Jur. 362, 363.

[2] This ignores the fact, which always exists, that the body is first united and constituted by mutual agreement, and the law merely gives it the artificial capacity.

[3] Walker's American Law (5th ed.), 216, 217.

universities form component parts of these larger corporations. And the individuals, or any of them, who, in their natural capacity, compose one corporation, may in the same capacity compose another distinct and separate corporation; as the president and directors of one bank, or any number of them, may be the president and directors of another bank, or the incorporated managers of any other institution. These undeniable propositions, kept in view, will assist in the examination of the questions under consideration. . . .

"The corporations of London and of Christ's Hospital of Bridewell are separately existing corporations, although the mayor, citizens and commonalty of London are incorporated by the name of the governors, etc., of the Hospital, etc., of Christ, etc., Bridewell; so the many colleges within the universities of Oxford and Cambridge are separate and distinct corporations from each other and from the larger corporations of those respective institutions."[1]

These observations of the learned judge add to the definitions which we have thus far considered, the idea that a corporation may be composed of an aggregation of several corporations; and if these similar corporations are intangible and exist only in contemplation of law, it is plain that the definitions are, in fact, no definitions.

Chancellor Kent defines a corporation to be "a franchise possessed by one or more individuals who subsist as a body politic under a special denomination, and are vested by the policy of the law with the capacity of perpetual succession and of acting in several respects, however numerous the members of the association may be, as a single individual."[2]

By this definition a new element is brought in, viz.: that a corporation *is a franchise* possessed by one or more individuals. He says of Chief Justice Marshall's language, that a corporation is immortal as well as invisible and intangible, but the immortality of a corporation means only its capacity to take in perpetual succession so long as the corporation exists. So far from being immortal, it is well known that most of the corporations recently created by statute are limited in duration to a few years.

[1] Regents of University of Maryland v. Williams, 9 G. & J. (Md., 1838), 365, 393, 395; 31 Am. Dec. 83.

[2] 2 Kent's Com. 295.

Is then the franchise, in legal contemplation, the corporation, or is the body the corporation? It must be borne in mind that language is now being used in a technical legal sense, irrespective of what in popular idiom it may mean. Generally, horses and chattels and land are spoken of as property; and while such use of these words is accurate enough for ordinary conversation, it is altogether too loose and indefinite for the purpose of exact legal expression.

Strictly speaking, the chattel or the land is not property, but the right and interest which one has in and to the land or chattel is property.[1]

So Marshall, in his argument in a celebrated case, says: "Property is the creature of civil society."[2] He says from the bench[3] that a corporation is the mere creation of the law.

If we would comprehend the real nature of corporations, we must use language with perfect exactness. The whole idea of personality, whether applied to a single individual or an aggregation of individuals, is in a certain sense a legal fiction by which the individual or the aggregation is clothed with certain capacities.[4]

Judge Sharswood observes, in his opinion in a celebrated case, that the object of making it (the city) a body politic is giving it a legal entity, a name and seal by which to act in solemn form, a capacity to contract and be contracted with, to

[1] Wynehamer v. People, 13 N. Y. 278.

[2] Ware v. Hylton, 3 Dall. 199.

[3] Trustees v. Woodward, 4 Wheat. 316.

[4] People v. N. R. S. Ref. Co., 121 N. Y. 619. The abstract idea of a corporation, the legal entity, the impalpable and intangible creation of human thought, is itself a fiction, and has been appropriately described as a figure of speech. It serves very well to designate in our minds the collective action and agency of many individuals, as permitted by the law; and the substantial inquiry always is, what in a given case has been that collective action and agency. As between the corporation and those with whom it deals, the manner of its exercise usually is material; but as between it and the state, the substantial inquiry is only what that collective action and agency has done; what it has in fact accomplished; what is seen to be its effective work; what has been its conduct. It ought not to be otherwise. The state gave the franchise, the charter, not to the impalpable and almost nebulous fiction of our thought, but to the corporators, the individuals, the acting and living men, to be used by them, to redound to their benefit, to strengthen their hands and add energy to their capital. If it is taken away, it is taken from them as individuals and corporators, and the legal fiction disappears. People v. N. R. S. Ref. Co., 121 N. Y. 622.

sue and be sued, a *persona standi in judicio*, to hold and dispose of property, and thereby to acquire rights and incur responsibility.[1]

We may now see that the idea of a corporation is in legal contemplation a franchise conferred upon either a natural being or an artificial body already in existence,[2] which confers upon it a capacity differing from its natural capacity.

Sec. 424. *Meaning of "Franchise."*— The right to be a corporation is generally called a franchise. The franchise which is conferred upon the individual or association is the cloak or mask conferred upon them, whereby they are hid from view, become a single legal entity or personage, different in capacity and character from a natural person.[3] The individuals are not a corporation any more than chattels or land is property; but the individuals, with the capacity of the law — that is, with the franchise,— become a new being endowed with a *personas*. Thus, in the same sense in which the law creates property, the law creates the corporation. That which is the subject of property must exist by nature; that which constitutes the elements of a corporation must exist by nature. The law clothes them with an artificial aspect, or endows them with artificial capacities; and this is the legal conception of the franchise conferred upon natural persons to be a corporation.[4]

The aggregation of men is constituted by their agreement, but the corporate entity is created by the charter.[5]

The word "franchise," so often used in the act and in the deed, has various significations, both in a legal and popular sense.[6] A corporation is itself a franchise belonging to the

[1] Philadelphia v. Fox, 64 Pa. St. 180.

[2] That is, the body must be in existence; the men incorporated must have been united by some sort of convention, and must accept the charter. Franklin Bridge Co. v. Wood, 14 Ga. 80.

[3] People v. N. R. S. Ref. Co., 121 N. Y. 619; California v. Pacific Ry. Co., 127 U. S. 40, 41.

[4] It is in this sense that Marshall uses the expression, a corporation is intangible, invisible, and exists only in contemplation of law; and to him property and corporations are alike the creations of law. See Cutshaw v. Fargo, 8 Ind. App. 691.

[5] See illustration in argument of Osborn v. Bank, 9 Wheat. 791.

[6] "*The word 'franchise'* is often used in the sense of privileges generally, but in its more appropriate and legal sense the term is confined to such rights and privileges as are conferred upon corporate bodies by legislative grant. It is in the latter sense alone the word is now to be considered. The franchise proposed

members of the corporation; and a corporation, being itself a franchise, may hold other franchises, as rights and franchises of the corporation. A municipal corporation, for instance, may have the franchise of a market or of a local court; and the different powers of a private corporation, like the right to hold and dispose of property, are its franchises. In a more popular sense, the political rights of subjects and citizens are called franchises, like the electoral franchise.[1]

A corporation, being itself a franchise, consists and is made up of its rights and franchises; and when all its franchises are gone, by surrender, by forfeiture judicially ascertained, by limitation of the grant, or in any other way, the corporation has

to be sold is a corporate franchise, and the artificial body or political entity to which it pertains is what is known to the law as an aggregate corporation. Such a corporation has been well defined to be 'an artificial being created by law and composed of individuals who subsist as a body politic under a special denomination, with the capacity of perpetual succession, and of acting within the scope of its charter as a natural person.' Now, a franchise is nothing more than the right or privilege of being a corporation and of doing such things, and such things only, as are authorized by the corporation's charter. This right of a body of men to be and act as an artificial person without, as a general rule, incurring individual responsibility, is declared by Blackstone to be 'a royal privilege or branch of the king's prerogative, subsisting in the hands of a subject.' (2 Blk. 37.) Such right or franchise is defined by Bouvier to be 'a certain privilege conferred by grant from government and vested in individuals.' (1 Bouvier, 545.) Now it is clear from these definitions, and from the very nature of a corporation, that a franchise, or the right to be and act as an artificial body, vests in the individuals who compose the corporation and not in the corporation itself. This fact, we think, is not without significance in reaching a conclusion upon the main question to be determined, outside of the numerous authorities bearing directly on the subject.

"It will be kept in mind that the corporate body, for purposes of ownership, and, indeed, for most purposes, has a distinct identity from that of the individual corporators. The latter may be wealthy, when at the same time the former is insolvent, and *vice versa*. The corporation has no right to appropriate, sell or otherwise dispose of any of the property or effects of a corporator. The relation of debtor and creditor may subsist between them in the same manner as between the company and other persons. The company's entire property may be swept away from it by sequestration or other means, and yet its franchises will remain vested in the corporators until they are either abandoned or forfeited to the state. All these propositions are familiar to the courts and the profession, and are well sustained by authority." Fietsam v. Hay, 122 Ill. 293.

[1] Com. Dig., Franchise, F. 1; Angell & Ames on Corp. 3; The King v. London, Skinner, 310, 311.

no longer any practical existence. If the franchise or franchises are of a nature to continue after they are lost by the corporation, they may be regranted to another corporation or to other individuals; but the former corporation is substantially dissolved.[1]

The franchise to be a corporation is one thing, and belongs to the persons who compose the corporation; it clothes them with a capacity of being an entity different, in the eye of the law, from their natural and private capacity. The corporate powers, sometimes called corporate franchises, are such powers as vest in the corporate body. These two are quite distinct.[2] The franchise to be a corporation cannot be sold, although by a transfer of the shares of stock the franchises may pass to an entirely new body of men; but the franchises still belong to the same corporation.[3] The body has changed, but the corporation has not. There has been no dissolution, succession or metamorphosis.[4]

Sec. 425. *The Attributes of a Corporation.*— Before attempting to define a corporation it will be wise to describe some of its constituent parts and characteristic attributes. In the first place, a corporation always consists of one or more persons, either natural or corporate; and if you call the individuals who are aggregated into a corporation a "body," then the body of the corporation is tangible and must exist in fact. So true is this, that the citizenship of the corporation was at one time thought to be determinable by determining the citizenship of its members.[5] But if the franchise, the artificial cloak, is the corporation, then the corporation is intangible and exists only in contemplation of law.[6]

A corporation cannot exist without its members.[7] Neither is it true, in a universal sense, that all corporations are created entirely by law; for the creation of all private and pure mu-

[1] 2 Kent's Comm. 305, and note *a*, 308 and 309; The King v. Passmore, 3 T. R. 199; Com. v. Hancock Bridge, 2 Gray, 23, 60; Pierce v. Emery, 32 N. H. 507; Warner v. Beers, 23 Wend. 172.

[2] S. P. Ry. Co. v. Orton, 6 Sawy. 157; 32 Fed. Rep. 458.

[3] Fietsam v. Hay, 122 Ill. 291–295.

[4] M. & L. R. Ry. Co. v. Commissioners, 112 U. S. 609–619.

[5] Bank v. Earle, 13 Pet. 514. See Const. Hist. Lect. Ann Arbor, 142. For modern view, see G., H. & S. F. Ry. Co. v. Gonzales, 151 U. S. 496.

[6] McCulloch v. Maryland, 4 Wheat. 316.

[7] 2 Wilson, 271; Mayor v. Seaber, 3 Burr. 1867.

nicipal corporations requires the voluntary consent of the corporators, individual members, or shareholders, to combine with the consent of the legislative will. That is, the law-makers cannot compel them to be a corporation, or confer the capacity without the consent; but in another sense the capacity, the franchise, is entirely the creature of law — a mere legal fiction. As will more clearly appear, important consequences of right and liability follow this distinction.

The distinguishing feature of a corporation is that the *entity* or personality recognized by law is created by law. The individual or individuals who compose or constitute the elements of a corporation may be natural, in fact always are individuals. But the legal entity known as the corporation is the mask or *persona juris* thrown over them by the law, and which hides the individual from the public view and protects him from personal liability.[1]

A corporation is a person; it is not a genus, but a species; and is generally called an artificial person.[2]

Definition.— A corporation is a legal entity or juristic person, which results from a personality being by the law conferred upon one or more, by virtue of which they have a capacity differing from their ordinary natural capacity,[3] or by virtue of which many become as one with peculiar attributes.

A corporation is not merely a capacity, neither is it merely a franchise. It is that which results from or grows out of the franchise, and which is by this franchise given a capacity differing from the natural capacity of the persons who constitute its membership. The franchise is the means, the corporation is the result. The corporate franchises are attributes conferred not upon the individuals who constitute the members of the corporation, but upon the legal entity.[4] It seems that there are but three essential attributes — necessary attributes — to a corporate being, viz.: First, to have perpetual succession, under a given designation; second, the capacity to acquire rights and assume obligations by this special denomination or name; third, to possess the corporate franchises and rights and enjoy

[1] Cutshaw v. Fargo, 8 Ind. App. 691.

[2] Maltz v. American Exp. Co., 1 Flipp. 611; Beaston v. Farmers' Bank, 12 Pet. 134.

[3] There are few, if any, *private* corporations sole; if any, they are ecclesiastical.

[4] Warner v. Beers, 23 Wend. 172.

them to the common interest of the corporators; to have perpetual succession under this artificial form, so that the individuals composing the body may entirely change without changing the identity of the corporation.[1]

In most cases, many more privileges and franchises than these essential ones are conferred upon corporations, but these are not *essential* to corporate existence, because they are privileges which might in the same manner be conferred upon individuals; while corporate powers, strictly speaking, are attributes or capacities essential to corporations, and which at the same time could not be exercised by *an individual*.[2]

Sec. 426. *Are Created by the State.*— The capacity of being a corporation can only be conferred by the state. It cannot be assumed by individuals. By no form of agreement, without this co-operation of law, can any number of persons become a corporation, because it is not within the power of individuals to change their personality.[3]

As we have noticed, and as we will examine more closely in other connections, pure corporations can only be incorporated by consent. No man or body of men can be compelled to become a corporation against his or their will; and for this reason it is said that the act of incorporation or charter of a private corporation is a contract, and cannot be arbitrarily taken away. Such capacity arises by mutual consent and operates as a contract.[4]

One of the most essential differences which exist between pure corporations (whether public, municipal or private) and public *quasi*-corporations is in the presence of this contract in the one case and its absence in the other, and the consequent control over the existence of the corporation in one case and the limitation upon the power of the people or legislative authority to arbitrarily, and without due process of law, take away its corporate existence.

Sec. 427. *Classification of Corporations.*— There have been several classifications of corporations, but none which will per-

[1] Warner v. Beers, 23 Wend. 174.

[2] S. P. Ry. Co. v. Orton, 6 Sawy. 188. While all of the above are essential to corporations, it does not follow that one of these may not be possessed by others, *i. e.*, perpetual succession.

[3] California v. Pacific Ry. Co., 127 U. S. 1–40. A corporation is not merely a capacity, it is an entity. Warner v. Beers, 23 Wend. 173.

[4] M. & L. R. Ry. Co. v. Commissioners, 112 U. S. 614.

mit the arrangement of all of the different species of corporations into separate and distinct classes in such a manner that none of *the powers* of a corporation of one class will fall within another.

All jurists admit the obvious distinction between public and private corporations, but they at the same time recognize that all public corporations may possess franchises and corporate powers which are of a private nature,[1] and not partaking of the character of a governmental power or duty; and conversely, it is equally true that private corporations may be invested by the legislature with powers which are public in their nature and might well be performed by public officers.[2] It follows,

[1] *A municipal corporation* ordinarily possesses several distinct classes of power:

First. Those strictly political or governmental, pertaining to the police and governments, in which they are the mere agents of the state. Moffit v. Asheville, 103 N. C. 237; Hill v. Boston, 122 Mass. 344.

A second class, such as the public are always interested in, namely, schools, hospitals, and the like. Speight v. People, 87 Ill. 595; Benton v. Trustees, 140 Mass. 13; Hearns v. Waterbury Hospital, 66 Conn. 98.

A third class, only *quasi*-public in their nature, such, for instance, as gas-works, water-works for fire protection, electric-lighting plants, and the like. Courts of different states do not agree in classifying these functions as public or private, but most American cities possess them. Springfield F. & M. Ins. Co. v. Keensville, 148 N. Y. 46; Elmore v. Drainage Com., 135 Ill. 269; Hill v. Boston, 122 Mass. 344; Walla Walla Co. v. Walla Walla, 19 Sup. Ct. Rep. 81.

A fourth class — private property. Hill v. Boston, 122 Mass. 344–59; Safety I. W. Co. v. Baltimore, 66 Fed. Rep. 140; People v. Hurlbut, 24 Mich. 103.

[2] This was wherein the difficulty lay in the Dartmouth College Case. The legislature of the state possesses the power to regulate the internal police of the state, and, having regard to the health and lives of the citizens of the state, to adopt such wholesome regulations as may be deemed best calculated to guard against danger and evils on account of the practice of the professions by ignorant and incompetent or improper persons. That this is a department of the police and a public function no one will deny. The legislature has the right to commit the administration of such a power to a private corporation. The corporation in that case acts as a governmental agent. It cannot be said that it obtains a franchise, but it possesses a power, and *the possession of this power and function does not make the corporation public.* Washingtonian Home v. Chicago, 157 Ill. 414; Regents v. Williams, 9 G. & J. 365; 31 Am. Dec. 72, 80, 81. It is there said: "A corporation may be private, and yet the act or charter of incorporation contain provisions of a positively public character, introduced solely for the public good and as a general police regulation of the state; such as the statute of 14th and 15th Henry VIII., chapter 5, creating the College of Physicians in London, and imposing a fine on persons practicing without license from the college,

therefore, that the practical classification which solves the questions of power, liability or immunity is in each case to depend upon the character of the specific corporate power attempted to be exercised, or exercised, and not of the preponderating powers of a given corporation which would determine its classification, when that is drawn in question.[1] That the broader classification is made according to the character of the foundation and the principal and paramount corporate powers of the given corporation.[2]

Again, it is obvious that no general classification of public or private corporations can be made which will be universal in its application, unless the courts of the various states are uniform in the view which they hold as to the character of the va-

which was held to be a private corporation (Gilbert's Evidence, 13), and the statute of the same reign, chapter 42, founding the College of Barbers and Surgeons." See also Hearnes v. Waterbury Hospital, 66 Conn. 98; Louisville v. University, 15 B. Mon. 642.

[1] People v. Detroit, 28 Mich. 228; Galveston v. Posnainsky, 62 Tex. 118–31; Heller v. Stremeld, 52 Mo. 309.

[2] Mr. Justice Shiras (of the United States district court), in the Yale Law J., February, 1893, gives the following suggestion: "In the varied uses and purposes to which corporate powers and privileges are now applied, necessity exists for the adoption of some general terms of classification, which, when applied to a given corporation, shall describe with reasonable accuracy the character of the corporate body, having in view the objects and purposes of its creation and the powers conferred upon it. To that end, it is suggested that corporations be classified as *political, public,* and *private. Political,* to include that class of corporations created to exercise delegated sovereign control over a defined subdivision of the state, like cities, towns, parishes, counties, school districts, and the like. *Public,* to include that class created to aid in the performance of governmental public duties, or in supplying public needs, like companies organized to build and maintain the public highways, or to furnish water and light for common use, or otherwise to supply the public wants, and wherein, to enable the corporation to accomplish the object of its creation, there is conferred thereon the power to exercise the right of eminent domain or other sovereign power; and *private,* to include that class of corporations created to advance private enterprises and undertakings, which are not authorized to exercise any sovereign power, but are in fact created only to confer privileges not available to the individual corporators." It is difficult to perceive how the change of name from *quasi-public* to public, in one case, would aid in simplifying the matter; and would not the classification of cities with towns and counties obscure the distinction that exists between them,—the former being real corporations, while the latter only partake of the nature of corporations and are only *quasi* such? It is believed that the object to be kept in mind is the nature of the corporate power.

rious corporate bodies. This is also true as to the classification of corporate functions; for it may, and in several instances does, happen that the courts of the various states will not agree as to what are public governmental functions and what are mere private functions.

Again, too much weight must not be given to English cases so far as they relate to the corporate nature of localities, because of essential distinctions between the principles underlying the nature of their powers.[1] With this caution, therefore, as to the generality of the classification, and the admonition to examine the character and quality of each particular corporate power, a general classification may be attempted.

All reasoning upon the classification of corporations, as to whether they are public or private, goes back to the opinions of Chief Justice Marshall, Justice Story and Justice Washington in the celebrated *Dartmouth College Case*, and those opinions were based upon distinctions already well established.[2]

Some criticisms are indulged, and it is sometimes stated that the opinions do not agree in the reasoning.

It is believed, however, that a close examination of these opinions will prove them to be in entire accord, both as to reasoning and conclusion.

The Chief Justice says: "The character of civil institutions does not grow out of their incorporation (that is, the fact of being incorporated), but out of (*a*) the manner in which they are formed, and (*b*) the objects for which they are created.[3] The right to change them (by legislation) is not founded on their being incorporated, but on their being *instruments of government* created for its purposes.

The same institutions, created for the same objects, though not incorporated, would be public institutions and of course be controllable by the legislature.

Webster had argued that the corporation was private because founded by private persons, and that the object was not material.

Justice Story says: "If the foundation be private, though under the charter of the government, the corporation is private,

[1] See Greenleaf's argument in Rumford v. Wood, 13 Mass. 193.

[2] Terrett v. Taylor, 9 Cranch, 43.

[3] Trustees v. Woodward, 4 Wheat. 638.

however extensive the use may be to which it is devoted, either by the nature of the foundation or the nature and objects of the institution."

The Public Corporation.— It is obvious that the language of all contemplates that where the public is not only the incorporator, but the creator, of a corporation, and the use is also public, the corporation must in that case be public; whereas, if the association and institution is established by private agreement, and becomes a corporation merely by grant of a charter, the corporation is private in its nature, provided its purposes, though of great public interest, are still regarded as in the nature of private enterprise, as distinguished from *a governmental object;* but, although the association is *voluntary*, as in the case of a city or incorporated village, but the objects of the incorporation are *governmental*, the corporation then becomes public.

Quasi-Corporations.— On the other hand, if some sort of loose organization is given solely for the purposes of government, without regard to any prior agreement between individuals or inhabitants, and without their acceptance or will in the matter, the association or organization, though public in its character, and partaking somewhat of the nature of a corporation, is not, strictly speaking, a corporation, and is termed a *quasi*-corporation.

The municipal corporation possesses a corporate capacity and an identity distinct from the state, while the *quasi*-corporation is but one of the members or parts of the state, having no distinct identity. It is in all respects a mere agency, having no voice in its own creation.[1]

Sec. 428. *Public Corporations.*— Public corporations are conveniently classified as *municipal* corporations and *quasi*-corporations.

Municipal corporations are the only organization within this designation which are, properly and strictly speaking, corporations.

Judge Elliott, in his excellent treatise on Municipal Corporations, says that "the distinguishing features of municipal corporations are the possession of certain *powers of legislation* and of certain powers and privileges which are to be exercised

[1] Heller v. Stremeld, 52 Mo. 309; Philadelphia v. Fox, 64 Pa. St. 169.

for the particular benefit of the inhabitants of the locality. . . . Under the head of *quasi*-corporations are included those bodies which are public in their nature, but in some cases have not all the characteristic powers and liabilities of corporations."[1]

What is meant by these "*certain powers of legislation*" and privileges which are said to be given to municipal corporations, and wherein they distinguish the properly so-called municipal corporation from the *quasi*-corporation, which is always erected for the purpose of "local self-government,"[2] to be exercised in many instances by legislation for the particular benefit of the inhabitants of the locality?

The real distinction between the municipal corporation, properly so called, and the local organizations, such as unincorporated townships, school districts and counties, consists in the fact that the municipal corporation is a voluntary one, originating in personal agreement, and has *a charter*, which may confer upon it not only powers strictly governmental, but also of a private nature; and this charter once given cannot, so far as private interests have vested, be taken away by the legislature, and can be forfeited only by judicial process, although the purely governmental power may be taken away at will.

In the so-called *quasi*-corporations, aside from constitutional limitations, they are the mere creatures of the legislature. They have no inherent charter rights as to their local self-government, except as protected by the constitution. Their functions are entirely governmental.[3]

Sec. 429. *General Classification of Private Corporations.*[4]— For the purpose merely of pointing out beforehand the nature of these bodies, which will be treated hereafter, and contrasting them with associations of a public nature, the classes and char-

[1] Elliott, Mun. Corp., sec. 3.

[2] Id. In the note, which cites 1 Dill. Mun. Corp., sec. 20, it is said that "the fundamental idea of a municipal corporation is 'the investing of the people of a place with the local government thereof.'" (Citing Cuddon v. Eastwick, 1 Salk. 143, quoted with approval in People v. Morris, 13 Wend. 325, 334.) This is precisely the function of township organization, and towns possess legislative powers. The distinction, then, between towns and cities must be sought further.

[3] People v. Village of Harvey, 142 Ill. 573. See *post*, sec. 432.

[4] A more minute classification will be given when the subject of private corporations proper is reached.

acteristics of private corporations will here be merely mentioned.

A private corporation is a franchise granted by the charter, which includes the legislative enactment, whether in the form of a general or special act, for an object which is private in its interest and its nature.

This object may be one in which the public are vitally and directly interested, and one which the public might properly accomplish; but that does not necessarily change the matter.[1]

Of such a character are educational and eleemosynary corporations, which it is extremely difficult to distinguish from a public corporation, and possessing a class of powers which are very frequently exercised by the public.

Quasi-public corporations are strictly private corporations, but are so called because the object in which they are engaged is of such general interest that it would be proper for the public to engage in or aid; or of such a nature that it is essential to the general convenience that such business be conducted, regulated and controlled by the state. Familiar instances are common carriers and warehousemen. The corporation itself is strictly private: the nature of its business is what occasions the designation *quasi*-public.[2]

Bearing these distinctions in mind, the order of arrangement naturally requires the treatment of the local subdivisions of the states, after which will follow the treatment of the subject of private corporations as private persons.

Sec. 430. *Local Organization — Form of.*— In considering the systems of local self-government which obtained in the various state of the Union, it should be observed that the investigation includes the subject of the corporate capacity or entity of localities and also the law of subordinate officers, and in that sense the treatment conforms strictly to the idea of personality heretofore noticed, and the subject is still within the law of persons, public or political.

The system of local self-government which prevails in the United States presents itself in a double aspect: the one a local

[1] Trustees v. Woodward, 4 Wheat. 518; Academy v. Harvard College, 12 Gray, 594; Board of Education v. Bakewell, 122 Ill. 339; Washingtonian Home v. Chicago, 157 Ill. 414.

[2] Miners' Ditch Co. v. Zellerbach, 37 Cal. 576.

territorial subdivision having no regard to the number of persons occupying the territory, the other in conferring upon an aggregation or collection of people an artificial, single corporate capacity. The former are counties, townships or parishes; the other pass under the name of cities, villages and towns.[1] The former are but *quasi*-corporations; the latter, if incorporated, are municipal corporations.

Sec. 431. *Historical View — Utility of.*— An account of the origin of counties, townships, cities, villages, and the power and duties of the magistrates to administer the law in these localities, would constitute a history of local self-government.[2]

Tracing their origin from some rude germ in a remote age, and explaining by what circumstances and with what modifications they come into our jurisprudence, would be a matter of interest, but beyond the scope allowed in this work.

The practical utility of such an inquiry into the history and organization of counties and towns anterior to the settlement of North America is very slight, if measured by the assistance furnished by the information in judging of the nature, capacities, liabilities and exemptions of our own institutions passing under the ancient names of cities, counties, townships, boroughs, towns and villages.

One historian sees in the folk-mote the germ of the Anglo-Saxon free state;[3] another concludes that, because in New England the inhabitants universally erected a meeting-house which served as a place of religious worship and as a place for the administration of local governmental affairs, there is an analogy between the legal proposition that in England no place could be a town if there had never been a parochial church and this action on the part of the New England settlers.[4]

[1] The words *town* and *township* are frequently used indiscriminately even in statutes and judicial decisions. There was probably an essential difference in the signification of the two, the town meaning a collection of houses, a little village, while the township applied to the territorial division. Mr. Elijah M. Haynes, the writer of a local work in Illinois, states that the suffix probably comes from the Dutch *schip*, or the Anglo-Saxon *scyppen*. However that may be, the student of legal institutions must take the matter as it now exists, that is, with the indiscriminate use prevailing.

[2] See Cooley's Blk. (3d ed.), App.

[3] Johns Hopkins University Studies, vol. II, pp. 211–437.

[4] Welsh v. Wray, Hobart, 41. But this was, in England, an essential to a town, not a township. Wood's Inst., Introduction. It is said of these

It will become early apparent to any one who investigates these subjects that inquiry into early village communities throws a very faint light upon the nature of village entities in America.

Should it be undertaken to settle disputed matters involving the rights and liabilities of boroughs, towns and villages in the United States by applying the rules applied by the English courts to entities passing under the same name, without distinguishing between the nature of the different entities, it will be discovered that the attempt can result only in confusion.

If regard is paid to our judicial decisions,[1] which have generally been made after careful investigation, it will be discovered that American municipal or *quasi*-corporations bear little analogy to the English corporations bearing the same names. Thus it is said the towns of New York are primarily political divisions. This was in no sense the case in England. As towns existed in New York they are unknown to the common law, and are of purely statutory creation,[2] while the pure New England town is an entirely different thing from the English town.[3]

towns that the inhabitants are a corporation for the purpose of supplying religious worship. Huntington v. Corporators, Kirby, 45 (Conn., 1786).

[1] There is occasion to use caution to distinguish between decision and *dicta*, even in our own decisions. There is a tendency in *dicta* to ascribe absolute and unlimited power to the state legislatures over the existence and franchises of public corporations. Mount Pleasant v. Beckwith, 100 U. S. 514. But when the case turns upon a question of legislative encroachment, the *decisions* have imposed important limitations upon the power of the legislature.

[2] Dorn v. Town of Oyster Bay, 84 Hun, 511.

[3] Boston was the first town in New England. For an interesting history of these early societies, see observations of the reporter in Smith, New Hampshire Report, pp. 1, 271–274. "Few, if any, English corporations," says an early New Hampshire case, "were like our towns." And speaking of the competency of inhabitants as witnesses, it is said: "In determining whether this interest is sufficient to render the inhabitants of towns incompetent witnesses for the towns in which they reside, very little aid can be derived from English authorities, because in England there are very few, if any, corporations which exactly resemble our town corporations. The charters of their cities, etc., usually confer particular *private privileges* upon the members of the corporation, so that the corporation is not merely public, but must be considered as in some respects a private corporation. And most of their decisions upon this point are so loosely reported that it does not distinctly appear what influence this circumstance may have had upon the decision in particular

Sec. 432. *Counties and Townships are Organic Elements of the State and are Inviolate.*— The student or jurist, examining the subject of the relative powers of the legislature and the local organizations, towns, villages, counties and cities, will discover much apparent contradiction of opinion as to the rights of the general legislative body of the state to add to or take from the powers and functions of these local bodies.

Expressions are common that these local subdivisions are mere auxiliaries of the state legislature; that they are the mere creatures of the legislature, and are entirely within its control; and that the legislature may enlarge, alter or divide, or entirely abolish, these local corporations.

The supreme court of Illinois says: "The relation between cities and villages and counties[1] is totally unlike that between the government of the state and the general government of the United States. Cities, villages and counties are mere agencies of the state, by and through which to conveniently administer the local government. In the absence of express constitutional restraint, the general assembly might abolish them, one or all, and substitute other and entirely different agencies in their stead."[2]

Indeed, the supreme court of the United States has said that they (these local bodies) cannot have the least pretension to sustain their *privilege or existence* upon anything like a contract between themselves and the legislature of the state;[3] seeming to imply that their existence was a privilege.

On the other hand, there are numerous expressions that there are limitations upon the power of the legislature to abolish townships, counties and cities, and that the admission of such a proposition admits that local-self-government exists at the will of the legislature.

Advocates on either side of cases quote the language of these

cases. It is, however, probably owing to this very circumstance that no general rule as to the admission of corporators as witnesses has ever been established in England. 2 Shower, 148; Weller v. Governors of the Foundling Hospital, 3 Burr., p. 1847." Eustis v. Parker, 1 N. H. 276.

[1] There being fundamental distinctions between villages, towns, counties and cities, it is strange that in a case where only the powers of a city were under discussion they should be grouped in one general statement.

[2] County of McLean v. City of Bloomington, 106 Ill. 214.

[3] Mt. Pleasant v. Beckwith, 100 U. S. 514.

opinions to sustain their positions: the one, that the legislature may do anything, because they created and they may destroy; the other, that the legislature cannot take away local self-government.[1]

The confusion which results from these general, unqualified statements is lessened if the true distinction between the subjects involved is made; and, by confining the expressions used in these opinions to the particular facts of the case, most of the decisions may be harmonized, but the *obiter* contained in the *expressions* cannot.

Classes of Powers Possessed by Townships and Counties.— The inhabitants of a township unincorporated, or a county, are not an agency. They are a part of the constituent body.[2] They possess both political rights and civil rights.

These local organizations exist for a double purpose:

First, as political subdivisions, essentially for the exercise of the political rights of the citizen in our scheme of a republican government with its representative system. This is the paramount and principal function of the county and township organization.

Second. The governmental function as an agency of the legislature to aid in exercising the *administration* of the affairs of the state. This is not essential to the existence of the township or county. The legislature, no doubt, has full and complete control over the general government of the state, and may choose the town officers or county officers as an agency to carry out those matters over which the legislature has complete control; but the political powers of the inhabitants are beyond and above the power of the legislature, and so are matters purely local. The opposite view as to absolute power is a mere theory without an instance of its exercise.[3]

"*Political legislation*," says Grimke in his celebrated argument before referred to, "is then, according to our distribution of power, the peculiar province of the people.

"*Civil legislation* is the appropriate office of the general assembly. The ordainment of a constitution, under our improved

[1] See 2 Cooley's Blk., App., p. 469.

[2] They are the people. They, through their votes, are the sovereign body. Cooley's Const. Lim. (6th ed.) 40; McCrary on Elections (4th ed.), 13, 24.

[3] See Judge Cooley's view. 2 Cooley's Blk. (3d ed.) 468.

system of government, is therefore of itself a withdrawal of political power, by the act of the people themselves, from the jurisdiction of the general assembly, and an appropriation of it exclusively to themselves. Can it be denied that the beauty and harmony of our system, theoretically considered, justify and require this construction?"[1]

Mr. Webster, in his argument in the Rhode Island rebellion case, said: "In England the representative system originated, not as a matter of right, but because it was called by the king. The people complained sometimes that they had to send up burgesses. At last there grew up a constitutional representation of the people. In our system it grew up differently. It was because the people could not act in mass, and the right to choose a representative is every man's portion of sovereign power. Suffrage is a delegation of political power to some individual."[2]

Our representative system requires the choice by localities of state representatives and local officers; hence the local subdivisions. These subdivisions are constituent bodies for this purpose.

We have heretofore sufficiently distinguished between the government and the people. Suffrage is an act of the people.

If the local subdivision does not rest on contract, as asserted by the supreme court, it does rest on a species of convention, namely, the constitutional basis upon which is founded our whole republican system of local self-government. That legislatures have until recent years been very cautious and sparing of enactments encroaching upon this system is the only reason why the right has not been defended. In recent years encroachments have been made by the legislature and have been as promptly checked.[3]

[1] State v. Hunt, 2 Hill (S. C.), *13.

[2] Luther v. Borden, 7 How. 1.

[3] "The *political* organization called the 'state' is created for the protection and enforcement of the rights and liberties of the people. Its sovereignty or power of rightful control is for the protection of personal [civil] and political rights as well. Prominent among these rights and liberties is the right of citizens to participate in the election; to have their proper voice and influence and just representation in the representative branch of the government as members and as possessors of the sovereignty vested in the people outside of the constitution, and not delegated by it. It is this sovereignty, these rights, these privileges and liberties, of the people which this court by virtue of its prerogative jurisdiction

The proposition that township and county organizations exist at the will of the central legislative assembly is now repudiated by weight of authority and force of opinion, which does not admit of contradiction. In fact, there are no *decisions* which hold that the legislature can abolish the political functions of the people exercised through these organizations, or abolish these territorial divisions.

There are many decisions holding, and properly, that such *mere governmental* functions as are *delegated* by the legislature may be resumed by the same body. Herein lies the true distinction. These local organizations exist for *local* purposes as constitutional rights, or the whole system falls. As is well said by Judge Cooley: "There is no middle ground. A state has no constitutional safeguards for its people, or it [a city even] has the right to have all its officers appointed at home. Unless this power is exclusive, the state may manage all city affairs by its own functionaries; and *this is more true of the town and county* organization than of a city."[1]

The boundaries may be changed, enlarged or diminished, but the local subdivision must be preserved for the purpose of serving the function of local representation in our republican form of government.

As a matter of course, all authorities admit that the property rights of the locality or the inhabitants thereof must be preserved.[2]

has an undoubted right to protect and enforce, as against unconstitutional and illegal attack from all sources whatever. Chief Justice Ryan, in In re Ida Louisa Pierce, 44 Wis. 431–443, speaking of the original jurisdiction of the court, and the purposes for which it exists, uses the following pertinent language on this subject: 'The words "liberties of the people," in a judicial sense, mean the aggregate political rights and franchises of the people of the state at large. . . . The liberties of the people here and elsewhere are not only essentially subject to the ordinary jurisdiction of the courts, not only unimpaired by them, but are absolutely dependent upon them. The supremacy of original judicial processes enters into the liberties of the people, and is essential to them. Order is essential to all liberty, and judicial supremacy is essential to order.'" State v. Cunningham, 81 Wis. 498, 499. This case came again before the court, and the principle was again enforced that the political right of the people to their local plan of selecting representatives was above legislative encroachment. 83 Wis. 90.

[1] People v. Hurlbut, 24 Mich. 44.

[2] "In respect, also, to public corporations which exist only for public purposes, such as counties, towns,

Sec. 433. *The Position of the City Distinguished.*— The position of the city is in this respect different. While the city plays an important part in our affairs, it is not *primarily* the purpose of the city to perform *political functions*, excepting in anomalous cases mentioned by Judge Tucker, heretofore alluded to; and whatever of *governmental* functions the city performs, it does so by delegation.

As applied to the governmental powers of a pure municipal corporation, a city or incorporated town, it may be truly said, as stated by Judge Sharswood: "It is merely an agency, instituted by the sovereign for the purpose of carrying out in detail the objects of government, essentially a revocable agency, having no vested right of erection, being in no sense a contract with the state, and therefore fully subject to the control of the legislature, who may enlarge or diminish its territorial extent or its functions, may change or modify its internal arrangement, or destroy its very existence with the mere breath of arbitrary discretion. *Sic volo, sic jubeo*, is all the sovereign need say."[1]

cities, etc., the legislature may, *under proper limitations*, have a right to change, modify, enlarge or restrain them, securing, however, the property for the uses of those for whom and at whose expense it was originally purchased." Terrett v. Taylor, 9 Cranch, 43–52; People v. Hurlbut, 24 Mich. 44. See People v. Draper, 15 N. Y. 557; People v. Albertson, 55 N. Y. 50. For a thorough examination of these principles see Rathbone v. Wirth, 45 N. E. Rep. 15. Gray, J., in this case, quoting Cooley's Const. Lim., p. 35, says: "If not expressly recognized, it is still to be understood that all these instruments are framed with its present existence and anticipated continuance in view. The principle is one which it takes but little reflection to convince the mind of being fundamental to our governmental system, and as contributing strength to the national life, in its educational and formative effect upon the citizen. It means that in the local or political subdivisions of the state the people of the locality shall administer their own local affairs to the extent *that that right is not restricted* by some constitutional provision. . . . The theory of the constitution is that the several counties, cities, towns and villages are, of right, entitled to choose whom they will have to rule over them; and that this right cannot be taken from them, and the electors and inhabitants disfranchised, by any act of the legislature, or of any or all the departments of the state government combined. . . . It is a right not only to be carefully guarded by every department of the government, but every infraction or evasion of it to be promptly met and condemned, especially by the courts, when such acts become the subject of judicial investigation. . . . It cannot be denied that legislation of this character has an inimical tendency, and unless the check of the constitution is strictly enforced by the courts, it may develop a germ of menace to local self-government."

[1] Philadelphia v. Fox, 64 Pa. St. 169.

Even in the case of the city, however, this language carries an impression beyond that justified by law. A governmental function properly exercisable by the general government, but delegated by it to the city, may be resumed; but it cannot be said that a locality may be incorporated into a city, and then the whole district governed by the officers appointed by the state legislature.

These general expressions confuse and mislead, and it is hard to understand why a court deciding a specific point in reference to the power of a city or town should indulge in general language applicable to cities, villages, counties and townships. It may not be out of place to again remark the importance of observing the nature of the power or function in question in a given case, rather than the name of the organization to which it is delegated.[1]

Sec. 434. *Counties.*— Counties were the ancient territorial *civil* divisions of England. They have always existed in those colonies and states which recognized the English sovereign and parliament as having a governmental oversight as to local affairs; and wherever there has been a direct control, the primary subdivision of the territory has been into counties.

The Virginia county system is the one usually contrasted with the New England township organization.[2]

[1] See cases cited in last section, and especially Rathbone v. Wirth. In a recent Michigan case, after defending the county, the court says: "But a city, especially one not in existence at the time of the adoption of the constitution, is the creature of the law, and has no constitutional right of being. There was no city at the time the present constitution was adopted, situated in this state, and there has been none since." Board v. Blacker, 92 Mich. 650.

[2] Of this organization Tucker says: "The civil division of the territory of Virginia is primarily into counties. Formerly there were one or more parishes in every county; in each of which a minister was established, with a salary, etc. The case of the poor was another object of the parochial division, which seems now to be virtually discontinued in all, as it is actually in the new-made counties. . . . Every county is by the constitution entitled to send two representatives to the general assembly; in every county there is also held a monthly court for the trial of all causes not exceeding twenty dollars or eight hundred pounds of tobacco, and for other purposes, such as the proving and recording of wills, deeds, granting letters of administration, etc., and generally for the regulation of the business of the county; as also, a quarterly court for the trial and decision of all causes of a civil nature, both at common law and in equity, to any amount; they have also cognizance of pleas of the commonwealth in all cases where the

As we have seen, the *ancient* New England town[1] was a purely voluntary association, paying little regard to territorial location, its boundaries marking rather a proprietary ownership than a governmental institution; whereas the county has always been a territorial subdivision created by a higher legislative or sovereign power.

In England counties existed only for *governmental* purposes and as a subordinate agency of the sovereign. An exception to this were the counties palatine,— that is, counties by charter granted special privileges of a private or corporate nature and a local jurisdiction.[2]

A county has some corporate characteristics, but it is not a

punishment doth not extend to life or member, or to disqualification from office. . . . The justices of the county are judges of the courts, and the sheriff, or, in case of his disability, the coroner, is the ministerial officer of the court and county. The county lieutenants heretofore had the military arrangements of the county committed to their care, each county composing one or two separate regiments of militia, commanded by proper officers. But their office seems now to be discontinued.

"The counties are by the constitution distributed into twenty-four senatorial districts, each district being entitled to send one senator. The arrangement of the counties into districts for this purpose was made by the same convention which established the constitution; it has not since been altered, the new-made counties having uniformly been arranged to the same district as the county or counties from which they were taken. . . .

"There are a great many towns (villages), or, more properly speaking, sites for towns, established by act of assembly in Virginia. . . . These towns have no other privileges that I know of, except conferring upon the freehold possessor of a lot therein, with a house thereon of twelve feet square, the right of suffrage.

"There are also several *corporate* towns, which possess the privilege of making by-laws for the regulation of their own police, with the further privilege of holding courts, but no other privilege, beyond the common towns above mentioned. Of these, Fredericksburg, Alexandria, Peterburg, Winchester, Staunton, and York, are either the whole, or the most considerable. . . . Norfolk is a corporate borough, and is by the constitution entitled to a representation in the assembly. Williamsburg and Richmond are cities, a title which they seem to have derived from having been respectively the seat of government. . . . Both are entitled to a representative in the general assembly, the former by the constitution, and the latter by an act passed in the year 1783. In all the corporate towns, as well as in Richmond, Williamsburg and Norfolk, the jurisdiction of the courts is somewhat more limited than that of the county courts." 1 Tucker's Blk., 120, note.

[1] This must be confined to the ancient pre-Revolutionary town.

[2] *Proprietaries.*— There existed in New England another organization so peculiar as to be called *sui generis.*

municipal corporation, though often so termed. It is an original political or civil division of the state, created by constitutional authority or statute for the purpose of securing local suffrage and representation and also to aid in the administration of government. It is in its very nature, character and purpose, public, a constituent element in the state, and a governmental agency or auxiliary, rather than a corporation. All the *governmental* powers with which county officers are intrusted are the powers of the state, and all the duties with which they are charged are the duties of the state;[1] but in the representative system the counties possess rights and functions not derived from the legislature.

Counties are the political division of the state government, organized as part and parcel of its machinery, like townships,

It was the proprietary organization — a species of ownership entirely anomalous. See Proprietors of Cornish v. Kendrick, Smith (N. H.), 270.

As to the signification of *county* in English treatises, the following is copied from an English law dictionary, compiled by F. O., printed in 1701: "'County' signifieth as much as 'shire,' the one descending from the French, the other from the Saxon; both containing a compass or portion of the realm, into the which all the land is divided for the better government thereof and more easy administration of justice, so that there is no land but it is within some county, and every county is governed by a yearly officer, whom we call a sheriff. (Cook on Lit., lib. 2, cap. 10, sec. 124.) Of these counties there be four of especial note, which therefore are termed 'county palatines,' as the county palatine of Lancaster, of Chester, of Durham, and of Ely; but Ely has been denied to be a palatine. And this county palatine *is a jurisdiction* of so high a nature that rules of pleas, touching the life or maim of man, called pleas of the crown, are ordinarily held and sped in the king's name, and cannot pass in the name of any other. The general governors of these, by special charter from the king, did heretofore send out all writs *in their own name*, and did all things touching justice as absolutely as the prince himself in other counties, only acknowledging him their superior and sovereign. But by the statute Anno 27 H. 8, cap. 25, this power is much abridged. There are likewise counties corporate, as appeareth by the statute Anno 3 Ed. 4, cap. 5, and these are certain cities (see Cooley, J., in People v. Hurlbut, 24 Mich. 44) or ancient boroughs of the land, upon which the princes of our nation have thought good to bestow such extraordinary liberties. Of these the famous city of London is one, and the principal; York is another (Anno 32 H. 8, cap. 13); the city of Chester a third (Anno 42 Eliz., cap. 15); Canterbury a fourth (Lambert Eiren, lib. 1, cap. 9, Coventry). And to these may be added many more; but I have only observed out of the statutes and other writers the county of the town of Kingston-upon-Hull (Anno 32 H. 8, cap. 26), and the county of Litchfield (Cromp. Just. P., fol. 59, *a*). The county of the town of Haverford, West (Anno 35 H. 8, cap. 26)."

[1] Askew v. Hale, 54 Ala. 639.

school districts, and kindred subdivisions. They do not derive any of the *powers* they possess by a special charter. Their functions are wholly of a public nature, and their creation a matter of public convenience and governmental necessity, and, in order that they may the better subserve the public interest, certain corporate powers are conferred upon them. Whether they will assume the corporate powers and perform the duties and obligations imposed are questions over which they have no choice, but their assumption is obligatory.[1]

Sec. 435. *Towns — The New England Town.*— Swift, in his System of Connecticut Laws, says: "Towns in their present form are a corporation[2] which originated in the state of Massachusetts, and are coeval with the settlement of the country. Though it be unquestionably a fact that our ancestors borrowed the name of towns from the country that gave them birth, yet so different are the powers and privileges that are vested in such corporations here from what they had in England, and so little is the resemblance between the institutions, that our towns ought to be considered as an original discovery in civil policy. At the first settlement of an uncultivated country it was natural to lay it out in small towns for the purpose of accommodating

[1] Granger and wife v. Pulaski Co., 26 Ark. 37–39. See Riddle v. Proprietors, 7 Mass. 169, cited and elaborated; Commissioners v. Mighels, 7 Ohio St. 109–33; Hampton v. Franklin, 16 Mass. 75.

[2] This is a loose use of the word. The New England towns were not *originally* created by a superior legislative power. They were originally voluntary, and existed before the calling of a general court. See note, 32 Conn. 136–37. "The colony of New Plymouth may be regarded as the most ancient establishment in New England. The adventurers procured a *patent* from the Virginia company in 1620, and, eight years after, a *charter* was obtained from the crown, the settlement having been previously effected. This charter, according to Governor Hutchinson, was intended to constitute a corporation *in England* like that of the East India Company; but on the proposal of several gentlemen of figure and estate who were dissatisfied with the arbitrary proceedings [in England] both in *church* and *state*, and pleased themselves with the prospect of the enjoyment of *liberty* in *both* in America, it was resolved the succeeding year, by the general consent of the company, that the *government and patent should be settled in New England.* In 1630 they established rules for proceeding in all civil actions, and instituted subordinate powers for punishing offenders. In *civil actions, equity,* according to the circumstances of the case, seems to have been their rule of determining; the judges had recourse to no authority but common sense and understanding." 1 Tucker's Blk., App., 397.

the adventurers who commenced the settlement in small parties. When towns were thus instituted, it was natural to vest them with all the powers necessary to manage their internal concerns and for their mutual protection and defense. It is beyond a doubt that the peculiar situation of the first settlers of this country led to the discovery and establishment of towns.[1] The same principle induced the first settlers in this state (Connecticut) to adopt the same institution. They therefore divided the country into towns of suitable extent to accommodate the meeting of the inhabitants for civil purposes. However unimportant this practice may appear, yet an attentive examination will convince every one that it is the introduction of a principle which, if carried to its full extent, may produce the most beneficial effects in a republican government."[2]

The Free Planters of Connecticut had no charter when they emigrated from Massachusetts, which was an organized commonwealth.[3]

[1] The novel feature of the New England town, which distinguished it from any organization in England, was the town meeting — the central feature of the New England system of self-government, — and which in time caused the town system to be regarded as an institution rather than an instrument. The town meetings were spoken of in England as hotbeds of sedition; on this side, as the cradle of civil liberty. The student of political science sees this readily. The student of law should grasp the point that the pivot of self-government is the system of local legislation for local affairs and the choice of representatives by local electors. See, however, Shumway v. Bennett, 29 Mich. 451.

[2] Swift's System of Conn. Laws, pp. 151, 152 [1795].

[3] Webster v. Town of Harwinton, 32 Conn. 131. "The Free Planters of Hartford, Windsor and Wethersfield had no patent from the king. They emigrated from Massachusetts, which was then an organized commonwealth, and with the consent of that commonwealth; but they received from Massachusetts no corporate powers. They came from three different towns in as many parties, and when they settled themselves down on the banks of the Connecticut they settled in three different places, and could, and did, organize themselves and establish *governments* as plantations or towns, and as one colony, and with a general court or legislature for all, and thus protect themselves, and make and wage offensive and successful war against their hostile Indian neighbors. But the inhabitants of the several plantations and towns obviously could not, and did not, constitute themselves *corporations;* nor were they created such by any superior government, existing or of their own creation, and were not such in any sense of the term which can be recognized by a jurist in determining a question of constitutional law. They and all the other towns of the state, however, are now corporations, and of course have charters. What are those charters, and whence derived?" Web-

Counties were not the original local units in New England; they were a creation of the general assembly. In New York the case is different, where towns and counties existed from the beginning, the state at first being governed by a royal governor, *without* a local general assembly — an anomalous condition brought about by the *conquest* of New York from the Dutch.[1]

In Massachusetts and Connecticut the townships are represented in the legislature, while the counties are not taken into consideration as local political divisions in the choice of representatives.[2]

In New York there seems to be a difference of opinion as to whether the unit of representation was the town, or a numerical body. One learned jurist affirms that the town is the unit,[3] while another equally distinguished holds that the policy of the state has always been to apportion representatives according to the number of inhabitants,[4] while a somewhat different view is taken by another.[5]

Sec. 436. *Modern Townships.*— The New England township was never seen in its purity outside of New England. Modern township organizations as created in the states differ in some essential particulars. For instance, in Pennsylvania, Ohio, Indiana, Iowa, Kansas and Missouri, the local functions of the town are preserved and a measure of self-government is retained, but there is no town meeting, nor is the town as a town represented on the county board; and the county system prevails in its authority over the township, and the county is represented in the legislature of the state.

The New York plan, which is adopted with some modifica-

ster v. Town of Harwinton, 32 Conn. 131, 136. For the history of New England towns, see Introduction to Root's Reports, vol. 1, p. v; Proprietors of Cornish v. Kendrick, Smith's N. H. Rep. 270.

[1] As to the territory wrested by England from the French and Dutch, Blackstone's remark, that they were conquered, applied; but, because England laid *original claim*, the colonists held they were only *reconquered*. Johnson v. McIntosh, 8 Wheat. 598.

[2] 1 Swift's System, 59; Hampton v. Franklin, 16 Mass. 87; Story's Misc. Writings, 516.

[3] People v. Rice, 135 N. Y. 473, 498.

[4] Baird v. Supervisors, 138 N. Y. 95.

[5] People v. Supervisors, 147 N. Y. 1, 16, 17. See also In re Whitney, 142 N. Y. 531. A Wisconsin jurist asserts that the county has been the most important body in the Anglo-American scheme of self-government. State v. Cunningham, 81 Wis. 440–525.

tions in Illinois, Wisconsin, Nebraska and Michigan, preserves the town meeting, but not the representation in the state legislature.

The county board is a representative body of supervisors from the towns. In all it will be seen that there is a power of local legislation, but no strict uniformity is preserved.[1]

Sec. 437. *Congressional Townships.*— A local subdivision frequently encountered in judicial discussions is the congressional township.

A congressional township is a subdivision which congress has provided in the survey of the public lands of the United States for the purpose of entry and sale.

It is not necessarily a political subdivision of a state or a county. If the state subdivision coincides with the congressional lines, it is only because the state constitution or legislature has adopted these lines.[2]

In many of the western states sections No. 16 in all townships surveyed by the government were granted to the state for the purpose of use or disposal for school purposes. They are held in trust for that purpose exclusively, and neither the land itself nor the proceeds of it can be devoted to any other purpose, nor can any other burden be imposed upon it.[3]

Sec. 438. *Quasi-Corporations Have No Inherent Governmental Powers.*— Counties and townships, and indeed cities and villages as well, derive all their powers and rights to legislate from the constitution, or the legislature which created them.[4]

[1] Bloomfield v. Charter Oak Bank, 121 U. S. 121.

[2] Weightman v. Clark, 103 U. S. 256. See Hackett v. Ottawa, 96 U. S. 86; People v. Trustees of Schools, 78 Ill. 136; Elliott's Mun. Corp., § 9.

[3] People v. Trustees of Schools, 118 Ill. 52.

[4] Crofut v. Danbury, 65 Conn. 294. "The powers expressly granted to a municipal corporation carry with them such other powers as are necessarily implied in or incident to such grants, and it also possesses all powers which are indispensable to the attainment and maintenance of its declared objects and purposes. Municipal corporations are more strictly limited in these respects than private corporations. The test of their right by implication to exercise any particular power is the necessity of such power, not its convenience. If there is a reasonable doubt as to its existence, it does not exist. Pratt v. Borough of Litchfield, 62 Conn. 112, 118; Dailey v. New Haven, 60 id. 314, 319; New London v. Brainard, 22 id. 552; Ottawa v. Carey, 108 U. S. 110, 121; Merrill v. Monticello, 138 id. 673, 681." Crofut v. Danbury, 65 Conn. 294. These powers which are granted are such as are *expressly* granted, or fairly *im-*

It was formerly argued in New England that because townships were older than the state constitution, and older than the legislature, they preserved unto themselves certain inherent rights, unless they were limited by the constitution; but that proposition has been refuted, and it may now be taken as settled that these subordinate bodies derive all their powers from the constitution or the legislature.[1]

Sec. 439. *Quasi-Corporations Have No Inherent Liability for Negligence or Torts of Officers.*— These governmental agencies being in fact, in effect, but a part of the state, are, as a corporate body, no more subject to liability, excepting by statute, than is the state itself; and aside from some legislative provision, they are not liable on account of the malfeasance or non-feasance of their officers.

The distinction must be kept in view between the liability of township officers and the corporate body itself.[2]

It may be stated as an absolute rule, that where the power exercised, or attempted to be exercised, is governmental in its

plied from those expressly granted, and those essential to the accomplishment of the declared objects and purposes. Wheeler v. Wayne Co., 132 Ill. 599; Dill. Mun. Corp. 89. They derive none of their powers from, nor are any of the duties imposed upon them by, the common law. Shepley, C. J., in Hooper v. Emery, 14 Me. (2 Shep.) 375.

[1] Webster v. Township of Harwinton, 32 Conn. 131. Interesting historical matter is contained in the discussion on either side of the question involved in this case. The Massachusetts courts were called upon to repel the same argument with the same conclusion, and this court also traversed the same historical ground as to the origin and development of the New England town. Stetson v. Kempton, 13 Mass. 272; 7 Am. Dec. 145.

[2] "While such corporations as villages, towns and cities, created for their own benefit, are held liable to private actions for injuries resulting to individuals by reason of the neglect of the corporate authorities to keep their streets, street-crossings and sidewalks in repair, there is a distinction in that regard between that character of corporations and towns established by law as civil divisions of a county merely; the latter are not liable, either by the common law or under any statute in this state, to a private action for damages occasioned by the neglect of the town authorities to keep their public highways in repair." Town of Waltham v. Kemper, 55 Ill. 346. See Board v. Allman, 142 Ind. 573, for a great citation of cases. It has been repeatedly held that a county, being a political subdivision of the state, is not liable in an action for damages, unless by consent of the state. A county, for example, has not the capacity to be sued except it is conferred by the law of its incorporation; and if a mode of procedure is pointed out, that mode must be strictly pursued. Rock Island v. Steele, 31 Ill. 543. See 68 Am. Dec. 298, note.

nature, the subordinate body exercising it, whether a municipal corporation or a *quasi*-corporation, or a mere local board attached to one of these,[1] is no more liable to private action than is the state.[2] This principle is equally applicable to municipal corporations. The nature of the power, whether it be general and governmental or local and private, is the test applied by the courts. Naturally, courts do not agree as to the nature of the same power or function.

Sec. 440. *Direct Injuries by Acts Done in Good Faith.*— There is a distinction between the rule as to the liability of a *quasi*-corporation on account of the negligent action and nonfeasance or trespasses of its officers in the nature of torts, and damages which are occasioned to an individual or his property by affirmative action by officers in supposed execution of a corporate power for a public purpose.

In such cases, where the individual sustains a special injury, it may be said that his property has been taken or damaged for the public use, and compensation should have been made in the first instance, or the work which caused the injury should be abated as a nuisance.[3]

On this as on most other questions, there is not entire uniformity of holding, but there are cases that hold the *quasi*-corporation itself liable in such cases.[4]

[1] McDonald v. Hospital, 120 Mass. 432; Glavin v. Hospital, 12 R. I. 411; Hughes v. County of Monroe, 147 N. Y. 49.

[2] Springfield F. & M. Ins. Co. v. Keenesville, 148 N. Y. 46. See Hill v. Boston, 122 Mass. 344; Hughes v. Monroe Co., 147 N. Y. 49. There was some confusion in Indiana on the question, but that court has fallen into line, overruling former anomalous cases. Board v. Allman, 142 Ind. 573.

[3] Young v. Com'rs of Highways, 134 Ill. 569.

[4] Hill v. Boston, 122 Mass. 344. As to the ancient rule of holding the inhabitants indictable for not repairing, see the case of State v. Hudson Co., 1 Vroom (30 N. J. L.), 137.

Where the injury was claimed to result from the *negligent* manner of doing the work, the liability was held to rest directly upon the town (*quasi*-corporation) by Justice Breese in Town of Harlem v. Emmert, 41 Ill. 319. It was denied in a later case in the same state (Cooney v. Town of Hartland, 95 Ill. 516), where it was held that the tort was the tort of the officer only. The reasoning in the case of Hill v. Boston, 122 Mass. 344, which holds the same liability and exemption for town and city, would sustain the action against the township. The liability is directly held in Coburn v. San Mateo County, 75 Fed. Rep. 520, to rest upon the county; the court there remarking: "There is a large class of cases in which the rights of both public and individuals may be deeply involved, in which it

Sec. 441. *Contractual Liability.*— That a *quasi*-corporation may be bound by contracts made by its agents within the scope of its authority, and within the scope of the power of the town to contract, is elementary.

Indeed, they may be held upon implied contract;[1] but the contractual liability of a public corporation is subject to two limitations: *First*, the act must be within the scope of the corporate powers; *second*, the mode of contracting, if prescribed, must be strictly followed.[2]

A contract not within the scope of the powers of the corporation is termed *ultra vires*, and if it is *ultra vires* in a strict sense, no recovery can be had on account of benefits.[3]

Where power is given a public officer or corporation to contract with reference to a particular subject, and the statute is silent as to the manner in which the contract shall be made, the public may be held liable as upon an implied contract, under like circumstances as an individual; but where the power to contract is coupled with specific direction as to the mode of incurring the liability, there can be no implied contract, for the law in such case only authorizes an express contract.[4]

cannot be known at the time the act is done whether it is lawful or not. The event of a legal inquiry in a court of justice may show that it was unlawful. Still, if it was not known and understood to be unlawful at the time, if it was an act done by the officers having competent authority, either by express vote of the city government, or by the nature of the duties and functions with which they are charged, by their officers, to act upon the general subject-matter, and especially if the act was done with an honest view to obtain for the public some lawful benefit or advantage, reason and justice obviously require that the corporation in its corporate capacity should make good the damages in consequence of the acts thus done. It would be equally injurious to the individual sustaining damage, and to the agents and persons employed by the city government, to leave the party injured no means of redress except against agents employed. It would simply be allowing a circuitous remedy, one against the officers, and they to be indemnified by the county. It is believed the safer, wiser and juster course is to allow direct action by the individual, treating it in the nature of a cumulative remedy for taking or damaging his property."

In another Illinois case the court says that the principle that the public has no right so to use its own as to injure another, applies as well to townships as to incorporated cities. Tearney v. Smith, 86 Ill. 391.

[1] See Contracts.

[2] State v. Yeatman, 22 Ohio St. 546; Board v. Allman, 142 Ind. 573.

[3] The principles governing *ultra vires* acts apply equally to all corporations, and for convenience they will be stated with the treatment of municipal corporations, in the next chapter.

[4] Parr v. Village of Greenbush, 72 N. Y. 463; McDonald v. City of New

So a public corporation cannot be held liable because it accepts and receives the benefit arising from a contract of this kind. The private individual must look to it that the statutory requirements are followed.[1]

Sec. 442. *County Officers.*— The existence of a county or town is seen and felt through its representative system and through its officers. The liabilities of a county, such as they are, arise from the acts, omissions or transactions with county officers; so that in reality the laws of counties and towns and all the public subdivisions may, to a large extent, be written around the law of public officers.[2]

The Supervisors.— The usual officers of a county are a governing county board, called a board of supervisors or county commissioners. To this board is committed the oversight of all the principal affairs of the county proper.

The Sheriff of a county was formerly an officer of great dignity and power, having judicial as well as executive functions; but now the sheriff is really one of the state officers, elected and paid by the county, whose principal duty is the execution of judicial process, civil and criminal.

York, 68 N. Y. 23; Bloomfield v. Charter Oak Bank, 121 U. S. 121; Richard v. Warren, 31 Iowa, 381.

[1] Heidelberg v. Francois, 100 Mo. 69; Brown v. First Nat. Bank, 142 N. Y. 510. If a county authorized by law to appoint a commissioner to build a bridge, according to a plan and with materials directed by the county court, appoint a commissioner with authority to build the bridge according to such plans as he shall think proper, the appointment is illegal and his acts are not binding upon the county. County of St. Louis v. Cleland, 4 Mo. 84.

"When a statute confers on a public officer the power to make a contract, and requires the officer to advertise for bids before making the contract, such advertising is a condition precedent to the grant of authority, and without the advertising there is no authority; hence contracts so made are held to be void. Shumm v. Seymour, 24 N. J. Eq. 153.

Exceptions to the Rule.— But when a general statute requires such advertising, it should not be strained beyond the reasons which support it; so such a statute has been held in other jurisdictions not to apply to a patented article, nor to the furnishing of an article such as gas, of which one company has a monopoly, nor to articles dependent for value upon the personal skill of the manufacturer, such as fireworks; nor to professional services. Hobart v. City of Detroit, 17 Mich. 246; In re Dugro, 50 N. Y. 513; Harlem Gas Co. v. Mayor, etc., 33 id. 309; Detwiller v. City of New York, 46 How. Pr. 218; Smith v. Flagg, 5 Abb. Pr. 232." City of Hartford v. Hartford Elec. Light Co., 65 Conn. 324–34.

[2] See Mechem, Public Officers. The whole subject of municipal officers is treated in this work.

The Coroner is an officer of equal antiquity. The duty of the coroner is to inquire into the cause of death of those dying mysteriously and present the case to the grand jury. He may perform the duties of sheriff in the absence or disability of that officer.

The Treasurer has the care and custody of the county funds, with the supervision of the collection of taxes, state as well as county.

A Clerk is provided in most counties, who is the recording officer of the official transactions of the county. He also performs the function of clerk to the county, surrogate or orphan's court, which has charge of matters of probate, lunacy, guardianship, and the like.

A Recorder is an officer provided in each county for the registration of deeds of transfer, and such private contracts and conveyances as are by law required to be placed of record. He may or may not combine in his office the office of recorder and clerk of the ordinary court, circuit or district, wherein contested litigation is commonly had, in which case he may be denominated circuit or district, or clerk of the court of oyer and terminer, as the case may be. He has in his custody and possession the records of his court and the records of transfers, etc.

A Superintendent of Schools is provided in most counties. His duties, as the name implies, are the supervision of the public schools of the county, etc.

Additional Officers.— In proportion to the size and complexity of the affairs of the county, the officers may be multiplied, and separate courts and clerks erected for matters of probate and the assessment of taxes and special assessments for local improvements, wherein judicial proceedings must be had.

County commissioners are the police tribunals of the county, whose functions can only be ascertained by an examination of local constitutions and statutes.

Sec. 443. *Township Officers.*— The local affairs of the town require the interposition of no legislative body as such, but are generally performed in a public meeting of the electors having proper qualifications, which is known as a *town meeting*. This is the most democratic institution existing in America.

The general affairs and policy of the county for the term intervening between these meetings is provided for at this town

meeting. These meetings are established by statute, and are organized by the electors coming together and choosing one of their number a moderator, after which business proceeds in the manner which has been termed "town-meeting style."[1]

Highway Commissioners.— The highways and bridges of the township are generally under the supervision of a board of highway commissioners.

Justices of the Peace.— Local judicial establishments known as justice courts, or magistrates' courts, are a part of the system of town organization. These courts have jurisdiction of small offenses and petty litigation.

Constables.— For the service of process and the conservation of the peace, constables are elected in every town.

Tax Assessor and Collector.— The assessment of the taxes levied by the state or county boards, or required by the town meetings, is laid by a township assessor and collected by another officer, called a township collector, who turns over the money to the county treasurer and receives his voucher for the same.

Poundmaster.— The keeper of the township pound is commonly regarded as the least exalted of the officers, state or national.

Sec. 444. *Liability of Officers to Private Actions.*— The subject of liability of public officers to private actions on account of the omission of a public duty, or the negligent or improper manner of performing it, has been thrown into some confusion on account of attempts to apply early English cases, based upon different reasoning and different principles, to our local officers.

It was formerly held that no action could be maintained against an officer for a mere non-feasance, and at one time it was supposed that none would lie for negligence in the performance of duty, in the absence of bad faith or malice.[2] But it is now thoroughly well settled that a public officer is individually liable for a negligent or wilful injury, and in many cases for the negligent omission to perform a specific duty where he has means at his command to perform it.[3]

[1] *Ante*, sec. 435.

[2] Bartlett v. Crozier, 17 Johns. 340. See Nagle v. Wakey, 59 Ill. App. 198.

[3] Weise v. Tate, 45 Ill. App. 626. When an individual sustains an injury by the misfeasance or non-feas-

The rule as to the liability of public officers whose duties are specific and ministerial, as distinguished from judicial and discretionary, is universal, and applies to all public officers of whatsoever character, or to all persons having a duty imposed upon them by public law.

Postal officers,[1] supervisors of election who refuse the right of voting,[2] commissioners of highways, inspectors of provisions, tax officers, sheriffs,[3] constables and policemen are individually liable under this rule. In fact the rule is universal that there is no wrong inflicted by one individual upon another for which the injured party may not have a remedy. "It is immaterial that the duty is one imposed on public grounds, and therefore primarily a duty owing to the public. The right of action springs from the fact that the private individual receives a special and peculiar injury from which it is the purpose of the law to protect him."[4]

Judicial Officers.— Judicial officers are wisely exempted from liability on account of ignorance, negligence or mistake, a remedy in such cases being generally afforded by appeal; but even judicial officers are held responsible for malicious acts, or for acts which are beyond their jurisdiction.[5]

ance of a public officer, state or local, who acts, or omits to act, contrary to his duty, the law gives redress to the injured party by an action adapted to the nature of the case. Adsit v. Brady, 4 Hill, 632. "Actions to recover damages resulting from injuries caused by defects in the public highways are of comparatively modern origin. As late as the case of Garlinghouse v. Jacobs, 29 N. Y. 297, the whole subject of the liability of the commissioner in such cases was elaborately examined, and it was held that he was not liable under any circumstances. Subsequently the court receded from this position in Robinson v. Chamberlain, 34 N. Y. 389; and in the case of Hoover v. Barkhoof, 44 N. Y. 113, the liability of the commissioner for such injuries, when resulting from his own negligence, was asserted and established." Lane v. Town of Hancock, 142 N. Y. 510.

[1] Teall v. Felton, 1 N. Y. 537; 12 How. 284.

[2] Ashby v. White, Ld. Ray. 938; Lincoln v. Hapgood, 11 Mass. 350; Blair v. Ridgley, 41 Mo. 63; 47 Am. Dec. 248.

[3] Bank v. Waterman, 26 Conn. 323.

[4] Raynsford v. Phelps, 43 Mich. 342.

[5] Id. If a judicial officer acts, no matter how erroneously, within the scope of his jurisdiction, he has immunity; but if he transcends the limits of his jurisdiction he is a trespasser. Sprague v. Birchard, 1 Wis. 464; Bradley v. Fisher, 13 Wall. 335; Thomas v. Hinsdale, 78 Ill. 359. There must be jurisdiction (*a*) of the subject-matter of the suit; (*b*) of the person of the defendant; (*c*) of the particular process, or punishment inflicted. Gummon v. Raymond, 1 Conn. 42; Gurney v. Tufts, 37 Me. 133. This subject will be fully investigated under the title "Trespass."

Sec. 445. *De Facto and De Jure Officers.*— Intricate and serious questions occasionally arise as to the validity of transactions which have taken place under supposed official authority, and the question arises in various phases.

Sometimes it is discovered that supposed official action has been taken extending over many transactions and a long period of time, but that in fact there has been no lawful office to fill, either because the law creating the office is unconstitutional, or the office has been changed by law and the change not discovered by local authorities.

Again, the officer is found to be ineligible or not legally elected or qualified. These and similar instances are known in the law as *de facto* offices or officers.

The mode of questioning the validity has a bearing on its solution. For instance, if the right to hold the office is directly attacked by *quo warranto* proceedings, the question is confined to the strict question of constitutionality or regularity and qualification; but if the official action arises collaterally and is questioned as a defense to official action, or by an officer to escape official liability, that is known as a collateral attack.

Judge Van Fleet, in his work on Collateral Attack, maintains that there may be a *de facto* officer where there is not a legal but simply a *de facto* office. He says: "If it is necessary, in order to guard the rights of the public, to hold the acts of an actual, although unlawful, incumbent of a judicial office valid, as being done by an officer *de facto*, then, *a fortiori*, is it necessary to hold an actual judicial tribunal, created under the forms of law, sustained by the power of the state, and settling rights and titles, a tribunal *de facto*." And he concludes that action by such a *de facto* tribunal, so far as taken, cannot be held absolutely void; thus, a judge appointed by the governor, or a city council, or transferred to another district, or a probate clerk or district attorney appointed by authority of an unconstitutional statute, and county officers elected in a new county before the law organizing it went into effect.[1] There may be doubt as to the correctness of this language if applied to all situations, and the opposite rule is contended for by Mr. Mechem.[2]

[1] Van Fleet, Collateral Attack, pp. 33–51; cited, State v. Gardner, 54 Ohio St. 24.

[2] Mechem, Public Officers, §§ 324–27, relying upon cases all of which are reviewed in State v. Gardner,

The character of the transaction, its importance, the seriousness of it, do not affect the question; and it must be regarded as settled that the acts of *de facto* tribunals, and *de facto* incumbents of *de jure* offices, so far as completely executed, must be enforced.[1]

The right of the incumbent to hold office or exercise the official duty can be questioned only by the state, with the qualification, of course, that it is the duty of the state, through its attorney-general and subordinate prosecuting officers, on relation of a private individual in many cases, to question the right of the incumbent.[2]

In any case where the officer claims rights affirmatively by virtue of his office, he must prove himself to be a *de facto* officer.[3]

Sec. 446. *Official Bonds.*— It is generally provided that officers shall furnish bonds for the faithful performance of their duty; and it occasionally happens that an official bond is given where there is no statute requiring it, or a bond not exactly in accord with the statute; but it has been held that a bond not executed in accordance with the statute may still be held good as a common-law obligation.[4]

The liability of sureties upon an official bond is peculiar; and while it cannot extend to any other office than that held by the incumbent, it is sometimes held to extend to acts performed before the period of time for which the particular bond was executed.[5]

The liability of the sureties on the bond cannot always with

supra. See Norton v. Shelby Co., 118 U. S. 425.

[1] So in a prosecution for bribery it cannot be defended by attacking the constitutionality of the law establishing the office of the incumbent upon whom the attempt is made. State v. Gardner, 54 Ohio St. 24 (1896). This case contains a valuable examination of the question, with citation of many cases. There is a dissenting opinion, thus rendering the case a presentation of both sides of the question.

Even in a capital case the defense is equally unavailing. Coyle v. Com., 104 Pa. St. 117; Leech v. People, 122 Ill. 420.

[2] People v. Bangs, 24 Ill. 184. If a person usurps an authority to which he has no title or color of title, his acts are simply void; but a colorable title to an office can be examined only in a mode in which the officer is a party. State v. Gardner, 54 Ohio St. 24.

[3] People v. Webber, 86 Ill. 283.

[4] Governor v. Allen, 8 Humph. 176. In United States v. Tingey, 5 Pet. 114, it was held that a voluntary bond to the United States was valid and obligatory. See Mechem, Public Officers, sec. 273; Moses v. United States, 166 U. S. 571.

[5] Mechem, Public Officers, sec. 287.

certainty be known in advance, because the legislature may impose new duties on the office and new obligations; and it has been held that all laws enacted during the continuing contract of an official bond are a part of the contract, and that the obligors entered into the agreement in view of the possible and probable modification by the legislative branch of the government.[1]

Generally speaking, the bond is executed for the faithful performance of official duty, and usually reads, "for all acts done and performed by virtue of his office;" but the liability is broader than a narrow construction would indicate, and extends to all negligent *omissions*[2] as well as to all acts done by virtue of the office, although unlawfully done, and constituting, because of the unlawfulness, a trespass.[3]

It occasionally happens that public money is lost where there is no lack of diligence or culpable fault on the part of the officer, as in the case of its deposit in a bank and the bank failing, or where it is feloniously taken from the officer by theft or robbery.

The courts are by no means harmonious on the question of liability, but the terms of the bond, the question whether the relation of debtor and creditor is held to exist, or the view which the court takes of public policy in such cases, will influence the result.[4]

Sec. 447. *Public Schools.*[5] — In treating the subject of local self-government, the New England township, with the town

[1] State v. Grizzard, 117 N. C. 105.

[2] Young v. Connelly, 112 N. C. 646. See State v. Grizzard, *supra*.

[3] Mechem, Public Officers, sec. 284, where authorities *pro* and *con* are cited; and still later, examination quite exhaustive is had in Risher v. Meehan, 35 Weekly Law Bul. 18 (Ohio Cir. Ct. Rep.).

[4] In United States v. Prescott, 3 How. 578, the officer was held liable although the fund was lost by felony. In Fairchild v. Hedges, 14 Wash. 117, a county treasurer was held liable notwithstanding the fund was lost by bank failure without his negligence, relying upon the strict liability to keep the money safely. In State v. Copeland, 96 Tenn. 296, the officer was held exempt on showing due care in the custody of the funds. These cases contain very exhaustive citation of the authorities and reasoning on the question. The above is real conflict, based on a fundamental difference in principles. An author *in such a case* cannot harmonize. One investigating the question to determine liability must inquire which principle the tribunal of the state where the question arises has adopted. If the question is new in the state, what is the better reasoning.

[5] Public schools are not, like towns

meeting, has been spoken of as an institution. It has been designated as an institution rather than an instrument, intending thereby to convey the idea that it was a voluntary original growth rather than the creation of a superior legislative power.

It has also been indicated that such an organization, with the quality of local self-government possessed and exercised by the townships, was unknown in England. Here, local self-government existed as a right; there, whatever local jurisdiction existed was granted as a privilege; and *in theory* it never ripened into a right, excepting in the case of certain counties palatine and certain incorporated communities, where the right was held to rest upon the contract of the charter.

County organization originally differed essentially, and lacked the quality of being an original constituent body instituted expressly for local legislation over local affairs and as an organization to exercise the right of representation.

Not less unique and distinctive in its organization, and equally powerful in its effect upon the scheme of local self-government which grew up in New England, was what passes under the name of "common school."

Schools were not unknown, education was not originated, in the colonies; but the public school system is the outgrowth of a new policy inaugurated in New England.

The free-school system of the American colonies was opposed to the policy of home government. It was fostered as carefully as was the religious institution or the town meeting.[1]

The term "common school" does not indicate the character or extent of education furnished. Its meaning is here associated with the most dignified sense in which the word *common* so frequently appears — the common law, the common weal, common right, common school; that is, open and free to all.

and counties, an essential in the plan of local government; but they are so intimately associated with it as to permit a mention of them at this place. See Cooley, Const. Lim. 224.

[1] In 1671 an inquiry was sent to all the colonies concerning the education of the people. Burkely, governor of Virginia, responded: "I thank God there are no free schools nor printing, and I hope we shall none of these hundred years, for education has brought disobedience and misery and sects into the world, and printing has divulged them and libels against the best government. God keep us from both." From Connecticut the reply was: "One-fourth of the annual revenue of the colony is laid out in maintaining free schools for the education of our children."

Public schools, however, are not regarded as of local interest only, but as of general concern, and under the state control rather than the control of local authorities, although the administration is largely committed to their hands; so that it is within the province of the legislature to compel towns, cities or counties to maintain schools and to raise funds for their maintenance.[1]

It is not necessary to a public school that it be entirely free. If the use is of such a nature as concerns the public, and the right of its enjoyment is open to the public upon equal terms, the use will be public whether compensation be exacted or not.[2]

Sec. 448. *Nature of Educational Corporations.*— It is often an extremely difficult matter, even at this time, to determine whether an incorporated institution for educational purposes, receiving aid from the state, is a public or a private institution.[3]

In reference to these, the same question is discussed that was so elaborately argued in the *Dartmouth College Case.*

All agree that schools when incorporated are charitable and eleemosynary, and that a gift designed to promote public good by the encouragement of learning, of science and the useful arts is a charity;[4] and Lord Holt remarks, "There is no manner of difference between a hospital and a college — both are eleemosynary."[5]

But, notwithstanding the public interest involved, and even the public support and assistance which is given, if the foundation is private the institution may still be a private corporation.

A remarkable illustration of this principle is the holding of

[1] Revell v. Mayor of Annapolis, 81 Md. 1. See Cooley, Const. Lim. (4th ed.) 223, note.

[2] Gerke v. Powell, 25 Ohio St. 229; Richard v. Raymond, 92 Ill. 617.

[3] See Dartmouth College Case, 4 Wheat. 518, and an equally interesting case, Regents v. Williams, 9 Gill & J. 1.

[4] Mr. Justice Grey, when on the Massachusetts supreme bench, defined a charity in its legal sense as "a gift to be applied consistently with existing laws for the benefit of an indefinite number of persons, either by bringing their minds or their hearts under the influence of education or religion by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public building or works, or otherwise lessening the burdens of government." Jackson v. Phillip, 14 Allen, 555.

[5] Phillips v. Bury, 2 Term Rep. 353. See Academy v. Harvard College, 12 Gray, 594.

the Illinois supreme court that the state normal school, although a general charity, was a private corporation.[1]

Sec. 449. *School Property.*— Public-school property, irrespective of its derivation, belongs to the state, notwithstanding subordinate bodies are created, and even incorporated, to handle and control the fund for the use of the people. The general legislature does not part with the power to control the fund nor to control the system of education.[2]

Cities are allowed to become trustees for the purpose of receiving charitable bequests for educational purposes, upon the principle that the trust is public in its nature and of the same character which is habitually placed upon cities; and if the body which is given control is a distinct corporate body, it is nevertheless public, and subject always to the control of the state. This is true as to city schools of any grade or denomination.[3]

[1] Board of Education v. Bakewell, 122 Ill. 339. It is difficult to define the meaning of the term "common school." Ordinarily it implies one which *begins* with the rudimentary elements of an education, but it may embrace a good deal more. The peculiar context of a statute, if it be a question of statutory construction, may affect the question. Powell v. Board of Education, 97 Ill. 375; Richard v. Raymond, 92 Ill. 617. The Missouri supreme court says: "The term 'common,' applied to schools, is used to denote that they are open and public, rather than to indicate the grade of the school, or what may or may not be taught therein. The term 'school,' *ex vi termini*, does not imply restriction to the rudiments of education." Roach v. Board of Directors, 77 Mo. 484.

[2] City of Chicago v. People, 80 Ill. 386.

[3] Revell v. City of Annapolis, 81 Md. 1. See Conover v. Parker, 57 N. J. L. 631; Vidal v. Girard's Ex'r, 2 How. 127; Philadelphia v. Fox, 64 Pa. St. 189.

CHAPTER XXV.

LOCAL SELF-GOVERNMENT — MUNICIPAL CORPORATIONS.

SEC. 450. *Scope of the Treatment.*— In approaching the subject of "municipal corporations," the fact should be recognized that there is no lack of books upon the subject, and that some of them leave little to be desired as a general treatment of the subject.

There is yet something to be added upon the fundamental principles governing these corporations, and a concise statement of these with the general outline of the subject may enable the student more readily to grasp the fundamental principles governing the subject, and thereby to distinguish and harmonize the mass of legal decisions and *obiter* with which the opinions abound, which otherwise incumbers and confuses, rather than aids to an understanding.

It will therefore be the endeavor in this chapter to present in the briefest possible form what are conceived to be the fundamental principles of the law of municipal corporations.

As to some of these it will be observed that the author differs diametrically on several fundamental positions from those who have in recent years written on this subject.

Definition.— A municipal corporation is an artificial person created by charter, being conferred upon an *existing aggregation of persons*,[1] granting to the new entity powers and privileges of a public nature which they did not before possess, and imposing additional duties and liabilities.

In all decisions imposing liability upon cities on account of negligent acts of officers, the corporations are called "voluntary;" in many decisions involving questions of legislative control, it is affirmed that the legislature can create or destroy at will, and that they are "involuntary."[2]

[1] Shumway v. Bennett, 29 Mich. 451–57. See Hill v. Boston, 122 Mass. 344.

[2] It has been settled in Michigan that there can be no municipal corporation that is not the direct *representative of the people of its locality.* O'Leary v. Board, 79 Mich. 281. Such boards do not represent the state. Board v. Auditors, 68 Mich. 576.

SEC. 451. *Creation, Control and Dissolution.*— Attention has heretofore been called to the proposition that all municipal corporations — that is, incorporated cities and villages — are pure corporations.

Cases have been cited showing a liability upon such corporations on account of negligent acts of servants and agents, based upon the fact that they are voluntary corporations, while an immunity exists in favor of the state, unincorporated towns and villages because they are involuntary corporations — mere agencies of the state, having their duties imposed upon them for the benefit of the general public.[1]

It was a universal rule of corporation law in England that no society or number of men could be compelled to be a corporation. This is admitted without dissent to apply to all private corporations.[2]

It is laid down, however, by our most distinguished writer on the subject, that this rule that a corporate body cannot be constituted except by consent does not apply to statutes creating municipal corporations.[3]

He states as a rule of our law, that a municipal corporation, including a city, may be *created*, altered, enlarged, or entirely *destroyed*, without the assent of the inhabitants of the district.

This proposition, with its logical inferences, deductions and conclusions, is of so startling a nature as to suggest a doubt in any inquiring mind.

Laying as it does at the threshold or foundation of the law of municipal corporations in perhaps its most important branch, the proposition may not be passed unquestioned.[4]

After an examination of the authorities cited by the learned author above named and those who follow and quote him, together with the English cases and other American authorities,

[1] *Ante*, sec. 439; Elmore v. Drainage Dist., 135 Ill. 269.

[2] 1 Dill. Mun. Corp. (4th ed.), sec. 44.

[3] Id.

[4] The proposition renders illogical the following rules:

First. Municipal corporations differ from *quasi*-corporations, because one is voluntary and the other involuntary; hence a difference of liability.

Second. One has a charter, the other not. What does a charter mean or amount to if that which is called a charter exists at the pleasure of the legislature?

Third. Local self-government, as an essential principle in our system, is destroyed by incorporation without consent, and control without consent.

the writer is constrained to dissent from the proposition, and especially from its logical sequences.[1] Such a rule may have had a theoretical existence as a power of parliament, which was the constituent body-politic of England, but it never had theoretical existence or practicable application in the United States.

The proposition is one of such serious moment, in its most important phase, as to require more than passing notice.

Sec. 452. *Local Government in Cities is a Right.*— No such rule can be found in the English cases prior to our Revolution, not even as to the power of parliament, and applied specifically to the incorporation of cities.[2]

Chancellor Kent announces the proposition as a part of the law, without the exception of public corporations, which he is treating in the same connection, that it requires the acceptance of the *charter* to create a corporate body; for the government cannot compel persons to become an incorporated body without their consent, or the consent of at least a major part of them.[3]

[1] Not a single case cited by Dillon, Beach or Mr. Elliott supports the proposition. In fact no legislation was involved in any of the cases which attempted to create or repeal a charter without the assent of the people of the locality. In several cases where the right of local self-government of the municipality was encroached upon by legislative provisions, they were held void.

[2] In Rutter v. Chapman, 8 M. & W. 36–38 (1841), 7 Eng. Ruling Cases, 179, it is stated that the consent of boroughs was necessary to make them municipal corporations. See on the English law, Shumway v. Bennett, 29 Mich. 457, 458; 2 Cooley's Blk., App., Local government in England and same in the United States.

In an early Massachusetts case it is said: "In Bagg's Case, Roll's Rep. 224, it seemed to be agreed by the court that a patent procured by some persons of a corporation shall not bind the rest, unless they assent. And in Brownlow's Reports, 100, there is this passage: 'It was said that inhabitants of a town cannot be incorporated without the consent of the major part of them, and an incorporation without their consent is void.' In Comberbach, 316, Holt, speaking of a new charter made to the city of Norwich by Henry IV., and confirmed by Charles II., says the new charter had been void if the corporation had refused it; but when they accept it, and put it in execution, it is good." If these principles were correct in England when prerogative ran high, and the crown or parliament could not force charters or patents upon the subject without his assent, surely in this free country, *where the legislature derives its power* from the people, such authority cannot be contended for. Ellis v. Marshall, 2 Mass. 277.

[3] 1 Kent, 277. This sentence cannot apply to a private corporation, because a voluntary association of individuals existing under contract cannot be compelled to be a corporation without the consent of *all*.

In no case cited by the learned authors above named, wherein broad expressions of the plenitude and absolute power of the legislature have been indulged in the *dicta* or opinions, has the question been involved.

The unwisdom of such general expressions in judicial opinions which do not involve the proposition needs only to be mentioned to be apparent.[1]

No instance has been cited involving an attempt of the legislature to create or destroy a city without local consent. It may readily be admitted that the *administration of governmental powers*, which the legislature have a right to impose upon its citizens, may be imposed upon the inhabitants of any locality without their consent, and that such a power may be withdrawn at will; but the proposition that our local municipal organizations — townships, counties and cities — exist at the behest of the legislature only, and only for so long as the legislature sees fit, is a proposition finding no support in any decision where the point has been involved.[2]

Sec. 453. *Cities Are Not Created by the Legislature.*—Wherever the question has arisen in a case by the inhabitants of a

[1] Mr. Justice Cooley well says: "Now, it must be conceded that the judicial decisions and law writers generally assert that the state creates the municipal bodies, endows them with such of the functions of corporate life and intrusts them with such share in the local government as to the legislative judgment shall seem best; that it controls and regulates their action while they exist, subjects them to such changes as public policy may dictate, and abolishes them at discretion; in short, that the corporate entities are mere agencies which the state employs for the convenience of government, clothing them for the time being with a portion of its sovereignty, but recalling the whole or any part thereof whenever the necessity or usefulness of the delegation is no longer apparent. This I understand to be the accepted *theory* of state constitutional law as regards the municipal governments. We seldom have occasion to inquire whether this amplitude of legislative authority is or is not too strongly expressed, for the reason that its exercise is generally confined within such bounds as custom has pointed out, so that no question is made concerning it. But such maxims of government are very seldom true in anything more than a general sense; they never are and never can be literally accepted in practice." People v. Hurlbut, 24 Mich. 44.

[2] The question will never arise, because no constitution exists that does not recognize local self-government as a right, and provides for its continuance. But it ought not to be allowed that the legislature has the power in the absence of express limitation. The decisions are all the other way.

city resisting the power of the legislature to take away their local self-government, the plenary and absolute power of the legislature has been subjected to positive and ample limitations.

The real truth is that these local organizations do not derive their existence from the legislature, and are above and beyond the power of the legislature to destroy. Only their capacity to legislate for general purposes is thus derived.

The proposition that they do, is nothing else or different than an assertion that the people may be governed by the central legislative power, and that whether they will or no, their local government may be entirely swept away.

Lest there be a misapprehension upon this vital proposition, abundance of caution requires the statement that the legislature may change corporate limits by decreasing the size, separating and annexing territory, and by adding burdens of government and administration; but they may not destroy, and this independent of express constitutional enactments.

This has been asserted in several great cases directly in point. No decision to the contrary has been cited by any law writer.[1]

As is well said by Justice Cooley: "We seldom have occasion to inquire whether this amplitude of legislative authority is or is not too strongly expressed, for the reason that its exercise is generally confined within such bounds as custom has pointed out, so that no question is made concerning it. But such maxims of government are very seldom true in anything more than a general sense; they never are and never can be literally accepted in practice."[2]

Theory in law consists in speculations concerning conditions and relations which do not exist. Practical law examines powers, rights and duties under existing institutions; and it is perfectly safe to assert that under no constitution in the United

[1] While extravagant expressions in the opinions in cases involving the exercise of functions falling far short of forcing corporate existence upon a community or taking away their corporate existence abound, they are as nothing compared with the direct decision of able courts where the point is directly involved. In the case of Philadelphia v. Fox, 64 Pa. St. 189, Sharswood, J., indulges in the widest possible *obiter*. The decision in that case is clearly right, but there is no connection whatever between the question involved, which relates to the control of the legislature over the powers of a city to act as a trustee (a question entirely foreign to corporate existence), and the question of power to create and destroy.

[2] People v. Hurlbut, 24 Mich. 44.

States is it within the constitutional power of the legislature to create local municipal corporations without the consent of the inhabitants of the districts expressed in some form of suffrage.

It is a perversion of terms to say that the legislature has the power to create and destroy, when the fact is that they have no choice but to create and preserve.

They may authorize substitution and change, but they must preserve to every locality its original inherent rights. Every constitution in the Union *requires* that local organization for the purpose of local self-government shall be established and preserved.

Sec. 454. *Legislative Power Over Cities is Limited.*—Mr. Justice Christiancy, in a case involving the power of the legislature over the city local government, in substance said: "While I have no doubt of the power of the legislature to abolish or discontinue any of the separate boards previously existing in the city, and to consolidate all their powers and duties in a new board, and to impose new duties upon them, I concur in the opinions of the chief justice and my Brother Cooley, that the legislature had no power to make the appointment of the members of that board as permanent officers for the full term;" and he holds in that case, in effect, that the local government of a city must be by the city, of the city, and for the city.

The chief justice in the same case said: "We are therefore compelled to consider the plain question whether the state authorities have a right to assume unlimited control of all municipal appointments. Judicial offices the constitution has distinctly provided for as elective; and they are *local in their action* rather than in their nature. But as to other offices, the power is plenary, or it does not exist at all. It may as well include every office as any less than all. It may put all the power into the hands of one person, as well as divide it among several; and it may continue it for life as well as for a less period."

He concludes that cities, like other local corporations, are put upon a popular basis entirely beyond legislative interference, so far as local independence of action is concerned, saying: "So that, if the people of cities have not similar immunities, we have in the same commonwealth two classes of citizens

with very different measures of freedom — one almost unlimited, and one not much more than nominal."[1]

Sec. 455. *Legislative Charters May Add to, Define and Regulate, but Cannot Destroy.*— "Incorporated cities and boroughs have always, both in England and America, been self-governing communities within such scope of jurisdiction as their charters vest in the corporate body. According to the doctrine of the common law, a corporation aggregate for municipal purposes is nothing more or less than 'investing the people of the place with the local government thereof.'[2] In the absence of any provision in the charter creating a representative common council, the whole body of freemen make the common council, and act for the corporation at their meetings. It is agreed by historians that originally all boroughs acted in popular assembly, and that the select common council was an innovation, which may have been of convenience or by encroachment. In modern times cities have generally acted in ordinary matters by such a select body. But townships still act by vote at town meetings, and for many purposes connected with taxation the people of cities usually have the same privilege. But whether acting directly or by their representatives, the corporation is in law the community, and its acts are their acts, and its officers their officers. The doctrine is elementary that all corporation officers must derive office from the corporation.[3] This has been from time immemorial settled law."

He adds: "Our constitution cannot be understood or carried out at all, except on the theory of local self-government; and the intention to preserve it is quite apparent. . . . It cannot be that the state can control these bodies by sending its own agents there, and it cannot be possible that it was contemplated that any members of that board should be selected by a different mode of election or appointment from the rest. . . . It is impossible to read the constitution without finding the plainest evidence that every part of the state is to be under some system of localized authority emanating from the people.

[1] People v. Hurlbut, 24 Mich. 44.

[2] That is, not only what they had before incorporation, but a greater franchise, jurisdiction or liberty over matters of general concern, like the state police.

[3] Kyd, ch. 3, sec. 8.

"This is no mere political *theory*, but appears in the constitution as the foundation of all our polity. There is no middle ground. A city has no constitutional safeguards for its people, or it has the right to have all its officers appointed at home. Unless this power is exclusive, the state may manage all city affairs by its own functionaries."[1]

In the dissenting opinion in the case just cited in the note, which opinion has now the sanction of the New York court, Mr. Justice Brown stated that cities were permanent elements in the frame of government, and so treated in the instrument that creates government. Upon the plainest rules of interpretation they are to be regarded as institutions of the state, durable and indestructible by any power less than that which gave being to the organic law. They are subject to the control and regulation of the legislature. It may enlarge or circumscribe their territorial limits, increase or diminish their numbers, separate them into parts, and annex some of the parts to parts of others; but they must still assume the form and be known and governed only as counties, cities or towns, because their distinctive character and attributes cannot be changed or destroyed without confounding the entire scheme of civil government.[2] The state at large is, and ever has been, an aggregate of these local bodies. They have habitually and uninterruptedly exercised many of the powers and functions of government.

[1] In People v. Draper, 15 N. Y. 532, a case involving legislative control over a city, and hence directly in point, and a case in *its decision* going to the extreme verge in allowing legislative control, and, by subsequent decisions of the same state, stated to be beyond the extreme in upholding legislative control over cities, the prevailing opinion says: "It cannot be denied that an act of the legislature which should propose to abolish counties would be hostile to the arrangements of the constitution. There are a great many provisions of that instrument, to the execution of which counties are indispensable. . . . But there is nothing in it which requires that these local divisions should always possess the same measure of *administrative* power, or that local functionaries should always exist within them, possessing the same functions as when the constitution was adopted. The counties and *cities must not only be preserved, but the legislature must do nothing respecting them which will render them less suitable for the purposes which they are recognized and employed by the constitution. All the arrangements to which counties and cities are subservient or instrumental, or in which their agency is contemplated, must have their free course unobstructed and unembarrassed by legislation.*"

[2] People v. Hurlbut, 24 Mich. 44.

"These considerations lead me to the conclusion that it was designed to place these civil divisions and the powers of appointment, election and local administration which the people then exercised beyond the reach of legislative abrogation and destruction."[1]

In a later New York case the court says: "This right of self-government lies at the foundation of our institutions, and cannot be disturbed or interfered with, even in respect to the smallest of the divisions into which the state is divided for governmental purposes, without weakening the entire foundation; and hence it is a right not only to be carefully guarded by every department of the government, but every infraction or evasion of it to be promptly met and condemned, especially by the courts, when such acts become the subject of judicial investigation."[2]

Indeed, the power to control, the power to change and remodel, is legislative; but the corporate existence for the political purposes of self-government may not be destroyed.[3]

[1] People v. Draper, 15 N. Y. 532. See Barrett v. Brooks, 21 Iowa, 152. In People v. Albertson, 55 N. Y. 50, the prevailing opinion says: "To my mind the dissenting opinion of Judge Brown, concurred in by Judge Comstock, presents unanswerable arguments why the decision should have been different." This has reference to the case of People v. Draper, 15 N. Y. 532.

[2] People v. Albertson, 55 N. Y. 50.

[3] "In regard to public or municipal corporations, sound principle requires that they should not be forced upon the corporators against their consent. Such is the well-settled principle in England in regard to all municipal corporations created by the crown. Though the king has the power to create corporations, he cannot impose them on his subjects without their consent. Whether it be an original act of incorporation, or a charter by which the franchise of a pre-existing corporation is altered, it must be accepted by a majority of those to whom it is granted. (King v. Amory, 1 Term Rep. 572; Willcock on Corp. 30.) It is not denied that a municipal corporation may be, either by the legislature or by the British parliament, by virtue of the plenitude of its power, imposed upon the corporators without their consent. It doubtless may be done. (Willcock on Corp. 25.) But it would be alike against the genius of our government and the spirit of the British constitution. It would be, in the nervous language of Lord Thurlow, an atrocious violation of principle which would cut every Englishman to the bone. Almost invariably in practice municipal charters have been granted or altered by our legislature in accordance with the expressed will of the corporators. The exceptions are very rare. [None have been found of creating or destroying.] They have occurred in seasons of high excitement; they cannot be reconciled to sound principle. They are to be regarded as

In *Rathbone v. Wirth*, decided in 1896, another case involving the power of the legislature to infringe upon the constitution of a city, it was stated by Gray, J., that "the theory of the constitution is that the several counties, cities, towns and villages are, of right, entitled to choose whom they will have to rule over them; and that this right cannot be taken from them, and the electors and inhabitants disfranchised, by any act of the legislature, or any or all the departments of the state government combined." The legislature cannot constitutionally deprive a municipality of its exercise of the functions as prescribed by the law of its being.

That a legislature may not wipe out a city and substitute in its place a system of government furnished by the central legislative power is beyond question.

Justice O'Brien says: "If such a system can be introduced into all the cities, towns and villages of the state, local self-government must disappear, and government by the majority in the legislature will be substituted in its place. It would be difficult to suggest a contrivance better calculated to undermine and destroy the spirit of civic freedom than a statute enacted by the central authority conferring powers upon a minority equal to those which can be exercised by the majority."[1]

Conclusion.— In conclusion, therefore, it may be inquired, of what utility is it to the student who wishes to understand our system, to the lawyer who desires to advise a client or prosecute a suit, or to a court in determining upon disputed and contested rights and liabilities, to assert that the legislature may impose a municipal corporation upon the inhabitants of a locality when no case where it has been done can be cited, and where certainly under none of our present constitutions is it permitted? Why assert that these local organizations may be abolished, when the most can be said, under any circumstances, is that their organization may be changed and modified, but their existence must be preserved, and that certain governmental powers only may be taken away?

Sec. 456. *Effect of Change of Organization or Boundary.*— The change of form of a corporation does not change its iden-

beacons to be shunned, not as precedents to be followed." City of Paterson v. Society, 24 N. J. L. 385–397.

[1] Rathbone v. Wirth, 45 N. E. Rep. 15–25.

tity or destroy the corporation. Thus, where a township was changed into a city, pending a suit against the township, the court said the city was the same municipality. As a town it had merely changed its machinery of government and its title and offices, and is called a city instead of a town. But it is still the same municipality. It consists of the same people, and whatever corporate property the town possessed would devolve upon the city.

The city cannot change itself, nor can the legislature change it in such a way that its real identity, with its rights and disabilities, is destroyed.[1]

In the same case it was said: "To hold that it can set its creditors at defiance by procuring the legislature to call it a city instead of a town, and its officers mayor and aldermen, instead of president and trustees, would be such a burlesque upon justice that the proposition needs but to be stated to be rejected."[2]

It is for the legislature to say, upon the consolidation of two or more localities, or their division, what proportion of the debts shall be assumed by each and in what manner they shall be paid.[3]

Sec. 457. *What May be Incorporated.*— The society which is to become a municipal corporation must be in existence before the charter is given. It is not understood that it is within the province of the legislature to throw into the form of a municipal corporation rural districts having no semblance of a village or a city.[4]

It is likewise understood that in the annexation the legislature cannot empower municipalities to take in adjacent farm lands, having no occasion or excuse for incorporation, and thereby subject them to the unusual burdens and restraints of municipal organization;[5] nor non-contiguous territory.[6]

[1] The boundaries may overlap township or county lines. State v. Cunningham, 81 Wis. 521.

[2] City of Olney v. Harvey, 50 Ill. 454. Old officers of a town may hold over. Becker v. People, 156 Ill. 301. See Mt. Pleasant v. Beckwith, 100 U. S. 526.

[3] Mt. Pleasant v. Beckwith, 100 U. S. 527; Galesburg v. Hawkins, 75 Ill. 152; Laramie Co. v. Albany Co., 92 U. S. 307.

[4] Shumway v. Bennett, 29 Mich. 458. See conflicting authorities, 27 L. R. A. 737.

[5] Id.

[6] See Elliott, Mun. Corp., p. 41 *et seq.*, § 51.

SEC. 458. *Modes of Incorporation.*— It has uniformly been the practice in America to grant charters of incorporation on the request of the inhabitants of villages or cities.[1] This was accomplished by a special charter granted by the legislature.

In recent years, however, the inconvenience occasioned by special legislation and diversified forms of village and city organization has led to the enactment of general incorporating acts, which provide for the manner in which localities may voluntarily become incorporated. In most of the constitutions the matter is regulated to some extent by restrictions against special incorporations.

SEC. 459. *The City Charter.*— The act of the legislature incorporating a city is its charter. All the governmental powers in reference to matters which otherwise would fall within the province of the state legislature necessarily come to the community through the medium of the charter.[2]

It was formerly questioned whether the state legislature had a right to delegate its legislative power; and while it is an acceptable and reasonable doctrine that the state legislature cannot delegate its legislative power to private persons or corporations, or other departments, or to mere agencies having no natural connection with the locality,[3] it has long since been well settled that a local community may be invested with a larger measure of governmental power than a mere township or county organization entitles them to; and that even in matters which are really matters of general concern, like the police, the power to conduct schools, etc., the power to tax in aid of

[1] Shumway v. Bennett, 29 Mich. 451; City of Paterson v. Society, 24 N. J. L. 385.

[2] "The powers expressly granted to a municipal corporation carry with them such other powers as are necessarily implied in or incident to such grants, and it also possesses all powers which all indispensable to the attainment and maintenance of its declared objects and purposes. Municipal corporations are more strictly limited in these respects than private corporations. The test of their right by implication to exercise any particular power is the necessity of such power, not its convenience. If there is a reasonable doubt as to its existence, it does not exist. Pratt v. Borough of Litchfield, 62 Conn. 112, 118; Ottawa v. Carey, 108 U. S. 110, 121; Merrill v. Monticello, 138 id. 673, 681." Crofut v. Danbury, 65 Conn. 294–300; Brenham v. Brenham Water Co., 67 Tex. 542.

[3] Board v. Auditors, 68 Mich. 576. See O'Leary v. Board, 79 Mich. 281.

public enterprises may be granted by charter to the inhabitants of a municipal corporation.

Indeed, the legislature has a larger power than this, irrespective of the question of incorporation. The legislature has the right to impose the burden of public enterprises upon the public at large, and, in the absence of constitutional limitations, to discriminate within a reasonable degree that a locality having the special benefits shall sustain special burdens; and it is entirely competent for the legislature to compel a locality to erect and maintain schools and bear the burden of a local police, and all the special burdens of general governmental duties which are felt principally in the locality; such is immemorial custom in reference to counties and townships.[1] In that manner the general treasury is relieved, and a burden more in accordance with the benefit is imposed.[2]

Sec. 460. *Classes of Charter Powers.*—The principal change which is made in the incorporation of a municipality consists in the institution of a local *representative* body, commonly called the common council; and instead of possessing but a few powers of a strictly local nature and having their local affairs decided in a democratic assembly or town meeting, the affairs of a municipal corporation are numerous and varied, and are regulated and controlled by a representative legislative body.

In villages this body is called the village board, and in certain towns a certain amount of legislative power is even vested in town commissioners;[3] but generally the powers of town commissioners are administrative rather than legislative in their character.

The inhabitants retain their original political rights. Although the method of exercising them is changed, the charter does not take away any power of local government which the community before that time enjoyed.

[1] Revell v. Annapolis, 81 Md. 1; Commissioners of Revenue, 45 Ala. 399. The latter is an extreme case, and carried the doctrine so far as to incur the criticism of Judge Cooley (Const. Lim. (6th ed.) 284, note); but it was affirmed in Mobile v. Kimball, 102 U. S. 691. See Cooley, Const. Lim. (6th ed.), 284, note, where are cited many cases applying the rule.

[2] A city receives such special benefits from the location of the county seat within its limits as authorize the imposition on such municipality of the entire cost of procuring such location and of the necessary public buildings. Schneck v. City of Jeffersonville (Ind.), 52 N. E. Rep. 212.

[3] See, for example, People v. Village of Harvey, 142 Ill. 573.

The government is still a self-government, although a representative system; but it is beyond the legislative power to appoint a city council in any other manner than by the choice of the people.[1]

The next important class of powers is, as we have heretofore noticed, those matters of general public concern which are delegated by the legislature to the locality.

It is in these, and these alone, that, properly speaking, the municipality can be said to be the mere agent of the state; and as to these powers, whatever diversity there may be in the decisions of the various states in classing specific instances as among those classes of powers, the courts are uniform in holding that, in the exercise of these powers as agents of the general government, the municipal community as a whole is not liable for negligent performance of those duties.[2]

[1] See O'Leary v. Board, 79 Mich. 281, where the principle is stated.

[2] The true test is the nature of the duties. If they are governmental, there is no liability.

An inspector of steam boilers appointed by the city. Mead v. New Haven, 40 Conn. 72.

The liability of a municipal corporation for the acts of servants or agents depends upon the character of the service. If the corporation appoints or elects them and controls them in the discharge of their duties, if it can continue or remove them or hold them responsible for the manner in which they discharge their duties, and if their duties relate to the exercise of *corporate powers* and are for the peculiar benefit of the corporation in its local or special interest, they may be regarded as its agents or servants, and the maxim *respondeat superior* applies. But if they are elected or appointed by the corporation, in obedience to a statute, to perform a public service, not local or corporate, but because this mode of selection has been deemed expedient by the legislature in the distribution of the powers of government, they are not to be regarded as the servants of the corporation, but as public or state officers, with such powers and duties as the statute confers upon them, and the doctrine of *respondeat superior* does not apply. Police officers appointed by the cities of New York and Brooklyn under a state statute, for the purpose of protecting the Brooklyn bridge, are not their agents or servants. 2 Dill. Mun. Corp. (3d ed.), secs. 974, 975; McKay v. City of Buffalo, 74 N. Y. 619; Maximilian v. The Mayor, etc. of New York, 62 N. Y. 160; Woodhull v. City of New York, etc., 15 N. Y. 450. See also the cases cited *ante*, sec. 439.

It was held in Detroit v. Blackeby, 21 Mich. 84, that cities are not usually liable unless made so by statute. O'Leary v. Board, 79 Mich. 281. In South Carolina a city is not liable for defective streets except by statute. Dunn v. Township, 43 S. C. 398. See 18 L. R. A. 105. In Thompson v. Mayor, 52 N. Y. Sup. Ct. 427, the city was exonerated from liability for the negligent conduct of its employees of the fire department. In Edgerly v. Concord, 59 N. H. 78, the defendant was acquitted of liability for an injury caused by the negligent testing of a hydrant. See Hafford v. New

A third class of powers, occupying a middle ground as it were between the two just mentioned, and yet not of such a character as to be called strictly private, is the larger measure of control over the streets and highways and buildings erected and owned by the city for purely corporate purposes, and essential to corporate existence. These powers being voluntarily assumed and partaking of the nature of private ownership, it is uniformly held by courts which hold this power to be in its nature voluntary and private, that there is a municipal liability on account of injuries received by strangers by reason of neglect in the management and control of these public instruments.[1]

Bedford, 16 Gray, 297, a case in which a hose carriage on its way to a fire ran over the plaintiff; Fisher v. Boston, 104 Mass. 87, in which the plaintiff's injury was caused by the rupture of a hose; Wild v. Paterson, 47 N. J. Law, 406, in which the injury resulted from the defective brake of a fire-engine; Hayes v. Oshkosh, 33 Wis. 314, in which the injury was caused by the fireman negligently allowing the sparks to escape from the engine; Wilcox v. Chicago, 107 Ill. 337, in which the damage was the result of a collision with a hook-and-ladder wagon, the driver being negligent; Howard v. San Francisco, 51 Cal. 52, in which a collision with the fire-engine was the cause of the injury; McKenna v. St. Louis, 6 Mo. App. 320, negligent management of the hose carriage; Jewett v. New Haven, 38 Conn. 368, and Grube v. St. Paul, 37 Minn. 402, exactly similar cases; Welch v. Rutland, 56 Vt. 228, in which the injury was caused by ice made of water that was negligently allowed to run from a fire hydrant; Dodge v. Granger, 17 R. I. 657, in which the injury was caused by the negligent projection of a ladder from an engine house; Simon v. Atlanta, 67 Ga. 618, in which the damage was the result of a rope stretched across the street by the fire department. See also Patch v. Covington, 17 B. Mon. 722; Brinkmeyer v. Evansville, 29 Ind. 187; Weightman v. Washington, 1 Black, 39, 49; Kies v. City of Erie, 135 Pa. St. 144; Heller v. Sedalia, 53 Mo. 149; Robinson v. Evansville, 87 Ind. 334.

"In providing a prison and keeping it in repair, and furnishing supplies for its inmates, a city or village exercises discretionary governmental functions, and is therefore not answerable to one who is injured in health or otherwise by the condition of the prison or the failure to furnish proper supplies to the persons confined therein. Le Clef v. Concordia, 41 Kan. 323; 13 Am. St. Rep. 285; Moffit v. Asheville, 103 N. C. 237; 14 Am. St. Rep. 810; Governor v. Clark Co., 19 Ga. 97; Ulrich v. City of St. Louis, 34 Am. St. Rep. 372; 112 Mo. 138." Elliott, Mun. Corp., § 315.

A municipal corporation is not liable for damages for the death of a person caused by the burning of its jail while such person was confined therein by the municipal authority for a violation of its ordinances, though such fire was caused directly by the wrongful act or negligence of the officers or agents of the municipality. Brown v. Guyandotte, 3 W. Va. 299; Howard v. Wooster, 153 Mass. 426; 25 Am. Rep. 651.

[1] For illustration, in Toledo v. Cone, 41 Ohio St. 163, 164, the delivering judge said: "It lay within the legislative capacity, judgment and dis-

It is common nowadays to permit municipal ownership of strictly private property to a certain extent, and as to this property there is no distinction in reference to the rights and liabilities of the city in reference thereto and that of private individual property, excepting, of course, that an execution could not be issued against the city and its property seized and sold; but there is a class of municipal ownership of public property and institutions in which the courts are not agreed as to the classification; for instance, the city water-works, telephone lines, hospitals, electric lighting plants, and the like.

The question of exemption from liability, or liability in such cases, in a given state, depends upon the view taken of it by the court as to whether the purpose is one of *public* and general interest as distinguished from one of local *quasi*-private, or, as it is expressed, *corporate* ownership.[1]

Sec. 461. *Mode of Exercising Municipal Power.*— The governing body of a municipality must be organized, and is subject to rules and regulations prescribed in the charter as to the manner of exercising its legislative control over the municipality.[2]

It is a well-established rule of the common law, that, as to powers intrusted to a public board or body, they may be exercised by a majority, whereas in private enterprises the contrary holds: that, unless specially authorized, any delegate body can only act as a whole, and there is no quorum.[3]

So, in the absence of direction in the incorporating act, a majority of the city council may meet and proceed to enact by-laws or ordinances, and in the passage of ordinances a majority of a quorum at a regularly appointed meeting may enact a binding ordinance.

The mode of enacting ordinances varies in the various states and is guided and controlled by the provisions of the charter.[4]

cretion of the city to provide for the burial of the dead, and to build requisite vaults; but, having become the owner of such property, the city in managing it was held to the same degree of care in preventing damage to others as would be required of natural persons."

[1] See Ihk v. Duluth, 58 Minn. 182; *ante*, secs. 439–460.

[2] See Elliott, Mun. Corp., ch. XIV.

[3] Livingston v. Lynch, 1 John. Ch. 573; Green v. Miller, 6 John. 39; Elliott, Mun. Corp., p. 221; Lawrence v. Ingersol, 88 Tenn. 52; 6 L. R. A. 308, and note; Rushville Gas Co. v. Rushville, 121 Ind. 206; 6 L. R. A. 315; Launtz v. People, 113 Ill. 137; 55 Am. Rep. 405. The record should affirmatively show the requisite majority. Ewbanks v. Ashley, 36 Ill. 177.

[4] In Campbell v. Cincinnati, 49 Ohio

It is usually required that a journal be kept and the yeas and nays shown in the passage of ordinances, and that they shall be published, either in a newspaper or by posting in some public, conspicuous place.[1]

Sec. 462. *Territorial Extent of Government.*— In order to render efficacious the control of the local police of a community, it is frequently essential that they have the power to prohibit certain occupations and conduct within a distance beyond the actual boundaries; and as to all governmental matters which the legislature itself has the right to control, it is quite well settled that a municipality may be invested with power to regulate police within reasonable distance beyond its boundaries.[2] So ordinances prohibiting the keeping of dram-shops, bawdy-houses, gambling places, and other offenses against the police, beyond the city limits, are common.[3]

In order to make efficient use of the powers of a city in reference to drainage, health, etc., it is equally well settled that under the law of eminent domain a city may go beyond its city limits to procure the source of its water supply,[4] or pass beyond its limits to obtain an outlet for its sewerage, or build works for the protection of the city.[5]

But it is not within the power of a city to construct a wholly independent work beyond the city limits.[6] The capacity of a city to engage in purely private enterprises is not doubted. It depends upon the provisions of the charter.[7]

Sec. 463. *Police Power.*— Sufficient has been said in connection with the power of courts over local police to indicate the nature of the police power.

St. 463, statutory provisions aimed at special legislation by the council and at omnibus bills were strictly enforced.

[1] Barr v. Village of Auburn, 89 Ill. 361; Ewbanks v. Ashley, 36 Ill. 177. A city ordinance is a law, but it is not like a general or public law. Courts do not take judicial notice of city ordinances. Dillon, Mun. Corp., sec. 346; Bowman v. St. John, 43 Ill. 337. They must be pleaded. Andrews' Stephen's Pl. 262.

[2] Chicago Pkg. Co. v. Chicago, 88 Ill. 221.

[3] Gunnarssohn v. Sterling, 92 Ill. 569. But the local government of people outside of the boundary cannot be taken away in this indirect manner. Board v. Auditors, 68 Mich. 576.

[4] Bailey v. New York, 3 Hill, 531 — the Croton water system; Walla Walla v. Water Co., 19 Sup. Ct. Rep. 77.

[5] Shawneetown v. Baker, 85 Ill. 563.

[6] Updike v. Wright, 81 Ill. 49.

[7] Bailey v. New York, 3 Hill, 531; Walla Walla v. Water Co, *supra*, and cases cited; secs. 439–460, *ante*.

Local municipalities of America are commonly invested with a large degree of power in reference to local police.[1]

In considering these grants of power, a few principal rules will generally serve as a guide to their solution.

While it is commonly said that grants are to be considered most strongly against the grantor, this rule is not generally applicable to grants of power of this nature; but a power to license and regulate would not be considered as a power to prohibit.

A general power to regulate all businesses within a community gives the power to pass all reasonable ordinances in reference thereto; but it is always a question within the province of the court to determine whether a village or city ordinance is a reasonable regulation.[2]

The conduct of business as well as the conduct of persons on the Sabbath day may, under such a power and under the general police power, be regulated, or certain classes of business even prohibited; but there is no more specific rule than the one just indicated, that such regulations must be reasonable, and their reasonableness will depend upon the character, mental qualifications and peculiar views, perhaps, of the *personnel* of the supreme tribunal which is ultimately to pass on this question.[3]

It should be borne in mind that in the exercise of this police power a city is merely the agent of the state, and so in reference to the usual accessories — police officers, city lock-ups and prisons;[4] these are but instruments and agencies of the state — the same immunities in reference to accidents, casualties and negligence or wilfulness of the officers obtain.[5]

[1] Elliott, Mun. Corp., 83; Roberts v. Ogle, 30 Ill. 459; Goddard v. Jacksonville, 15 Ill. 588.

[2] Elliott, Mun. Corp.; Howes v. Chicago, 158 Ill. 653; 30 L. R. A. 225. The legislature may give the city power to do what it might itself do in this regard. Commonwealth v. Davis, 140 Mass. 485.

[3] Hart v. People, 89 Ill. 407; Seibold v. People, 86 Ill. 33; Eden v. People, 161 Ill. 296. A *state* law prohibiting the exercise of business of barbers on Sunday held void because it discriminated; but the case and its arguments are valuable on the Sunday question.

[4] *Ante*, sec. 460, and note.

[5] The city may be given exclusive or concurrent powers. Seibold v. People, 86 Ill. 33. But in no case, except by statute, where the city is executing the police power, is it liable for a failure to protect property or persons from injury on account of the acts of others. State v. Mayor, 109 U. S. 285. The famous New Orleans mob case is New Orleans v. Abbagnato, 62 Fed. Rep. 240; 26 L. R. A. 329. See Elliott, Mun. Corp. 278.

Sec. 464. *Executive Officers.*[1]— The execution of the laws of a city are intrusted to the mayor and other executive or municipal officers; generally a city attorney, city clerk, city treasurer, superintendent of streets or a street department, city marshal or chief of police, with a police department,— the number and subdivision of all these depending on the extent and complexity of the city organization.

The mayor and city attorney are usually considered parts of the city council — the mayor with a vote in case of tie, and a limited veto; the city attorney with the privilege of speaking in the council upon measures, but having no vote.

The mayor has usually the power to pardon.

Sec. 465. *Control Over Streets, Alleys and Parks.*— Streets and alleys of a city are placed under their care and control, and in some of the localities the fee of the street is held to be in the city in trust for the public.[2]

It is within the power of the municipality to pass all reasonable ordinances regulating the use of streets and alleys; and being so invested with complete control, it is generally held that for defects in the street, after notice, or which exist for such a reasonable time that notice should be presumed,[3] the city is liable in its corporate capacity for private injury on that account. The same rule would extend to all its private property.[4]

The public parks which belong to the city, and distinguished

[1] *Removal of Officers.*— Ordinarily, when appointing power is confided to an officer or board, the power of removal at will accompanies the power of appointment, when no fixed term is provided by law, unless excluded by express words or necessary implication. See Throop on Police Officers, sec. 354, and cases cited; Fuller v. Attorney-General, 98 Mich. 101; Attorney-General v. Jochim, 99 Mich. 367. Where the charter of a city empowers the board of police commissioners to appoint and summarily dismiss a policeman, where specific charges have been preferred against an officer upon which he is tried and found not guilty, he cannot be dismissed as guilty of another offense which is not specified. Wilkinson v. Board, 107 Mich. 394. See Wellman v. Board, 84 Mich. 558.

[2] Hibbard & Co. v. Chicago, 173 Ill. 91. The streets are not merely for travel, but may be put to reasonable use by abutting owners. Field v. Barling, 149 Ill. 556. Children playing on them are making lawful use. Quincy H. Ry. Co. v. Gnuse, 38 Ill. App. 212.

[3] Aurora v. Dale, 90 Ill. 45.

[4] It is liable for injury occasioned by the ruinous condition of a building owned by it. Chicago v. O'Brennan, 65 Ill. 16.

from the parks which the city is compelled by general legislation to maintain, are within the control of the city, even to a greater extent than the streets; and an ordinance which might be held by the court to be unreasonable as to the use of a street — for example, the prohibiting of parades, or beating of drums, or shouting, such as are sometimes indulged in by religious enthusiasts — might be held reasonable in the case of the parks of a city.[1]

The city has undoubtedly the right to repair or change the grades of the streets at will, and it is not every consequential injury for which an individual may recover.[2]

In making these changes of grades, however, every reasonable means must be availed of to prevent overflow or damage to private property.[3]

Sec. 466. *Grants of Franchises in Streets.*— The ownership of the streets is in the city in trust for the public, and this trust cannot be frittered away or materially impaired. While the

[1] An ordinance making it unlawful to beat a drum upon any traveled street without special permit from the president of the board of trustees of a city, who is authorized to grant such permits, is sustained in Re Flaherty, 105 Cal. 538; 27 L. R. A. 529, against the contention, on which several of the judges based a dissent, that an unconstitutional delegation of power was thereby made to the president of the board to exercise his discretion in granting permits. An ordinance is not unconstitutional because it provides that no person shall, in or upon any of the public grounds, make any public address, etc., except in accordance with a permit from the mayor. Davis v. Massachusetts, 167 U. S. 43. The public common of Boston is the property of the inhabitants. Id.; Lincoln v. Boston, 148 Mass. 578.

[2] Wabash Ry. v. Defiance, 167 U. S. 88. "A city has the complete control over the streets, pavements, etc., and determines, in the exercise of its functions, everything in connection with their grading, paving and condition according to its best judgment; and where it chooses to grade its streets so as to leave only a two-inch depth of gutter, instead of six, it may do so without being subject to any control of the courts." McHale v. Easton & B. Transit Co., 169 Pa. St. 416. See Davis v. Crawfordsville, 119 Ind. 1.

[3] A city has absolute control over the grade of its streets, and may change the grade at will. In such cases the city is liable to the same extent that a natural person is for direct, physical injury caused by obstructing the flow of water, or collecting it and casting upon it. Rye v. City of Mankato, 36 Minn. 373. See Nevins v. City of Peoria, 41 Ill. 502 (this is one of the great leading cases); Perry v. Worcester, 6 Gray, 544. And where the constitution provides that property shall not be taken or *damaged*, any substantial *consequential* injury by reason of a change must be compensated for. Elgin v. Eaton, 83 Ill. 535. If the improvement is made without provision for ascertaining the damage an action lies. Id.

city may license or suffer temporary or continual use of the streets for mere private purposes not interfering with the public use or the rights of adjoining owners,[1] it cannot *grant* a franchise of a permanent nature for any use except of a public nature.[2] It may authorize their use by private persons for the purpose of supplying water, gas or electric light, or for purposes of transportation.[3]

It has been held that such use is not an additional burden such as requires compensation to the adjacent owners either by condemnation proceedings or otherwise.[4]

Sec. 467. *Taxing Power.*— The taxing power of the city, like that of the state, must be for public purposes — maintenance of schools, libraries, sewers, public watering-troughs, city lock-ups,[5] city hall, and all the various essentials or conveniences reasonably necessary for the management of municipal affairs,— and may be provided for out of the general fund.

Upon precisely the same principle relating to the state, the city may be empowered to impose special assessments for local improvements, and special taxation of contiguous property.

The city may be compelled to tax for the purpose of maintaining instruments and agencies of government which it would be within the power of the state legislature to maintain, and no very strict line is drawn to distinguish between the local and special benefit, and the special benefit to the public.[6]

[1] Hoey v. Gilroy, 129 N. Y. 132.

[2] Hibbard & Co. v. Chicago, 173 Ill. 91.

[3] People v. Ft. Wayne & E. Ry. Co., 92 Mich. 525.

[4] Id. See Detroit Ry. Co. v. Mills, 85 Mich. 643, and citations. The placing of poles in the streets for the purpose of stretching wires designed for the purpose of conveying electricity is not such a use of the highway as private persons may make without the license of the municipality, and a city may exact compensation therefor. St. Louis v. W. U. Tel. Co., 148 U. S. 92.

[5] While it has at various times in legal experience been customary to allow and sometimes to compel prisons to be built and maintained by larger or smaller municipal corporations, yet all criminal prisons are and must be public and not private places of detention, and no imprisonment can be lawful that is not authorized by public laws. In England it is settled that all prisons, by whomsoever kept, are the king's prisons (2 Inst. 100; Ex parte Evans, 8 T. R. 172), and no new prison can be erected except by act of parliament. Detroit v. Board, 108 Mich. 494; *ante*, sec. 460.

[6] In Washington Home v. Chicago, 157 Ill. 414, the complainants sued the city of Chicago to compel the paying over of a portion of tax provided in the incorporating act that it might receive from the city of

The taxing power of a city is of the same nature, extends to the same objects, and has only the same limitations which the same power has when exercised by the United States or a state, but it is a derivative power and may be controlled by the legislature.

By becoming a municipal corporation the inhabitants of a city do not escape the liability to compulsory taxation under which they rested before the charter was granted.

Attention has been called to the extremes to which this legislative power to compel taxation has been carried.[1]

Chicago. It was incorporated under a special act of the legislature of 1867. The object of the incorporation was the maintenance, care, cure and reclamation of inebriates. It was provided that any person sentenced by the authorities of Chicago may, with the consent of proper officers of said Home, be received, detained and treated by said hospital. The act also required the city to pay over ten per cent. of all moneys received from licenses for the sale of spirituous liquors. For many years the city paid the money and the corporation performed the services. Finally the payment was stopped, and it was held by the supreme court that this institution was not of a character sufficiently public to authorize the legislature to authorize the city to grant this assistance.

The supplying of municipal corporations and their citizens with natural gas is a public use or purpose for which taxes may be levied. State v. Toledo, 48 Ohio St. 112; Toledo v. Hosler, 54 Ohio St. 209. While the erection of all such works is sufficiently public to authorize the city to maintain them, this does not determine their character as to whether they are governmental or merely private in their character. In Bailey v. Mayor, 3 Hill, 531, it was held that the Croton Water Works System was purely private. The title of the act under which this system was erected was "An act to provide for supplying the city of New York with pure and wholesome water." The double object of a water-works system may be profitably observed—(*a*) to supply pure and wholesome water; (*b*) to supply water for extinguishment of fires. All will agree that the prevention and extinguishment of fires is a part of the police and general governmental duty; it is believed that there is no conflict of opinion upon this. Others maintain, as was maintained in the case just cited, that the furnishing of pure and wholesome water for domestic purposes is a purely private function. This case is of doubtful authority at the present time. Springfield Ins. Co. v. Keeseville, 148 N. Y. 46. See, on these distinctions, City of Walla Walla v. Walla Walla Water Co., 19 Sup. Ct. Rep. 77; Helena Water Co. v. Steele, 20 Mont. 1; *ante*, sec. 459.

[1] The relation of a municipality to the state, in respect to the performance of a public duty imposed upon it by the legislature, is presented in Davock v. Moore, 105 Mich. 120; 28 L. R. A. 783, which holds that the consent of a municipality or its local officers or boards is not necessary to the validity of a tax to raise money required by a board of health under legislative authority. In a recent case in Montana the same question was ex-

SEC. 468. *Liability for Personal Torts.*— Aside from questions of municipal liability for the acts of officers done under color of office or supposed execution of law, questions arise where officers commit personal torts, either maliciously or recklessly; and the question frequently arises whether the city is liable for such torts.

When such officers are engaged in executing what are clearly the criminal laws of the state, it is quite plain on principle that there can be no more liability against the city than there would be against the state;[1] but where these officers are engaged in enforcing city or village ordinances regulating matters of indifferent nature, not contrary to the criminal law, and which would be perfectly lawful unless prohibited, there is more ground for saying that they are executing a mere city power, and not the powers of the state.

But even in such cases it has been held that the city is not liable for assault and battery, or the loss of personal property.[2]

It may, however, be well doubted whether this rule will apply where the officer was strictly pursuing and carrying out the direction of the city, either by resolution or ordinance. In such a case there would seem to be no distinction between a personal act of violence and false imprisonment and a direct trespass against property, and that an action in such case will lie either for personal tort or direct trespass against land.[3]

amined, and while the case involves constitutional restrictions, the position maintained by Judge Cooley (and approved in some of the states, which is contrary to the decision in the United States court heretofore cited, *ante*, sec. 459) is sustained. Helena Water Co. v. Steele, 20 Mont. 1, citing People v. Chicago, 51 Ill. 17.

[1] College v. Cleveland, 12 Ohio St. 375; 30 Am. St. Rep. 373; Bowditch v. Boston, 101 U. S. 16.

[2] Butterick v. Lowell, 1 Allen, 172; Elliott v. Philadelphia, 75 Pa. St. 342; 15 Am. Rep. 591.

[3] Chicago v. McGraw, 75 Ill. 566; Allen v. City of Decatur, 23 Ill. 332. See Wolf v. Boettcher, 64 Ill. 316; Thompson, Corp., sec. 6305; Elliott, Corp., ch. 16. "Where the act done is within the corporate power, and might have been lawfully accomplished had the municipal authorities proceeded according to law, the corporation will be liable for the acts of its officers and servants, proceeding contrary to law, or in an irregular manner. But where the act complained of lies wholly outside of the general or special powers of the corporation, it can, in no event, be liable, whether it directly commanded the performance of the act, or whether it be done by its officers without express command." City of Chicago v. Turner, 64 Ill. 419. See Sacks v. Minneapolis, 77 N. W. Rep. 563, and citations.

Sec. 469. *Corporate Power — Doctrine of Ultra Vires.*— When questions arise as to the nature of the power of a corporation to perform certain acts or to enter into certain contracts, they are generally designated as questions *ultra vires.*

So we have works entitled "Ultra Vires;" and because the expression in this brief form is incapable of conveying very definitely the whole meaning, the doctrine itself has been rendered somewhat confused and uncertain.[1]

Nowadays the expression is almost universally confined to the subject of corporation contracts, although sometimes spoken of in connection with corporate acts not contractual; but, as we have seen heretofore, it is sometimes used in relation to the powers of legislature or congress. It was originally used, it is said, in Kames' Principles of Equity, questioning the validity of a deed.[2]

Form of Presentation Important.— Treating it as a question of corporation law, and equally applicable to public and private corporations, the manner in which the question is viewed will frequently affect the court's decision.

An act done or contract entered into by a corporation may be alleged to be *ultra vires* from several standpoints.

First. The objection may come from the state, which seeks to forfeit the charter or restrain the further exercise of the alleged unwarranted power.[3]

Second. A corporation may seek to deny its liability upon a contract or for the action of its officers, expressly entered into or expressly authorized, or it may deny the implication of authority.[4]

Third. A third person, against whom an action is brought by a corporation upon a contract regular in form, may deny that the corporation had power to enter into such contract.[5]

Fourth. A member may object to the performance of a contract or to the execution of a contract, or the performance of

[1] See Elliott, Mun. Corp., § 288.

[2] Anderson's Dict., title "Ultra Vires."

[3] People v. N. R. S. R. Co., 121 N. Y. 121; People v. P. P. C. Co., 175 Ill. 125; Chicago Mut. B. L. I. Ass'n v. Hunt, 127 Ill. 257; People v. Chicago Gas. T. Co., 130 Ill. 268.

[4] California Bank v. Kennedy, 167 U. S. 362.

[5] City of Fulton v. Northern Ill. College, 158 Ill. 333.

acts by the corporate body, which he claims to be *ultra vires* its corporate powers.[1]

The state is the only party that can question certain powers.[2]

Sec. 470. *The Test of Power.*— A corporation derives all its powers from its charter, and can exercise only those expressly granted therein, or implied as essential or proper to the carrying out of the objects for which the corporation was created.[3]

A contract strictly *ultra vires* is void, not simply voidable. As a contract, no rights or liabilities can flow from it;[4] and such a contract may be questioned by any one, at any time, and under any circumstances.[5]

In such cases, if parties have proceeded under the contract, and one has received a benefit from the other merely by way of services, there is no liability *on the contract*, because the power to contract in any form is wanting; but if one party had received money or property which might under ordinary circumstances be recovered, the money or property may be recovered under appropriate form of action.[6]

The difficulty in such cases generally arises in reference to what are called incidental or implied powers, and questions

[1] Byrne v. Schuyler Elec. Mfg. Co., 65 Conn. 336; Bastian v. Modern Woodmen, 166 Ill. 595. These phases, properly termed *ultra vires*, should be distinguished from the features of a corporate contract or act which would be beyond the right of any person to enter into, such as contracts in restraint of trade, or contracts creating a monopoly, such as trusts, combinations and consolidations, which are prohibited on general principles of the common law, or by statutes applicable to all persons, whether artificial or natural. Brenham v. Brenham Co., 67 Tex. 542.

[2] Champaign v. Harmon, 98 Ill. 491; Railway Co. v. Mills, 85 Mich. 643.

[3] See this subject more closely examined under "Private corporations," p. 572; Cook Co. v. McCrae, 93 Ill. 237; Crofut v. Danbury, 65 Conn. 294; Wheeler v. County of Wayne, 132 Ill. 599–604; Huesing v. City of Rock Island, 128 Ill. 465; People v. Chicago Gas Trust Co., 130 Ill. 258; McPherson v. Foster, 43 Iowa, 48; *ante*, sec. 459.

[4] Bissell v. Mich. Southern Ry. Co., 22 N. Y. 258; Davis v. Old Colony Ry. Co., 131 Mass. 248; 41 Am. Rep. 221.

[5] Pittsburgh & St. L. R. R. Co. v. Keokuk B. Co., 131 U. S. 371; Cent. Trans. Co. v. Pullman P. C. Co., 139 U. S. 24.

[6] Salt Lake City v. Hollister, 118 U. S. 256 (see closing part of opinion); Pittsburgh, C. & St. L. R. Co. v. Hamilton Bridge Co., 132 U. S. 371; Central Trans. Co. v. Pullman P. C. Co., *supra;* Smith v. Ala. L., Ins. & T. Co., 4 Ala. 558; Dill v. Wareham, 7 Met. (Mass.) 438; Morville v. American Tract Society, 123 Mass. 129, 137; Argenti v. City of San Francisco, 16 Cal. 256; Miller v. Am. Mut. Ass. Ins. Co., 92 Tenn. 167; Phila. Loan Co. v. Towner, 13 Conn. 249; Sacks v. Minneapolis, 77 N. W. Rep. 563.

may arise not only as to the act which may be done, but the manner of performance.[1]

If the act is one which is performed in an irregular manner, or inappropriate means have been taken to accomplish it, circumstances may arise which will estop the party questioning the power from contesting it, or even contesting the manner of its execution; and in many such cases where the municipality might perform the act, an implied obligation may be created on the ground of equity and fairness, or the defendant held estopped from making the defense in the particular instance.[2]

The doctrine of *ultra vires* is established for the benefit of the public and on grounds of general expediency, and cannot be used to defeat that end.[3]

So a defendant, while retaining the fruits of a transaction, will not be heard to allege an excessive exercise of a power possessed in some degree.[4]

In all such cases the contract, so far as executed, is enforceable, although its provisions are beyond and broader than those authorized by the enabling act.[5]

Contracts are in such cases enforced, not on the ground of power, but on the ground of conscience.

It is impossible to lay down any general rules which will be safe guides in specific instances. It is sometimes said that the courts are inclined to maintain with vigor the limitations of corporate action whenever it is a question of restraining the corporation in advance from passing beyond the boundaries of their charters. They are equally inclined, on the other hand, to enforce against them contracts, though *ultra vires*, of which they have received the benefit.[6]

[1] City cannot loan without express authority. Fulton City v. Northern Ill. College, 158 Ill. 333. On the power to borrow, see Mayor v. Ray, 19 Wall. 469; Daniels v. Tearney, 102 U. S. 415.

[2] Sturgeon v. Board of Com., 65 Ind. 302. An estoppel proceeds upon the theory of denying the right to insist upon what is truth in fact, or the true construction of an act.

[3] Bank v. Matthews, 98 U. S. 642.

[4] Wright v. People, 101 Pa. St. 204; Whitney Arms Co. v. Barlow, 63 N. Y. 62; Himes Brewing Co. v. Flannery, 137 Ill. 318; East St. Louis v. Gas Co., 98 Ill. 415.

[5] In the following cases mortgages were enforced which were beyond the power of the corporation to make: Darst v. Gale, 83 Ill. 337; Ammerman v. Niles, 9 C. E. Green, 13. Foreclosures were allowed upon such mortgages in the following instances: Walters v. Texas B. & L. Ass'n, 8 Tex. Civ. App. 500; Bond v. Terrell Mfg. Co., 82 Tex. 310; Bank v. Matthews, 98 U. S. 621.

[6] Bradley v. Ballard, 55 Ill. 413.

Morawetz, in his work on Corporations, says that, if specific performance of a contract amounts only to compelling the payment of money under a contract, it may be granted, although the contract might be *ultra vires*.[1]

Sec. 471. *Municipal Bonds — Estoppel in.*— A vast amount of litigation has arisen over the validity of municipal bonds issued in aid of private enterprises of a *quasi*-public nature, and in a great many cases it naturally happens that there is irregularity, either in the issue of the bonds or want of power to issue them in the particular instance.

It being settled by law that a city may under some circumstances execute a particular contract (the one involved in the litigation), whether a bond or otherwise, or accept a contract in the nature of a security, it naturally follows that, in the hands of an innocent third person, there should be a presumption of the validity of an instrument of that nature.[2]

While the original holder of such an instrument, received from a municipal corporation, should be prepared to defend the power and legality of the instrument if assailed, it has become the practice to insert in municipal bonds a recital of the purpose for which the bond was given, and also a brief recital of the basis of the issue.

If this recital indicates due and proper compliance with the law, it ought to, and does, bind the municipality, and estop it from questioning the facts expressed and implied in the recital, for the doctrine of estoppel applies to an artificial person as well as to a natural one.[3]

[1] Sec. 684.

[2] The execution of a mortgage under seal, regular on its face, is *prima facie* evidence of its regularity. Wood v. Whelen, 93 Ill. 153; Railway Co. v. McCarthy, 96 U. S. 267; Miners' Ditch Co. v. Zellerbach, 37 Cal. 543; 99 Am. Dec. 30. That a municipal corporation may be a creditor and take securities for repayment is settled. See 2 Dill. Mun. Corp. 677; Sturgeon v. Board of Com., 65 Ind. 302; Pacific Exp. Co. v. Peabody, 25 Ill. App. 74.

[3] The law on this subject is fully settled. The subject is quite fully treated by Mr. Elliott. Mun. Corp. 164.

CHAPTER XXVI.

PRIVATE CORPORATIONS.

Sec. 472. *Forms of Individual Association.*— The practice of association between private individuals for the accomplishment of some desired object of charity or business is very ancient.

The forms of association which individual interest and enterprise have contrived are numerous, both in character and in their object.[1]

Among the associations which the law recognizes, and which exist in sufficient number to have been the occasion for distinctive systems of rules, are partnerships, joint-stock associations and corporations. Mining partnerships[2] and syndi-

[1] The student of the subject of private corporations should read as his first case the great decision of Chancellor Kent in Livingston v. Lynch, 4 Johns. Ch. 573; 1 N. Y. Ch. Rep. (Lawy. Co-op. ed.), p. 941. The case was not a corporation case, but it is one of the most widely-cited cases, and its principles apply to corporations. Following this should be read Thomas v. Dakin, 22 Wend. 9. In this case Justice Nelson says: "We may in short conclude by saying, with the most approved authorities at this day, that the essence of a corporation consists in a capacity: 1. To have perpetual succession under a special name and in an artificial form. 2. To take and grant properties, contract obligations, sue and be sued by its corporate name as an individual; and 3. To receive and enjoy, in common, grants of privileges and immunities." This description of Justice Nelson has been approved and acted upon in Snell v. Chicago, 133 Ill. 430, Mr. Justice Magruder saying: "The first two franchises enumerated by Judge Nelson are those which *belong to the corporators* and create *them* a corporation; the third is a franchise which belongs to the corporation as such." See Warner v. Beers, 23 Wend. 103; Memphis Ry. Co. v. Commissioners, 112 U. S. 609.

[2] *Mining Partnerships.*—Mr. Justice Wood, quoting Mr. Justice Field in Kahn v. Smelting Co., 102 U. S. 641, says: "'Mining partnerships, as distinct associations, with different rights and liabilities attaching to their members from those attaching to members of ordinary trading partnerships, exist in all mining communities; indeed, without them successful mining would be attended with difficulties and embarrassments much greater than at present.' He then quotes a passage from the opinion in Skillman v. Lockman, 23 Cal. 199, 203, to the effect that a mining partnership is governed by many of the rules relating to ordinary partnerships, but also by some rules

cates[1] are varying forms of these associations, partaking of the nature of partnership, but having some peculiar features.

Clubs, though not incorporated, are recognized as possessing a sort of entity, or, as one might say, a *quasi*-personality.[2]

Joint-stock Associations.—Unless some artificial identity is given to a numerous body, all must be recognized in contracts or legal proceedings.

"The inconvenience of this rule, as applied to large unincorporated joint-stock companies, has long been seriously felt. It has been avoided in England by the institution of a public officer to sue and be sued on behalf of the members of the association. In this case, care is taken to render the public officer the representative of the company, as distinct from the individuals composing it. Where this is done, legal proceedings between the public officer and those individuals, or any of them,

peculiar to itself, one of which is that one person may convey his interest in the mine and business without dissolving the partnership, and then proceeds as follows: 'The same doctrine is asserted in numerous other cases, not only in that court, but in the courts of England. Associations for working mines are generally composed of a greater number of persons than ordinary trading partnerships; and it was early seen that the continuous working of a mine, which is essential to its successful development, would be impossible, or at least attended with great difficulties, if an association was to be dissolved by the death or bankruptcy of one of its members, or the assignment of his interest. A different rule from that which governs the relations of members of a trading partnership to each other was therefore recognized as applicable to the relations to each other of members of a mining association. The *delectus personæ* which is essential to constitute an ordinary partnership has no place in these mining associations. Duryea v. Burt, 28 Cal. 569; Settembre v. Putnam, 30 id. 490; Taylor v. Castle, 42 id. 367.'" Bissell v. Foss, 114 U. S. 252.

[1] *Syndicates.*—A form of association, generally for the purpose of purchasing, holding and selling, is called a syndicate. The property is vested in a trustee, with full powers of sale and division of the proceeds; the arrangement between the shareholders and trustee never contemplates that the shareholders should be entitled to an interest in the land, but only in the proceeds of the sale. It follows that no shareholder can claim partition, or upon his death claim that the property passes to his estate so that his widow is endowed. The members are, to a certain extent, partners, but not to such an extent as makes them agents, nor that their death absolves the syndicate. Their interest is a mere personal chattel, the assignment of which does not change the status of the association. Mallory v. Russell, 71 Iowa, 63; Sparling v. Parker, 9 Beav. 450; Ward v. Davis, 3 Sandf. 502.

[2] Mechem, Agency, § 557; People v. Adelphi Club, 149 N. Y. 5. *Cf.* State v. Gilpi, 48 La. Ann. 520.

are theoretically as unobjectionable as are legal proceedings between incorporated companies and their shareholders.[1] Such an officer must be created by law, since the partners or associates cannot, by their own act, empower their treasurer or secretary, for the time being, to represent the firm, and sue and be sued on its behalf. Such a person would not be a representative, like a corporation sole, and could not have standing as such in court.[2] On the other hand, if a representative of the firm be established *by law* instead of by acts of the partners, the cases already cited show that he may sue and be sued by one of the associates, though the associates themselves are not incorporated."[3]

Sec. 473. *The Policy of the Law.*— The policy of the law in permitting an artificial capacity to be assumed by private individuals was originally the accomplishment of some object or the encouragement of some enterprise which would redound to the general good of the community, and on that account a special privilege or liberty, technically called a "franchise," was bestowed.

Tendencies of Corporations.— Experience has shown that this expedient, which at first was resorted to to accomplish the public good, has gone aside from the original design.

Very early in the history of our country the baneful tendency of the private corporation was recognized. For example, Mr. Justice Wilson, speaking in 1790, says: "It must be admitted, however, that, in too many instances, those bodies-politic have, in their progress, counteracted the design of their original formation. Monopoly, superstition and ignorance have been the unnatural offspring of literary, religious and commercial corporations. This is not mentioned with a view to insin-

[1] Lindley on Partnership, 720. See Lawrence v. Wynn, 5 M. & W. 355; Skinner v. Lambert, 4 Man. & Gr. 477; Wills v. Sutherland, 4 Exch. 211; Smith v. Goldsworthy, 4 Adol. & Ellis (N. S.), 430; Reddish v. Pinnock, 10 Exch. 213; Chapman v. Milvain, 5 id. 61; Ex parte Hall, 3 Deac. 405; Harrison v. Brown, 5 De Gex & Sm. 728.

[2] Hybart v. Parker, 4 C. B. (N. S.) 209.

[3] Wescott v. Fargo, 61 N. Y. 538–548. See cases distinguishing these joint-stock associations, which lie so very close in their attributes to corporations. People v. Coleman, 133 N. Y. 279; Waterbury v. Mer. U. Exp. Co., 50 Barb. 157; Com. v. U. S. Exp. Co., 157 Pa. St. 579; Oliver v. L. & L. Ins. Co., 100 Mass. 531; Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566; Livingston v. Lynch, 4 John. Ch. 573.

uate that such establishments ought to be prevented or destroyed. I mean only to intimate that they should be erected with caution and inspected with care."[1]

Sec. 474. *Modern Idea of the Franchise.*— It may readily be seen how at one time such a franchise was a special privilege or peculiar liberty, but at present, when incorporation is the rule and not the exception, and when incorporation upon the same terms is the right of all who choose to avail themselves of it equally with every other person, the franchise to be a corporation can scarcely be deemed a special privilege.[2]

It is obvious, therefore, that too much importance must not be attached to the ancient technical meanings of the word "franchise."[3]

[1] 2 Wilson's Works, 265. "The great increase of corporations for almost every purpose is seriously alarming. A spirit is growing which will be productive of the most mischievous effects. Interested and corrupt motives are growing daily more prevalent from this source. The independence and integrity of every branch of our government are attempted, and it is full time that a check be put to this spirit, and to an independent and enlightened judiciary can we alone look for its application." Ellis v. Marshall, 2 Mass. 272 (1807).

"Corporations derive their existence from the society, are the offspring of transitory conditions of the state; and with faculties for good in such conditions, combine durable dispositions for evil. They display a love of power, a preference for corporate interests to moral or political principles or public duties, and an antagonism to individual freedom, which have marked them as objects of jealousy in every epoch of their history. Therefore, the power has been exercised, in all civilized states, to limit their privileges, or to suppress their existence, under the exigencies either of public policy or political necessity." Justice Campbell, in Dodge v. Woolsey, 18 How. 331–375 (1855).

"The processes of combination, says Justice Brown, have not only put practically the entire manufacturing industry of the country into the hands of corporations, but have enabled the latter to put an end to competition among themselves by the creation of trusts. On the other hand, labor is gradually consolidating, with the avowed purpose of dictating the terms upon which the productive and transportation industry of the country shall be carried on. The reconciliation of this strife between capital and labor, if possible, is the great social problem of the coming century." Address of Justice Brown, "Forum," August, 1895; quoted in 2 Wilson's Works, 282, note.

[2] Howe v. Flagg, 72 Ill. 397.

[3] "What is a franchise? Under the English law, Blackstone defines it as a 'royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject.' (2 Blk. Com. 37.) Generalized and divested of the special form which it assumes under a monarchical government based on feudal traditions, a franchise is a right, privilege or power of public concern, which ought not to be exercised by private individuals at

Sec. 475. *Motives for the Varying Forms of Association.*— The usual object of incorporating for the purpose of accomplishing the desired object is to permit the investment of so much of one's capital as seems desirable, without the risk of more. Perhaps this is the most usual motive; but this immunity from individual liability is not an essential feature of a corporation.[1]

In fact, in some states individuals are liable to creditors in proportion to their stock holdings, notably in California.

The motive for forming a joint association is to change the manner of holding; for the members of a partnership are joint tenants of the property, and members of an association are tenants in common.[2]

On the other hand, stockholders are not in any sense owners of the corporate property, nor do they even have an equitable interest therein.

Still a further motive to choose incorporation or syndicate, rather than a partnership, is that the members are not agents of either the corporation or the other members, while partners are the agents of the firm.[3]

Sec. 476. *Scope of the Treatment.*— With the history or policy of creating and maintaining corporations it is not the purpose to extend the scope of this treatise.[4] Neither is it intended to attempt an extended treatment; but this inquiry will be

their mere will and pleasure, but should be reserved for public control and administration, either by the government directly or by public agents, acting under such conditions and regulations as the government may impose in the public interest and for the public security. Under our system, their existence and disposal are under the control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority. No private person can establish a public highway, or a public ferry, or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived. These are franchises. No private person can take another's property, even for a public use, without such authority; which is the same as to say that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise. The list might be continued indefinitely." California v. Pacific R. R. Co., 127 U. S. 1–40.

[1] Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566.

[2] Livingston v. Lynch, 4 John. Ch. 573.

[3] See Van Aerns v. Bleiston, 102 N. Y. 360.

[4] Paul v. Virginia, 8 Wall. 168. See argument of Pinckney in McCulloch v. Maryland, 4 Wheat. 384.

strictly confined to an outline of the principal features of modern private corporations in such a manner as to afford a practical understanding of their creation, management and dissolution. It will be useful to distinguish them from other associations having similar attributes, and to distinguish the different classes of private corporations.

Sec. 477. *Classes of Corporations Aggregate.*— The objects for which corporations are formed are as varying as the different forms of business enterprises. The objects of incorporation, however, serve as a basis for the classification of private corporations aggregate.

Formerly they were classed as lay and ecclesiastical. We more appropriately say, corporations for religious purposes and corporations for secular or civil objects.

These corporations for religious purposes, however, in our view are not a *genus*, but a *species*, and together with all other classes of corporations not for profit, whether they be for mutual indemnity, mutual charity, free alms, or free nurture, fall within the designation *eleemosynary*. All others may be said to be civil or secular.

Eleemosynary corporations may be again classified as religious, and lay or charitable. Civil or secular corporations are all private in their foundation and ownership. There is a difference in the objects intended to be accomplished, in the nature of their franchises, which constitutes a reason for a well-recognized classification.

The only franchise possessed by a commercial or manufacturing corporation is the franchise to be a corporation, but the nature of its business is such as may be performed by any individual.

On the other hand, the *quasi*-public corporation is one constituted of private persons, but the object of their association is to engage in a business public in its nature.[1] Here the business is one which no private individual may engage in without a special franchise, or a business so public in its nature that the state may control its exercise. In these cases the business itself is a franchise.

[1] 1 Cooley's Blk. (3d ed.) 471; Academy v. Harvard College, 12 Gray, 594; Board of Education v. Bakewell, 122 Ill. 339; Proprietors v. Newcomb, 7 Met. 276; 37 Am. Dec. 757; Thompson v. People, 22 Wend. 579.

Sec. 478. *Distinctive Features.*— A partnership is nothing more or less than a voluntary contractual association for the accomplishment of some object[1] or business. Up to a certain stage in the process of formation the creation of a corporation aggregate is identical.[2]

While a partnership may to a certain extent acquire an individuality or personality, it can never do so to the extent of concealing the identity of the partners, or relieving them from ultimate personal liability.[3] There is no further tie between partners than a contractual one.

A corporation arises by a union of the consent and the sanction of the state creating a new person.

The agreement to become incorporated, the object of incorporation, name, location, and in fact all the principal features of a corporation, must be agreed upon by the parties, and this agreement is known in law as the articles of association, and, upon incorporation, to a certain extent become a part and parcel of the charter.

In determining whether an association of individuals having characteristics similar to corporations is in fact a corporation, the legislative designation in the statute that they are a body-politic, or are not to be so considered, is not decisive.

Judge Gresham well said: "It is of no consequence that, in the statute under which these companies are organized, they are called unincorporated associations. In determining what such institutions really are, regard is to be had to their essential attributes rather than to any mere name by which they may be known. If the essential franchises of a corporation are conferred upon a joint-stock company, it is none the less a corporation for being called something else."[4]

[1] It is accordingly treated as a part of the subject of contracts. Livingston v. Lynch, 4 Johns. Ch. 571–592.

[2] Mining and land syndicates.

[3] Clark v. Laird, St. L. Ct. App., Jan., 1895.

[4] Fargo v. L., N. A. & C. Ry. Co., 6 Fed. Rep. 787.

Corporations Distinguished from Joint-stock Associations.— "Taking judicial notice, as this court is bound to do, of the laws of the state of New York, I find that joint-stock associations are recognized by statute, and endowed with the following attributes of corporations:

"1st. They may sue and be sued in the name of their president or treasurer. 3 R. S. (Ed. 1875), p. 762. For this purpose the officer is regarded as a corporation sole; he is a representative of the company, distinguished from the individuals composing it, and a suit may be brought

To a certain extent this perpetual succession may exist in joint-stock associations, such as syndicates. So the exemption of individual liability in a corporate body does not change it from a corporation into a private association.[1]

The essential features are the possession of complete personality, with the capacity of perpetual succession, which is one of the attributes which must exist to be a corporation (although it may be possessed by an association not a corporation); a power to take, hold and grant property in its own right, not merely as trustee, for syndicates take and hold property by or through a trustee, leaving but an equitable interest, and not

against him by other shareholders in the company. Westcott v. Fargo, 61 N. Y. 542; Cross v. Jackson, 5 Hill, 478. No such suit abates by reason of the death, removal or resignation of the officer so sued, but may be continued against his successor. 3 R. S., p. 763. The officer so sued is not personally liable. Id.

"2d. Its capital is represented by certificates of stock. Id., p. 764.

"3d. Neither the death of a stockholder nor the assignment of his stock works a dissolution of the company. In other words, they are endowed with perpetual succession, or, as it is termed, the immortality of corporations. Id.

"4th. They may take, hold and convey real estate in the name of their president, and in perpetual succession. 2 R. S., p. 402; Waterbury v. Mer. U. Exp. Co., 50 Barb. 160.

"Partnerships have none of these attributes. Indeed, except in the want of a common seal, these associations are corporations without the name. The definition of a corporation is quite broad enough to include associations of this character. In the work of Angell & Ames, it is defined as a 'body, created by law, composed of individuals united under a common name, the members of which succeed each other, so that the body continues the same, notwithstanding the change of individuals who compose it, and is for certain purposes considered as a natural person.'

"Though the acts of New York above cited provide that joint-stock companies shall not have the rights and privileges of corporations, they are expressly endowed with inherent qualities as such; and the constitution of the state (art. 8, sec. 3) provides that the term 'corporations,' as used in this article, shall 'be construed to include all associations and joint-stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships. And all corporations shall have a right to sue, and shall be subject to be sued, in all courts in like cases as natural persons.' It is true that stockholders are liable individually for the debts of the association. But this liability attaches only after an exhaustion of remedies against the joint property. 3 R. S., p. 763. As observed by the supreme court, this individual liability is by no means incompatible with the corporate idea. Liverpool Ins. Co. v. Massachusetts, 10 Wall. (77 U. S.) 566. Indeed, such liability is frequently imposed in favor of creditors of banks and claims for personal labor." Maltz v. Am. Exp. Co., 1 Flippin, 16; Fed. Cas. 566.

[1] Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566.

an estate in the members. This artificial form naturally confers the power to sue and contract obligations, and to be sued in the corporate name.

So, after all, the idea of *personality*, *artificial individuality*, one may say, is the peculiar distinguishing feature of a modern corporation.[1]

Sec. 479. *The Articles of Association.*— The first step in the formation of a corporation is the agreement to associate together as such, and this is usually accomplished by means of a written contract called the "articles of association."

These articles of association will generally, and should, follow in their provisions the requirements of the law, stating the name by which the corporation is to be known, the location of its principal office,[2] the objects which are intended to be accomplished by the incorporation — that is, the business to be followed, if it is a business corporation,— the plan which is to be followed in accomplishing it, and the officers which are intended to manage the business.

This agreement does not differ in any essential particular from what the agreement would be if the parties were not intending to incorporate.

Sec. 480. *Promoters and Their Contracts.*— In practical operation, the design to form a corporation is frequently made by persons who are unable to consummate their intent for want of capital or some other essential requirement, and between the time of forming this agreement and the time of receiving a charter there are employed persons to assist in obtaining the necessary subscriptions to the stock of the corporation, or the necessary number of members required by law, and these agents and assistants are known as *promoters.*

The acts, representations and contracts of promoters are, from the necessities of the case, frequently recognized and en-

[1] So. Pac. Ry. Co. v. Orton, 6 Sawy. 157. Judge Dillon approves Savigney's designation of them as juridical persons. 1 Mun. Corp., § 3.

[2] If no location is fixed, it nevertheless follows that the meeting of the corporation for strictly corporate purposes, as distinguished from business purposes, must be within the state creating it. 1 Thomp. Corp., § 55; Lincoln Co. v. Prince, 2 Mass. 544; Taunton Co, v. Whiting, 9 Mass. 321; Bastian v. Modern Woodmen, 166 Ill. 595. A corporation is a resident only of the state creating it. Wilcox & G. Co. v. Phœnix Co., 60 Fed. Rep. 932; Shattux v. Insurance Co., 58 Fed. Rep. 609.

forced against the corporation, which comes into being because of their efforts, and which has availed itself of the benefit of their labors; or whether there happens to be a benefit or not, whenever the corporation has expressly or impliedly adopted or ratified the acts of the promoter.[1]

Sec. 481. *The Charter.*—In most, if not all, of the states, at the present time, there are general incorporating acts, providing for the incorporation of the different classes of private corporations, such as banking corporations, railroad corporations, religious corporations, charitable institutions, corporations for profit, or money corporations with or without stock; and it is generally required that an application be made for incorporation, accompanied by articles of association, containing provisions covering the subject heretofore mentioned, stating the location, object of the corporation, the plan, and designating a temporary board of management; and, upon this being filed and approved, the secretary of state issues a certificate of incorporation.

The Elements of the Charter, then, are the articles of association, the statutory provisions of the law and the sanction of the state. The charter is the constitution of the society, the fundamental law of its existence.[2]

Sec. 482. *The Object of General Incorporating Acts* is to have every corporation of the same class organized under substantially the same terms. In this manner is secured uniformity and equality of corporate powers, functions and privileges.

It is apparent from an examination of the statutes that the creation of corporations under general laws, rather than by special legislative enactment, was not intended to work any essential change in their nature or character. Whether deriving existence from a special law or from incorporation under the general law, the corporation is an artificial being of legislative creation, *having no other powers or properties* than such as the law confers or which may be incidental to their very existence. The statutes have carefully prescribed the mode of incorporation. The persons proposing to be incorporated must

[1] See a valuable article by the late Austin Abbott, 1 Am. & Eng. Corp. Cases, p. 1.

[2] Granger L. & H. Ins. Co. v. Ramper, 73 Ala. 325; 10 Am. Corp. Cas. 27; People v. Chicago Gas L. Co., 130 Ill. 267; Ohio Ry. & Nav. Co. v. Ohio Ry. Co., 130 U. S. 1.

file, and cause to be recorded in a designated public office, a declaration in writing, stating the name of the corporation, the objects for which it is formed, the amount of capital stock, the number of shares into which it is divided, the names of the stockholders, and the number of shares each may hold.

The office and effect of the declaration the statutes do not leave in doubt; when recorded, the persons signing it and their successors become a body corporate by the name stated therein, and with the powers conferred by law.

It is an acceptance by the corporators, under the name designated, *for the objects expressed*, of the corporate powers and capacity the law confers, and a statement of the *principal constituents* of the corporation.[1]

Sec. 483. *The Charter is the Measure of Power; it is the Constitution.*— The charter granted by the legislature is the constitution of the corporation. The powers, duties and functions of the corporation are all to be measured by the charter. Not only the power to perform, *but the manner in which the objects of the corporation are to be accomplished*, are to be determined by the charter.[2]

It follows from this that a definite notion of what is the charter is essential to a right determination of what the corporation may or may not do, and in what manner these things may be accomplished.

The charter is a grant from the sovereign power of the state, and by the consent of the state only can it be varied or enlarged. So a declaration in the articles of association that the object of the corporation is of a character different from the objects permitted under the act of incorporation is simply surplusage and void.[3]

A method of management contrary to the statute is not permissible. Whatever is beyond, or contrary to, the general act of incorporation upon the acceptance of a charter becomes void.[4]

Sec. 484. *The Articles of Association are Merged in the Charter.*— Wherever the incorporation is by a special act incorporating the company according to the articles of associa-

[1] Cases cited to sec. 481.

[2] Byrne v. Schuyler Elec. Mfg. Co., 65 Conn. 336; Granger L. & H. Ins. Co. v. Ramper, 73 Ala. 325; 10 Am. Corp. Cas. 27.

[3] See next section.

[4] Chicago Mut. Ben. Ass'n v. Hunt, 127 Ill. 257.

tion, these, as a matter of course, contain the substance of the charter; but wherever, as is now universally the case, corporations are formed under general acts, the articles of association become merged in the corporation.

These articles of association can add nothing to the provisions of the statute; nor is it within the province of any ministerial officer, like the secretary of state, to add anything to the general incorporating act by giving sanction to the incorporation of associations having provisions in the articles of association foreign, or greater, or contrary to, the provisions of that portion of the act under which the particular corporation is organized. That would be allowing the corporators to take unto themselves special privileges and provisions.[1]

Sec. 485. *Control of Corporations.*— The corporation itself belongs to the members, and the membership has the right to control it. The manner in which this control is to be exercised is fixed in the articles of association and in the charter; and it is implied, in the absence of express provision, that, as to all matters of policy and changes provided for in the charter, a majority rules.[2]

This is said to be one of the principal aims of incorporation; but, unless provided for in the charter, no fundamental change, like a change in the charter by changing the articles of association, can be made except by the unanimous consent of the members.[3]

The corporation can move in the orbit marked out by the charter, and accomplish all of its purposes and aims, and perform all its business, and in all such matters a majority rules; but a new course, new objects and new methods cannot be adopted by a simple majority.[4]

Another limitation upon the power to change is the consent of the state. An organic change is not within the implied powers, for the same reason that the incorporators cannot, by the

[1] This was the precise point decided in People v. Chicago Gas L. Co., 130 Ill. 268; Granger L. & H. Ins. Co. v. Ramper, 73 Ala. 325; 10 Am. Corp. Cas. 27.

[2] Snell v. Chicago, 133 Ill. 430; Livingston v. Lynch, 4 John. Ch. 573; Rumford v. Wood, 13 Mass. 195.

[3] Zabriskie v. Hackensack Ry. Co., 18 N. J. Eq. 178; Byrne v. Schuyler El. Mfg. Co., 65 Conn. 336; Allerton v. Chicago City Ry. Co., 18 Wall. 233; March v. Railway Co., 43 N. H. 515.

[4] Id.

articles of association, accomplish a different purpose, or accomplish it in a different manner, than is provided for in the incorporating act. So they have no power, after their incorporation, to change. All changes must be sanctioned by the state.[1]

Sec. 486. *The Management of the Corporation Business.*— The management of the business of a corporation is distinct from the management of the corporation itself.[2]

The incorporators, stockholders or members never manage the business; they always appoint agencies. These are called the officers, and in a money corporation are usually the president and board of directors. The secretary and treasurer are employees rather than managing officers.

The officers of a corporation have the implied power to manage all the business concerns of the corporation without consulting the stockholders.[3]

They have the power to adopt by-laws for the guidance and management of the affairs of the corporation. They have no power to make fundamental changes in the articles of association, nor to transact any business not within the scope of the objects for which the corporation is constituted.[4]

In fact, they are the agents of the corporation, and are not the agents of the members, except in so far as they are expressly authorized to act for the members.[5]

Sec. 487. *By-laws.*— Among the implied powers of corporations is the one to make by-laws, although the incorporating act generally expressly provides for it.[6]

[1] Willis v. Central Ry. Co., 41 N. J. Eq. 5; Zabriskie v. Hackensack & N. Y. Ry. Co., 18 id. 178. See these cases as to the effect of legislative acts purporting to make changes. They are very often cited.

[2] Railway Co. v. Allerton, 18 Wall. 233; Eidman v. Bowman, 58 Ill. 444; McNulta v. Corn Belt Bank, 164 Ill. 427.

[3] Id.

[4] All such acts are *ultra vires.*

[5] It is a well-established principle that in partnerships and general associations the majority cannot change or alter their fundamental articles of partnership against the will of the minority, however small, unless there is an express or implied provision in the articles themselves that they may do so. March v. Railway Co., 43 N. H. 515. The same principle applies to corporations. See Livingston v. Lynch, 4 Johns. Ch. 571; Byrne v. Schuyler Elec. Co., 65 Conn. 336; Zabriskie v. Hackensack Ry. Co., 18 N. J. Eq. 178; Allerton v. Chicago City Ry., 18 Wall. 233; Eidman v. Bowman, 58 Ill. 444; McNulta v. Corn Belt Bank, 164 Ill. 427; Farmers' Ins. Co. v. Knight, 162 Ill. 470–80.

[6] *By-laws.*— It is not essential that a corporation have by-laws, especially where the charter sufficiently indi-

Members' By-laws.— It is sometimes the practice for the incorporators or members to formulate a code of by-laws for the direction of the officers, and with unanimous consent it would appear competent for the members to constitute the board of directors or managing officers *their agents* to act in and about their own peculiar affairs, such as voting for them by proxy; performing acts in the nature of acts of members, which only the members could do excepting for this authority; that is, change the methods of doing business with the consent of the state, or changing articles of association with like consent; but in such action taken by the directors, they would act as the agents of the corporators or members, rather than as the agents of the corporation.[1]

Directors' By-laws.— In order that the proceedings of the managing officers shall be controlled by some uniform order and method, it is usual for them to adopt by-laws for their future guidance, so that the movements of the corporation shall be orderly rather than erratic, and the members may know in advance what to expect, and may be able to investigate or control after a fact has transpired.[2]

The directors have ample power to make by-laws without express authority from the members.[3] While the members may give them additional authority to make by-laws effecting their interests, a general authority to make, alter or repeal all by-laws does not authorize such a delegate body to make changes in the fundamental features of the articles of association.[4]

cates the manner of doing business. Thomas v. Dakin, 22 Wend. 70. By-laws of a corporation adopted by members amount to a contract between the members and the corporation, and they are also in the nature of a law unto the body. Kent v. Quicksilver Min. Co., 78 N. Y. 159; Brick Presbyterian Church v. City of New York, 5 Cow. 538. The by-laws of a corporation, passed under direction of a statute which requires that the corporation prescribe for the doing of an act, amount to more than a mere private contract, and such a provision may amount to a public law, and authorize *mandamus* to compel its execution. Bassett v. Atwater, 65 Conn. 363.

[1] Byrne v. Schuyler El. Mfg. Co., 65 Conn. 336; March v. Railway Co., 43 N. H. 515.

[2] These by-laws must be reasonable and conform to the charter. Reg. v. Governor, etc., 6 Ad. & El. 717; 51 E. C. L. 716; People's Home Ins. Co. v. Supreme Court, 104 Cal. 649.

[3] 2 Wilson's Works, 270; 1 Blk. Com. 475.

[4] McNulta v. Corn Belt Bank, 164 Ill. 427; Allerton v. Chicago City Ry. Co., 18 Wall. 233; Livingston v.

The reasoning upon which these rules depend is well established and easily understood. The articles of association of a corporation constitute the contract entered into between individuals, and it is fundamental that a contract would not be a binding obligation if one or any part of the number less than all might change its stipulations without the assent of the other.[1]

Sec. 488. *Agreement to Become a Member — Subscriptions.*— Individuals may become members of associations or corporations by signing this original agreement called the articles of association. In some cases the agreement takes the form of subscription for stock.[2]

This assent is sometimes sought by means of personal representations of promoters or other members, or by statements in a prospectus, and the subscriber has a right to rely upon any representations made to him,[3] and may resist the payment of his subscription because of attempts to divert the corporation from the plan set forth in the articles of association,[4] or because of these misrepresentations. Any material change in the objects or methods constitutes a good cause for a refusal to pay a subscription.

Lynch, 4 John. Ch. 573; Stevens v. Davison, 18 Gratt. (Va.) 819; March v. Railway Co., 43 N. H. 515.

[1] Venner v. Atchison, T. & S. F. R. Co., 28 Fed. Rep. 581; March v. Railway Co., 43 N. H. 515. "It is an admitted principle which pervades all contracts whereby persons associate themselves together, whether partnerships joint-stock associations, or corporations, that a vote of the majority cannot change or alter the fundamental articles of copartnership or association against the will of a minority, however small, unless there is an express or implied provision in the articles themselves that they may do so." March v. Railway Co., 43 N. H. 515; Byrne v. Schuyler Elec. Mfg. Co., 65 Conn. 336. "*The authority to pass by-laws* is, as a matter of course, authority to pass such as are consistent with the articles of association, and not a power to subvert the law of corporate existence. The by-laws of a corporation are only rules and regulations as to the *manner* in which the corporate powers shall be exercised. Any attempt on the part of defendant, by by-laws or otherwise, to deprive an unconsenting stockholder of the right secured to him by the corporate articles, is in excess of defendant's authority, or, in legal parlance, *ultra vires*." Bergman v. St. Paul Mut. B. Ass'n, 29 Minn. 275; 9 Am. Corp. Cas. 496; Livingston v. Lynch, 4 Johns. Ch. 573.

[2] One may become a subscriber by actually signing the subscription or by authorizing his signature. Kern v. Chicago Brewing Ass'n, 140 Ill. 371. See 1 Cook, Stock and Stockholders, sec. 52.

[3] Kent Co. v. Wilson, 5 Houst. 49; Nockell v. Crosby, 3 B. & C. 824.

[4] Banet v. Alton & S. Ry. Co., 13 Ill. 504.

Sec. 489. *Payment of Subscription.*— In form the subscription to capital stock is an agreement to take so much of the capital stock at par; *i. e.*, if the shares are $10, to pay $10 therefor.

In the scheme of financial manipulation, on account of which the corporation has become famous, the intention to pay is seldom manifested in any other way than in this expression in the subscription, and it has become the habit of directors and managers to issue stock without full payment, taking in exchange therefor some commodity, patent-right privilege, franchise or abstract idea at a fabulous and fictitious valuation.

This manipulation passes under the name of watered stock,[1] and in many instances the consideration is so ethereal that watered seems too substantial a designation.

If that which is given and received has some tangible or appreciable value or efficacy as a means of enabling the corporation to accomplish the object of its creation and earn a dividend, though it be but a trade-mark, good-will, a patent,[2] or a formula for medicine, it is admissible to issue stock for a fair valuation, and courts will not hold stockholders liable for mere mistake in the valuation. The overvaluation must be of such a nature as to amount to a fraud;[3] but where the overvaluation is palpable, or designed merely as a cover, it amounts, irrespective of intent, to a fraud upon the creditors, and they have a right to recover of the stockholders the difference between the value of that given and the amount of their subscription.[4]

[1] See Cook on Corporations, ch. III.

[2] See Whitehill v. Jacobs, 75 Wis. 474.

[3] Handley v. Stutz, 139 U. S. 417; N. T. W. Co. v. Gilfillan, 124 N. Y. 302; Sprague v. Nat. Bank of Am., 172 Ill. 149. This last is one of the most important cases in the books, and should be particularly studied.

[4] Sprague v. Nat. Bank, *supra*. Defendants organized a corporation with a capital stock of $250,000, and subscribed for the whole amount. In payment of their subscription they transferred to the company, *without actual fraud*, a bond for title to land, for which they had paid only $5,000. For the balance of the purchase-money the company executed its notes. *Held*, that under the constitution of Alabama (art. 15, § 6), and code of Alabama, 1876 (§ 1805), defendants are liable to creditors of the corporation to the extent of the difference between the value of the property and the amount of their subscription. Elyton Land Co. v. Birmingham Warehouse and Elevator Co., 92 Ala. 407. It has been held that the persons who have become creditors of the corporation by having dealt with the corporation with full knowledge of an arrangement by which stock was issued at

Sec. 490. *Corporation Affairs and Business.*— A little reflection renders it easy to perceive that a corporation may have *affairs* distinct from the *business* which it is the object of the corporation to transact.

As we have seen, the corporate franchises belong to the corporators or members, while the business franchises belong to the corporation. These latter are the franchises to perform the particular functions which it was the object of the corporators to seek by incorporation. This is generally the transaction of the corporation business, if it be a business corporation; the prosecution of the particular enterprise or charity, if it is a corporation not for profit; but, in any event, the particular office and function of the agents of the corporation — that is, its officers — is the transaction of the corporation business.

Most important results depend upon this distinction. An authority to transact the business of a corporation does not vest in the directors authority to change the articles of association, or to perform corporate acts which are appropriately and essentially the acts of the corporators.[1]

The members, by giving a general authority to perform all

less than its face value could not recover against the stockholders. First Nat. Bank v. Gustin Min. Co., 42 Minn. 327; Coit v. Amalgamating Co., 119 U. S. 343. In the late Illinois case above cited, it was held that the fact that a creditor dealt with a corporation with full knowledge as to the manner in which the subscription was paid did not deprive him of his remedy. It was held in another case that where the creditor was also a stockholder, and extended the credit with full knowledge, he could not, in the absence of fraud, enforce an individual liability against other stockholders. Whitehill v. Jacobs, 75 Wis. 474.

A copartnership was formed to buy certain property, thereafter to be conveyed to a corporation *to be formed*, and stock issued to each partner at $70 per share, of the value of $100 per share, according to the capital contributed. One partner, who became president of the corporation, was to contribute $490,000. He issued stock to himself accordingly, but in fact only contributed $133,000, and gave notes for the balance, which he afterwards paid with the corporation's funds. *Held*, that the issue of stock by the president to himself over the amount actually paid for with his own money was fraudulent. Huiskamp v. West, U. S. C. C. (Ill.), 47 Fed. Rep. 236.

The stockholder sought to be charged must be connected with the fraud. Am. M. & G. Co. v. Buckley, 107 Mich. 447. See Burns v. Beck, 83 Ga. 471; Hawes v. Petroleum Co., 111 Mass. 200; Manufacturing Co. v. Bank, 6 Rich. Eq. 227.

[1] Eidman v. Bowman, 58 Ill. 444; Reichwald v. Hotel Co., 106 Ill. 439; Allerton v. City Ry. Co., 18 Wall. 233; Bastian v. Modern Woodmen, 166 Ill. 595.

corporate acts and transact all business, do not authorize the board of directors to exercise all the powers which the members themselves might exercise.[1]

Sec. 491. *Limitation on Powers of Members.*— The charter which designates the manner in which the business shall be transacted is also a limitation on the members and any majority thereof.

The members, by their articles of association prior to or contemporaneous with accepting the charter, cannot designate any different agencies or methods from those pointed out in the charter, and after the incorporation is complete they cannot change the control and management of the corporation from the agencies and methods pointed out in the charter, unless expressly authorized so to do.[2]

Sec. 492. *Changing the Articles of Association or Charter.*— As between the corporation, its members, its agents and the state, or between any and all of them, the charter is a contract and cannot be changed without the assent of all.[3] Unless there is a reservation in the laws of the state providing for the power to change or repeal such charters, the state cannot change the charter of a private corporation.[4]

The state, however, may authorize a change, which may be consummated by acting upon the authority; but it is not within the power of the directors alone to accept such a change.

A stockholder cannot have a fundamental change forced upon him.

It follows that any attempt to change by any delegated body, whether it be a board of directors or other delegate body, such as is generally found in Free Mason societies, or voluntary indemnity associations, like the Grand Lodge of Free Masons or the Head Camp of the Modern Woodmen of America, would be of no effect.[5]

The act of change, like the original act of incorporation or

[1] Id.

[2] Chicago Mut. Ben. Ass'n v. Hunt, 127 Ill. 347; Byrne v. Schuyler El. Mfg. Co., 65 Conn. 336.

[3] Mills v. Cent. R. R. Co., 41 N. J. Eq. 5.

[4] Id.; Regents v. Williams, 9 Gill & J. 365; 31 Am. Dec. 72; State v. Adams, 44 Mo. 470; 3 Withrow, Corp. Cas. 515; Braceville Coal Co. v. People, 147 Ill. 66.

[5] Bastian v. Modern Woodmen, 166 Ill. 595; Railway Co. v. Allerton, 18 Wall. 233; Livingston v. Lynch, *supra*.

act of dissolution, is an original constitutional act of agreement.[1]

If these principles are kept in view, nearly all the questions concerning directors' powers, stockholders' powers, and the power to consolidate and combine and enter into trusts, may be quite easily solved.[2]

Sec. 493. *Change of Membership.*—Thus far we have only spoken of the manner of becoming an original or charter member; but one of the essential objects of a corporation is to provide for the change in the membership without affecting the corporate capacity or identity. This is what is called perpetual succession. That is, members come and go, join and lose their membership, but the corporation does not change.

In stock companies this is accomplished by the transfer of the stock;[3] and connected with the transfer of capital stock will be encountered some difficult problems, namely, the liability of the person selling and the liability of the person purchasing the stock. The new member assumes the stock with all its liabilities, so far as third persons are concerned; but ordinarily by selling the stock a member does not escape any personal liabilities which had accrued at the time of the sale. The new member steps into the shoes of the old.[4]

It depends upon the law of the state in what manner this

[1] Livingston v. Lynch, 4 John. Ch. 573. The act of change is not a corporate act, but the act of members. Byrne v. Schuyler El. Mfg. Co., 65 Conn. 336.

[2] The principle pervades all contracts whereby persons associate, whether partnership, joint-stock associations or corporations. March v. Railway Co., 43 N. H. 515.

[3] A provision *in the by-laws* requiring a transfer to be registered affects only the members. The actual assignment vests the title and changes the membership. Parker v. Bethel Hotel, 96 Tenn. 252. A refusal by the officers to make a transfer when properly applied for amounts to a conversion of the stock. The parties injured may sue in trover for the value, or they may bring a suit in equity to compel the transfer. Ralston v. Bank, 112 Cal. 208; Cook on Stock, etc., §§ 289–292. Where the charter or by-laws provide that the stock shall be security for a stockholder's indebtedness to the corporation, and the purchaser is chargeable with notice, he purchases subject to the rights of the corporation. Id.

[4] The purchaser or assignee of stock which has not been fully paid does not become liable to corporate creditors for the unpaid balance, where the stock has been issued as fully paid, and he has acquired the same in good faith, and without notice that it has not been fully paid. A creditor in such a case would have a remedy against the original stockholder. Sprague v. Nat. Bank of America, 172 Ill. 149.

transfer is made, and when it may be considered complete; whether the mere assignment of the stock shall constitute the complete change, or whether the change is not consummated until the transferred stock is noted on the registration books of the corporation.

Sec. 494. *Locality, Residence, Citizenship.*—

Locality.— A corporation charter is in the nature of a commission from the state to the members and their successors in interest, whether at home or abroad.

It creates them a person artificial, it is true, but with the power to migrate and prosecute the object of its existence wherever by the comity of nations its natural citizens might go.[1]

Each government in the creation of corporations exercises its own discretion and determines the conditions of its grants. It may, or may not, impose territorial restrictions.[2]

A state cannot enlarge its own jurisdiction; consequently, it cannot create a corporation which must be regarded as a corporation outside of its own territory;[3] but it can confer gen-

[1] Merrick v. Van Santvoord, 34 N. Y. 208; Female Academy v. Sullivan, 116 Ill. 375.

Tramp Corporations.— A practice has grown up by non-residents of incorporating in a state where the laws are more favorable than the laws of the state where the corporation intends to do business, and where its principal stockholders dwell. Such parties frequently seek to evade the spirit of the law by having a nominal office within the state giving the charter, and transacting some slight business there; for example, having a desk in some attorney's office. These have become sufficiently numerous to have recognition, and are known in common parlance as "tramp corporations." Several of the states have forfeited charters because of the evasion. State v. P. & N. Lumber Co., 58 Minn. 330; 1 Am. & Eng. Corp. Cas. 24–26. Others are held liable as partners, the nominal incorporation being ignored. Hill v. Beech, 12 N. J. Eq. 31; Booth v. Wonderly, 36 N. J. L. 250; Montgomery v. Forbes, 148 Mass. 249; Cook on Stock & Stockholders, § 238.

[2] Id. While a corporation is for certain purposes within the fourteenth amendment, that amendment is not a limitation upon the power of a state to entirely exclude a foreign corporation from doing business within its limits or from exacting conditions on that account. The only restriction on the state in that regard is, first, where the corporation is an agency of the government, or its business is strictly interstate or foreign commerce. Pembina Silver Min. Co. v. Pennsylvania, 125 U. S. 181. But if a state allows a corporation to transact business and undertakes to exact conditions, these conditions must not be repugnant to the constitution or laws of the United States. For example, a condition that they shall not remove their suits to the federal courts. Barron v. Burnside, 121 U. S. 186.

[3] Rules of comity do not require a

eral powers to be exercised wherever the comity of nations is respected for the purpose of commerce. Such a commission is regarded like a government flag, as a symbol of allegiance and authority, and to a certain extent it is entitled to recognition abroad until it forfeits its existence at home; but a corporation, as such, can exist only in the state creating it.

It may transact business wherever the rules of comity prevail, but it cannot perform a strictly corporate act beyond the state of its existence.[1]

Mr. Thompson enjoins the necessity for carefully observing the distinction between acts done by the members in their capacity as corporators and by directors in their capacity of agents or trustees. This is really but a corrollary of the fact that the members are in fact the corporation, while the directors are never anything more than agents appointed to transact business.[2]

A state has an undoubted right to confer upon citizens of a foreign state a corporate capacity, but such an incorporation need not be recognized in any other state; and it has been held that meetings to accept the charter and strictly corporate meetings must be held within the state of the creation.[3]

The views above stated are but the logical results of the view that a corporation is an intangible, artificial person created by the sovereign authority, and this artificial capacity must be kept at all times within the control and *quasi*-visitorial powers of the jurisdiction creating it.

Residence.— The residence or domicile of a corporation, like that of a natural person, may be regarded from a double aspect, and a corporation may be held to be, for business purposes, a resident of many different localities; and so a foreign

state to allow a foreign corporation to do what it will not allow its domestic corporations to do, and a state may exclude entirely a foreign corporation from doing business within its boundaries. Hartford Ins. Co. v. Peoria, 156 Ill. 420. A corporation organized with authority to transact business everywhere excepting in the state of its creation has no standing under the rules of comity. I. G. Co. v. Com., 6 Kan. 645.

[1] 1 Thomp. Corp., sec. 55. See Drummond Tobacco Co. v. Randall, 114 Ill. 412; Merrick v. Van Santvoord, 34 N. Y. 208; Bastian v. Modern Woodman, 166 Ill. 595.

[2] Cook, Stock and Stockholders, § 588; People v. N. R. S. Ref. Co., 121 N. Y. 619; Camp v. Byrne, 41 Mo. 525.

[3] Miller v. Ewers, 27 Me. 509; 46 Am. Dec. 619. See Cook, Stock and Stockholders, where the subject is fully discussed (chs. 13, 36, 41).

corporation may be a resident, for the purposes of suit, of any state where it does business;[1] but a domestic corporation is entitled to be sued, like any other citizen, in the county of its residence, unless a statute provides otherwise; and hence, although it may have agencies or subordinate bodies in various counties or districts, for the purpose of suit its residence is in the county where its principal business office is located.[2]

Citizenship.— The citizenship and residence of a corporation may be distinguishable for certain purposes. For example, the jurisdiction of the United States courts depends upon the citizenship of litigants.

Formerly the citizenship of corporations was held to depend upon the residence of the majority of its stockholders; but this view has been gradually set aside, until now the corporation is conclusively presumed to be a citizen of the state creating it.[3]

SEC. 495. *Powers of Directors.*— From what has been said, the logical conclusion coincides with the legal rule that inasmuch as the members or corporators are not the agents of the corporation, the corporation itself — that is, as an instrument to accomplish its objects — must have agents.[4]

[1] See an article by Seymour D. Thompson in 42 Central Law Journal, No. 11.

[2] Taunton v. Whiting, 9 Mass. 321; N. W. L. Ass'n v. Stout, 32 Ill. App. 31; U. Mut. Life Co. v. Reil, 38 Ill. App. 414; Galveston, etc. Ry. Co. v. Gonzales, 151 U. S. 496.

[3] As early as 1809 it was held that the citizenship of the members must determine the citizenship of the corporation. Hope Ins. Co. v. Boardman, 5 Cranch, 57; Bank v. Deveaux, id. 61. This rule was approved in 1839. Bank v. Earle, 13 Pet. 519. The unwisdom of the rule was soon perceived, and the rule given in the text declared. Louisville Ry. v. Leston, 2 How. 497 (1844). See Maltz v. Am. Ex. Co., 1 Flip. 611; 16 Fed. Rep. 566. This rule has been consistently adhered to. Muller v. Dows, 94 U. S. 444; Pensacola Tel. Co. v. W. U. Tel. Co., 96 U. S. 1; N. & L. Ry. Co. v. Boston & L. R. Co., 136 U. S. 356; St. L. & San F. Ry. Co. v. James, 161 U. S. 545.

[4] Cook, Stock and Stockholders, § 11. "The shareholders, and not the directors, constitute the company when there is stock." Simons v. Vulcan Oil & Mining Co., 61 Pa. St. 221. "The directors are the agents of the company, and not the company itself." Ohio & Miss. R. R. Co. v. McPherson, 35 Mo. 13; Miller v. Ewer, 27 Me. 509. "In Railway Co. v. Allerton, 18 Wall. 233, in speaking of what may be done by the directors, and what by the stockholders, in a case where the charter provided that 'all the corporate powers of said corporation shall be vested in and exercised by a board of directors, and such officers and agents as said board shall appoint,' the court say: 'The general power to perform all corporate acts refers to the ordinary business transactions of the corporation.' And

The natural legal agents are the managing officers usually provided for in the charter — president, directors, secretary, treasurer, and other agents under whatsoever name.[1] The business affairs of the corporation are under their direction.[2] It is ordinarily competent, without express authority, for the directors to appoint sub-agents for the transaction of mere ordinary business, who are subject to the ordinary rules of agency.[3]

The relation of agency being a fiduciary one, it follows that directors holding a position of trust and confidence are subject to rules governing that relation, but they occupy as to many matters the higher relation of trustee.[4]

Any action of the directors contrary to the objects of the corporation, or beyond the scope of their powers, constitutes a

again: 'If the charter provides that the capital stock may be increased . . . by the corporation, this is undoubtedly authority for the corporation (that is, the stockholders) to make such a change by a stockholders' vote in the regular way.'" Wood v. Whelan, 93 Ill. 153.

[1] Important results depend upon whether the agency fall within the nature of a trust relation or merely the ordinary fiduciary relationship of general ministerial agents. Cook v. Berlin Mills Co., 43 Wis. 433.

[2] Reichwald v. Commercial Hotel Co., 106 Ill. 439. The directors, being in that capacity only agents, need not be members unless the charter so provides. 1 Cook, Stock and Stockholders, § 11. If an act is required to be done by the directors, and a recital is made that it is done by the company, it is the same in law. Williams v. German Mut. F. Co., 68 Ill. 387. But the converse is not always true; for where permission or direction is given to the corporation, it depends entirely upon the nature of the act as to whether it may or must be done by the stockholders or the directors. This distinction is one of the most important, not only as between members and managing agents, but as to transactions with third persons. The rule is that one dealing with the agent of a business corporation in a matter relating to its business operations, and not involving its corporate functions, is not charged with notice of its by-laws; but if the transaction involves corporate functions, even a stranger must look to the fountain-head for authority. In the matter of the private business which it was the object of the corporation to transact, the powers of an apparently general agent cannot be limited as to third persons by by-laws. It is sometimes said that the only general agents of a corporation are its directors, but this is not the law. Employees hired by the directors may in the sense of commercial law be agents. Johnson v. Milwaukee & W. Inv. Co., 46 Neb. 480. See also Rathbun v. Snow, 123 N. Y. 343; Babcock's Ex'r v. Allegheny Coal Co., 82 Va. 913; Relfe v. Rundle, 103 U. S. 222; Mont. Furn. Co. v. Hardaway, 104 Ala. 100.

[3] Cook, Stock and Stockholders, § 715.

[4] Hoffman Steam Coal Co. v. Cumberland Coal Co., 16 Md. 456; s. c., 22 Md. 495; Farwell v. Great W. Tel. Co., 161 Ill. 596; G., C. & S. F. Ry. Co. v. Kelley, 77 Ill. 437.

fraud upon the stockholders, irrespective of any actual intent, or even though the intent was shown to be innocent,[1] and the act intended to be beneficial;[2] and while the corporation may be bound by the *ultra vires* conduct, the members have a right to call the directors to account or restrain their further action.[3]

The directors have a wide discretion in the management of the corporate business, and are not liable to the corporation or members for mistakes in judgment; neither are they obliged to ask the advice of the stockholders, even in important transactions; but, on the contrary, unless their acts are tainted with fraud, they have a right to act upon their own judgment, even against the will of a majority of stockholders.[4]

Sec. 496. *Stockholders' Rights and Liabilities.*— The stockholders in theory furnish the capital,[5] and it depends upon their sagacity, prudence and foresight what further interest they shall preserve in the concern; for unless special provision is made in the articles or members' by-laws,[6] the stockholders, as such, have no control whatever over the capital or the management of the business.[7]

They may elect new officers at the stated time, or they may

[1] March v. Railway Co., 43 N. H. 515.

[2] Byrne v. Schuyler El. Mfg. Co., 65 Conn. 373.

[3] Sec. 497.

[4] Cook, Stock and Stockholders, § 11; Humphreys v. McKissock, 140 U. S. 304; Smith v. Hurd, 12 Met. 371–85.

[5] In practice, very often, *innocent* third persons advance the money on the bonds of the company; or in other cases a deluded public grants aid. The latter scheme is practically worn out; the former is becoming unpopular with investors. "In an epigrammatic way it has been said that a new railroad is not in a sound physical and financial condition until the bondholders have closed out the stockholders and a receiver has closed out the bondholders." Cook's Corp. Problem, 63.

[6] Park v. Grant Locomotive Works, 40 N. J. Eq. 114.

[7] Cook on Stock and Stockholders, § 11. "It is a well-recognized principle of law that the directors of a corporation, and they alone, have the power to declare a dividend of the earnings of the corporation, and to determine its amount. 5 Am. & Eng. Ency. of Law, 725. Courts of equity will not interfere in the management of the directors unless it is *clearly made to appear* that they are guilty of fraud or misappropriation of the corporate funds, or refuse to declare a dividend when the corporation has a surplus of net profits which it can, without detriment to its business, divide among its stockholders, and when a refusal to do so would amount to such an abuse of discretion as would constitute *a fraud*, or breach of that good faith which they are bound to exercise towards the stockholders." Hunter v. Roberts, Thorp & Co., 83 Mich. 63.

meet and dissolve the corporation, under certain restrictions; but these are barren rights,[1] and practically efficient only as a means of saving some remnant from the wreck.

The rights of the stockholders, aside from their power to change the organization, are merely negative, and consist in such remedies as the law provides them to protect the corporation and themselves from plunder by the officers.

Shareholders seldom recognize, before entering into membership, that their greatest danger is not on account of liability to third persons, or of loss because of the perils of the venture, but that it lies in the direction in which they have a right to expect the greatest measure of protection, namely, from their managing officers.

This subject is a most practical one connected with the subject of corporation law. The methods of perpetrating and concealing fraud and perpetuating power on one hand, and the mode of detecting and relieving against it on the other, has resulted in producing a system of rules making up in volume probably one-third of the subject of corporation law.

The experience of the complainant in the last case cited on the preceding page is too frequently the result of litigation.[2]

The Corporate Earnings are Beyond the Power of the Stockholders.— The managing officers alone have the power to declare

[1] Wheeler v. Pullman I. & S. Co., 143 Ill. 197.

[2] In a paper read before the New York State Bar Association at its annual meeting in 1896, Henry Wynans Jessup, A. M., LL. M., said: "A great body of judicial decisions has grown up in England bearing on the frauds of corporate promoters, agents and directors. In this country the cases involving breaches of trust by the managers of corporations are far more numerous than those involving promoters."

Mr. Cook, himself an able and successful corporation lawyer, and speaking no doubt from observation, says in his work on Corporations: "In these latter days the robbery and spoliation of corporations and stockholders by the corporate directors and managers have been systematized into well-known methods of proceeding, and the carrying out of such plans has become a profession and an accomplishment. The skill, audacity, experience and talent of the highest order of administrative ability have reduced to a certainty the methods of diverting profits, capital, and even the existence, of the corporation itself, to the enrichment of the corporate managers and their co-conspirators. Corporations become insolvent and stockholders lose their investment, while individuals become millionaires. Illegitimate gains are secured and enormous fortunes are amassed by the few at the expense of the defrauded and generally helpless stockholders." Cook on Stock and Stockholders, § 643.

and pay out the profits by way of dividends.[1] They have the right to reserve the accumulated profit and re-invest it at their discretion, and thereby they may increase the volume of the business, and, theoretically, the magnitude of their responsibility as agents, and this frequently serves as a pretext for increasing their compensation.[2]

The opportunity of the managing officers is great and their returns immediate. Not so the compensation of the stockholder. Whatever rights the members have after once embarking upon the venture are mere so-called equitable rights, occasioned by wilful fraud or a palpable abuse of discretion, to be enforced through the devious ways of the chancery courts.

The burden of proof in this class of agency is upon the principal, and the *quantum* must exceed a showing that there was error and established fraud. The gist of the bill is fraud.[3]

Sec. 497. *Remedy of the Stockholders Against Officers.*[4] — Wherever, by reason of neglect[5] of duty or fraudulent misconduct of the directors or other officers, the funds of the corporation have been lost or misapplied, the *injury* is in legal *theory* done to the corporation, but practically and *immediately* it affects the stockholders.

The relief afforded is always tardy, and never certain. This results from the peculiar nature of a corporation and the essential forms of law.

First, it is for the corporation to call the officers to account for their negligence or misconduct. The action is not one which the stockholder may himself bring directly against the offending officer or officers, or against the corporation in the first instance.[6]

[1] Cook, Stock and Stockholders, §§ 534–545; Hunter v. Roberts, Thorpe & Co., 83 Mich. 63.

[2] Cook, Stock and Stockholders, § 545.

[3] State of Louisiana v. Bank, 6 La. 745. See Cook, Stock and Stockholders, chs. 32–42; Miner v. Belle I. I. Co., 93 Mich. 97. See Cook, Stock, etc., § 545, notes.

[4] The forms of suit, parties and jurisdiction are treated under "Procedure."

[5] An action lies for *negligence* (O'Brien v. Fitzgerald, 39 N. Y. Sup. 707), or embezzlement allowed by negligence. Empire S. Bank v. Beard, 30 N. Y. Sup. 756; 81 Hun, 184.

[6] In Green v. Hedenberg, 159 Ill. 489, the court deemed it well settled that, where the corporate officers wrongfully deal with the corporation's property to the injury of the stockholders, the latter, even if only holding stock shares as pledgees, may maintain a bill against the company and its

It is obvious that where wrong is committed by a majority of the managing officers they will refuse to bring the suit. In that instance the member has the privilege of bringing a suit in equity on behalf of the corporation and all the other stockholders situated in the same relation to bring the offending officers to account.[1]

If the action which affects the stockholder consists of a pretended act of the corporation, though manipulated by the directors, the corporation should be made a defendant and not a complainant. Generally, the corporation must be a party.

Where the suit relates to the money or property of the corporation, the money must go back into the treasury of the corporation.

Where the complaint relates to contemplated illegal or *ultra vires* acts of the corporation, such acts are restrained and the corporation compelled to resume its proper status.[2]

Mr. Cook says: "The expense, difficulty and delays of litigation; the power, wealth and unscrupulousness of the guilty parties; the secrecy, skill and evasive nature of their methods, and the fact that the results of even a successful suit belong to the corporation, and not to the stockholders who sue, all combine to baffle investigation and exposure, to discourage the stockholders and to encourage and protect the parties guilty of the wrong."[3]

The real remedy lies in the prevention: First, by provisions in the articles of association for the calling of special meetings to remove officers; second, power in the same body and in the same manner to declare dividends and require their payment; third, a more rigid criminal code in reference to this class of vandalism.

officers for relief against such misappropriation. But before bringing such a bill, a demand must be made upon the proper officers to bring the action, *unless there is a reasonable certainty of non-compliance with such demand.* Some courts have erroneously proceeded to argue that such a demand partakes of the jurisdiction of the cause, as held by the first district appellate court of Illinois in Weigley v. People, 51 Ill. App. 51.

[1] Green v. Hedenberg, 159 Ill. 489; Waymire v. San F. & S. M. Ry. Co., 112 Cal. 646.

[2] Pollock v. Farmers' L. & T. Co., 157 U. S. 429; Bastian v. Modern Woodmen, 166 Ill. 595.

[3] Cook on Stock and Stockholders, § 643.

Sec. 498. *Directors' Contracts.*— The directors and managing officers of the company are the agents of the corporation and are under all the liabilities and disabilities incident to that relation.

The directors, or those officers to whom are intrusted matters of discretionary management, are also trustees as well as agents.

The essential distinction between the two cases is that a trustee has a title to the subject of his property, distinct from his interest, while the agent has no title. Upon this distinction it has been claimed that the directors are only agents; and while the situation is anomalous, the directors are held under all the disabilities and obligations of trustees.[1]

It would naturally follow upon the principles ordinarily applied to trustees having a title, that directors cannot purchase property directly from the corporation through themselves.[2]

It seems to be well settled that a director may make a valid purchase of the property of the corporation, notwithstanding the transaction must in form and effect be a purchase from himself of the subject of his trusteeship.[3]

It is, however, a question upon which there is not entire harmony, whether such a purchase derives its force and valid-

[1] "In Ex parte Chippendale, 4 De Gex, M. & G. 52, Lord Justice Turner said that: 'Although directors undoubtedly stand in the position of agents, and cannot bind their companies beyond the limits of their authority, they also stand in some degree in the position of trustees. . . . There is no inconsistency in this double view of the position of directors.' The views of judicial writers and courts have differed upon the subject whether the relation of the managers or directors of their corporations has the character of trustees, in the sense applicable to that term, or is that of their agents merely. While the directors may be treated as agents of the corporation, they may upon authority be deemed to have in some sense the relation of trustees. In Poole, Jackson & Whyte's Case, 9 Ch. Div. 322, 26 Moak, 142, Jessel, M. R., said: 'It has always been held that the directors are trustees for the shareholders, that is, for the company. They are managing partners of the company, and if they abuse their powers, which they hold in trust for the company, to the damage of the company, for their own benefit, they are liable to make good the breach of trust to their *cestui que trust* like any other trustees.' And in Peabody v. Flint, 6 Allen, 52, it was said: 'As between the corporation itself and its officers, it was long since held that they were trustees, and that a court of equity would hold them responsible for every breach of trust.'" Empire State Savings Bank v. Beard, 151 N. Y. 638 (for opinion, see 30 N. Y. S. 756).

[2] Cook v. Berlin Mills Co., 43 Wis. 433; Michoud v. Girod, 4 How. 557; Davoue v. Fanning, 2 Johns. Ch. 226 (1 Lawy. ed. 377).

[3] Beach v. Miller, 130 Ill. 162.

ity as a transfer merely by virtue of such a transaction having taken place in the form of a purchase and sale.[1]

The courts are all agreed that such a contract is voidable at the option of the stockholders of the corporation. On the other hand, many courts hold, and it is believed in accordance with policy and principle, that the contract is of no validity whatsoever as a direct purchase and sale,[2] but that it may be ratified as such by all who have a right to object, or such circumstances may transpire as to raise an estoppel against those seeking to question the transaction.

Such result may grow out of actual acquiescence or laches. It is straining the principle to sanction a contract between a corporation and the directors involving a transfer of property during the existence of the trust relation.[3]

In case of insolvency, a contract of the nature just mentioned is universally held to be not only voidable, but void.

It is allowed to exist on proof affirmatively made by the trustee of complete good faith, but it would have been wiser, and would have saved a vast amount of property to stockholders, temptations to directors and litigation in the courts, had the rule been simply that the property of the corporation could not become the property of the director by virtue of any transaction during the existence of the trust.

Where corporation is insolvent, all authorities agree that such a purchase by the directors is void.[4]

Sec. 499. *Executive or Ministerial Officers.*— As to such officers acting in the capacity of employees, a somewhat less stringent rule applies. They may purchase of, lend to or borrow

[1] Twin Lick Co. v. Marbury, 91 U. S. 587.

[2] Cook v. Berlin Mills Co., 43 Wis. 433. See Cook on Stock, etc., § 653. The lawyer will readily understand the distinction above suggested, but for the benefit of the student it may be well to emphasize that the transfer does not rest upon the contract or grant originally made, but upon estoppel, laches or acquiescence; and it follows that before such a result can take place, there must be a full and complete disclosure to the stockholders of all the facts and circumstances. Torrey v. Bank of Orleans, 9 Paige, 649. See Cook v. Berlin Mills Co., *supra*. The subjects of estoppel, acquiescence and laches will be treated elsewhere. But see Cumberland Coal & I. Co. v. Sherman, 20 Md. 117; 16 Md. 456; G., C. & S. F. Ry. Co. v. Kelly, 77 Ill. 426.

[3] The subjects of ratification, acquiescence and laches will receive direct treatment.

[4] Beach v. Miller, 130 Ill. 162.

from their corporation, but the contract is not binding on the corporation, its stockholders or creditors, but is always open to attack, and is always handicapped with the presumption of fraud or lack of authority.

General authority to conduct the business and to issue the promissory notes of a corporation is authority to do those acts *for corporate purposes* and in the interest of the corporation only. It does not include the power to exercise them for the exclusive benefit of others to the detriment of the corporation. And while a promissory note, made by an agent or officer having such authority, in the usual form, and taken by a stranger in the ordinary course of business, carries with it the presumption that it was issued for corporate purposes and under lawful authority, a note issued by such an agent, *payable to himself*, is accompanied by no such presumption, but is itself notice that it is without the scope of his general power, and that it does not bind his principal unless its execution was specially authorized by the corporation, through its directors or officers, other than the agent to whom it is payable. Such a note is a danger-signal, which the discounter or purchaser disregards at his peril. It is notice to him that, if it is contested, he cannot recover upon it, under any general authority in the agent, or at all, unless he proves that the agent was specially authorized to make that particular transaction or to make contracts of the corporation with himself.[1]

[1] Park Hotel Co. v. National Bank, 86 Fed. Rep. 742. In this case the court adds: "To the general rule that the acts and contracts of a general agent, within the scope of his powers, are presumed to be lawfully done and made, there is an exception as universal and inflexible as the rule. It is that an act done or a contract made with himself by an agent on behalf of his principal is presumed to be, and is, notice of the fact that it is without the scope of his general powers; and no one who has notice of its character may safely rely or recover upon it without proof that the agent was expressly and specially authorized by his principal to do the act or to make the contract. . . . This exception is a striking illustration of the policy of the law to prevent the possibility of conflict between the duty and the personal interest of an officer or agent. It prohibits him from acting for both himself and his principal wherever their interests clash, and makes every act and contract in which he violates the inhibition voidable at the election of his principal. It forbids him to act at the same time as vendor and purchaser, or as lender and borrower, or as promisor and promisee. It forbids him to sell as the agent of his principal and to buy for himself; to lend as the agent

Sec. 500. *Liability to Third Persons.*— Sufficient has been said to indicate that a corporation may be liable *ex contractu* or *ex delicto* to third persons.[1] The corporation need not contract under seal; neither is it necessary that there be a formal contract; but a contract may be implied. The same rule that originally prohibited implied contracts prevented the courts recognizing the liability for tort, but in modern law the corporation may be guilty of an assault and battery, a trespass or a tort, where malice is the gist of the action, *e. g.*, a libel.[2]

Sec. 501. *Eleemosynary Corporations — Religious Societies, Hospitals and Colleges.*— The religious society is something of an anomaly in American corporation law, the object of the corporation being the prosecution of a business not controlled

of his principal and to borrow for himself; to promise as the agent of his principal and to accept the promise and reap the benefits himself." This case cites others from many jurisdictions.

[1] A *charitable corporation* not for profit partakes sufficiently of a public nature that it is not liable for torts of servants. Hearne v. Waterbury Hosp., 66 Conn. 98.

Directors May Also be Liable.—The principles of agency do not preclude a liability against the officers individually, so directors may be held liable jointly with the corporation, or, inasmuch as torts are joint and several, they may be sued alone.

The president and general manager of a corporation are held personally liable in Nunnelly v. Southern Iron Co., 94 Tenn. 397; 28 L. R. A. 421, for damages caused to a riparian proprietor by the operation of ore washers in the company's business. In a note to the case are presented other authorities illustrating the personal liability of officers of a corporation for its torts or negligence.

[2] Daniels v. Tearney, 102 U. S. 420. "In State v. Morris & Essex R. R. Co., 23 N. J. L. (2 Zabriskie), 369, it was well said that, 'if a corporation itself has no hands with which to strike, it may employ the hands of others; and it is now perfectly well settled, contrary to the ancient authorities, that a corporation is liable *civiliter* for all torts committed by its servants or agents by authority of the corporation, express or implied. . . . The result of the modern cases is, that a corporation is liable *civiliter* for torts committed by its servants or agents precisely as a natural person, and that it is liable as a natural person for the acts of its agents done by its authority, express or implied, though there be neither a written appointment under seal nor a vote of the corporation constituting the agency or authorizing the act.' See also Salt Lake City v. Hollister, 118 U. S. 256, 260; New Jersey Steamboat Co. v. Brockett, 121 U. S. 637; National Bank v. Graham, 100 U. S. 699, 702." Denver, etc. Ry. Co. v. Harris, 122 U. S. 597–608. A corporation may be liable to a third person on account of the malicious acts of its officers in prohibiting employees from trading or doing business with him. Graham v. St. Charles St. Ry. Co., 47 La. Ann. 1656. See Walker v. Cronin, 107 Mass. 562.

and regulated by general laws of the state. Yet such a corporation has secular affairs and property, real and personal. These are subjected to the same rules as the property of individuals or other corporations.

The relationship existing between the members and their rights are largely governed by a code of rules and regulations promulgated by each denomination or society, and, in so far as these provide, they operate precisely as articles of association or stockholders' by-laws agreed upon by the members, and every member is governed accordingly; but the civil courts still exercise a supervision to protect the rights of individuals from arbitrary exercise of power by the corporate authorities, both in regard to property and corporate rights.[1]

Membership.— It is sometimes a difficult question in these eleemosynary corporations to determine precisely what are the constituent elements of a corporation; that is, whether the founders and incorporators constitute the corporation, or whether the whole membership falls within the body of the corporation, or whether some smaller governing body constitutes the corporation, or all of those who may become members of a college, for instance, fellows, students and graduates.[2]

Sec. 502. *Stockholders' Rights and Liabilities.*—

To Contract with Corporation.— The stockholders do not sustain the relationship of agency or any other fiduciary relation to a corporation, and in the absence of insolvency or fraud they may contract with it precisely as would a third person.[3] They do not own the property of the corporation. Though all unite they can perform no part of the corporation business.

To Dividends.— After dividends are declared they become the property of the stockholders *pro rata*, and are held by the corporation or its officers in trust for the stockholders. In that situation they may demand it or recover it, and it is subject to the usual process of execution or garnishment for their debts.[4]

[1] *Ante*, secs. 214–222. See Philomath College v. Wyatt, 27 Oreg. 390; 26 L. R. A. 68; Lamb v. Cain, 129 Ind. 486; 14 L. R. A. 518; Schleter v. Keiter, 156 Pa. St. 119; 22 L. R. A. 161; Bear v. Heasley, 98 Mich. 279; 24 L. R. A. 615.

[2] The trustees of Dartmouth College were the incorporated body. See State v. Sibley, 25 Minn. 587; 7 Am. Corp. Cas. 624; Regents v. Williams, 9 Gill & J. 365.

[3] Cook, Stock and Stockholders, §§ 11, 649.

[4] Id., §§ 541, 542; Parker v. Bethel Hotel Co., 96 Tenn. 252; 31 L. R. A. 706.

Individual Right to Sue.— In order that there be no failure of justice, the existence of the stockholder, even as to the affairs of the corporation, is recognized apart from the residence and location of the corporation; and it is accordingly held that a member or shareholder residing in a foreign state may sue the directors on behalf of the corporation, or sue it and the directors, or either alone, in the federal courts, notwithstanding the fact that the main body of the membership would not have such a privilege, and notwithstanding it may be a case where the suit must be on behalf of all of the stockholders and of the corporation, and possibly in the name of the corporation, while it has not the same privilege.[1]

Individual liability of stockholders to third persons upon contracts with the corporation, or on account of torts for which it may be held, is always the result of statute. No such liability exists at common law. It is, however, not uncommon to provide that stockholders shall be liable to the extent of a percentage of their holdings or in some fixed amount, or absolutely in certain cases.[2]

Sec. 503. *Consolidation, Combination and Reorganization.*— To the same extent that any person may contract with another, a corporation may combine with another corporation, or with an individual, subject only to the law against unlawful combinations and trusts.[3] The basis of the invalidity of such contracts or action may rest in general public policy against forming monopolies, or be invalid because *ultra vires* the charter, or, as in the last case cited, a violation of the federal constitution against unlawful combinations and trusts.

A corporation has not the power to consolidate or form a partnership without the consent of the state and the stockholders.[4]

If stockholders form a new corporation in another state with the same name and objects, identical in every respect, the two corporations are not identical.[5]

[1] Dodge v. Woolsey, 18 How. 331; Seddon v. V. T. & C. S. Co., 36 Fed. Rep. 6; Muller v. Dows, 94 U. S. 444; Hawes v. Oakland, 104 U. S. 452. The subject of the form of such suits and the parties belongs with procedure.

[2] Hall v. Klinck, 25 S. C. 351; Terry v. Little, 101 U. S. 217; Sullivan v. Manufacturing Co., 14 S. C. 499; Rider v. Fritchey, 49 Ohio St. 295; Flenniken v. Marshall, 43 S. C. 80; Merrick v. Van Santvoord, 34 N. Y. 208, 28 L. R. A. 304.

[3] People v. Chicago Gas Trust Co., 130 Ill. 268. See People v. North R. S. Ref. Co., 121 N. Y. 582; United States v. Joint Traffic Ass'n, 171 U. S. 505.

[4] Byrne v. Schuyler El. Mfg. Co., 65 Conn. 336.

[5] Newport & C. B. Co. v. Wooley,

A reorganization in this method, with a transfer of all assets of the company, cannot be accomplished without the consent of all the members (unless by some forms of eminent domain);[1] neither can the stockholders escape their liability upon stock subscriptions, or as stockholders, by selling out their property to a new corporation organized by them in another state. Such a transfer has been called a burial in one state for the purpose of resurrection in another, but for the deeds done in the first body the old stockholders are liable in this new world.[2]

Sec. 504. *Dissolution.*[3] — The ownership of all the shares of stock by one person[4] does not dissolve the corporation; neither does the sale of all the property.[5]

The corporation may exist even though for a time it has retired from business[6] or gone into the hands of a receiver.[7]

Neither the directors nor the whole body of the members can sell the franchise to be a corporation. This franchise is not assignable or communicable. It belongs to the particular body obtaining it, or the assigns of their stock, or their successors, and only the state can authorize its transfer in any other manner than by a surrender to the state.[8]

In the absence of a statute there is no method by which the members, unless they are unanimous, can dissolve a corporation.[9] Except by statute there is no method by which creditors can dissolve a corporation.[10] No one can question the right of a corporation to exist except the state.[11]

78 Ky. 523; Drummond Tobacco Co. v. Randall, 114 Ill. 412.

[1] Cook, Stock, etc., § 502.

[2] Sprague v. Nat. Bank, 172 Ill. 149.

[3] See Cook, Stock, etc., § 628.

[4] Parker v. Bethel Hotel Co., 96 Tenn. 352; 31 L. R. A. 706.

[5] Id.; Reichwald v. Hotel Co., 106 Ill. 439.

[6] Parker v. Bethel Hotel Co., *supra.*

[7] Id.

[8] Memphis L. R. Ry. Co. v. Commissioners, 112 U. S. 609. The franchise of becoming and being a corporation in its nature is incommunicable by the act of the parties, and incapable of passing by assignment. Snell v. Chicago, 133 Ill. 413. "The franchise to be a corporation," said Hoar, J., in Commonwealth v. Smith, 10 Allen, 448, 455, "clearly cannot be transferred by any corporate body of its own will. Such a franchise is not, in its own nature, transmissible." In Hall v. Sullivan R. R. Co., 21 Law Rep. 138 (2 Redfield's Am. Ry. Cases, 621; 1 Brunner's Collected Cases, 613), Mr. Justice Curtis said: "The franchise to be a corporation is therefore not a subject of sale and transfer, unless the law, by some positive provision, has made it so, and pointed out the modes in which such sale and transfer may be effected."

[9] Wheeler v. Pullman I. & S. Co., 143 Ill. 197.

[10] Sprague v. Nat. Bank, 172 Ill. 149.

[11] Parker v. Bethel Hotel Co., 96 Tenn. 252. Unless there is a power re-

Dissolution may take place in the following ways: 1. By the death of all the members. 2. By surrender of charter and acceptance. 3. By legislative act where the power is reserved. 4. By expiration of charter. 5. By a forfeiture judicially determined.[1]

Procedure.— In many states it is provided by statute that insolvent corporations may be compelled to go into liquidation and have their affairs wound up at the suit of a creditor who has reduced his claim to such tangible form as the statute requires. This has become a well-established method of winding up corporations.

Another mode of procedure is by *quo warranto* or an information in the nature of a *quo warranto*, or a proceeding by *scire facias*.

Originally a *quo warranto* proceeding was only appropriate where the right to exist and proceed as a corporation, or as a public officer, was questioned; and where it was sought to forfeit what was admitted to be an existing charter or organization, the proceeding was by *scire facias*. However, *quo warranto* proceedings were adopted as early at least as the attack upon the charter of London, and in modern times the *quo warranto* proceeding may be resorted to when the attack is upon the organization, or when it is sought to dissolve the corporation for an abuse of its franchise or a failure to perform its functions.[2]

Sec. 505. *De Facto Corporations.*— It sometimes happens that persons undertake to become incorporated and assume all the forms and outward semblance of a corporation, in good faith believing themselves to be so, but on account of some irregularity or omission their organization has never become complete, or it may happen that the law under which they have organized is unconstitutional.

Such an organization made in good faith, and actually embarked upon its career, is known as a *de facto* corporation, and persons dealing with it cannot ignore its corporate character and seek to hold the members liable as partners.[3]

served in the charter the legislature cannot forfeit a private charter. Such action by the legislature is judicial. Regents v. Williams, 9 Gill & J. 365. Such an act is spoken of as *disfranchisement*. Com. v. Society, 2 Binn. 441; 4 Am. Dec. 453.

[1] Folger v. Col. Ins. Co., 99 Mass. 267; Parker v. Bethel Hotel Co., 96 Tenn. 252; People v. N. R. S. Ref. Co., 121 N. Y. 582.

[2] Thompson v. People, 23 Wend. 537.

[3] Am. M. & G. Co. v. Bulkley, 107 Mich. 447. See Cook, Stock, etc., §§ 5,

Sec. 506. *State Corporations.*— An anomaly in the law of corporations is presented in the recognition of a corporation owned and controlled by a state, the difficulty being the idea of a charter granted by a state to itself. It is not difficult to understand the organization of sub-districts, such as towns and counties, and investing the locality with an entity; but the creation of a business stock company, all of whose stock is owned and controlled by the state, and investing it with an artificial personality, is a fiction more difficult to grasp.

That a state may own shares of stock in a private corporation is clear and presents no difficulty;[1] or that it may acquire by purchase all of the shares is a mere deduction from the proposition just made;[2] but it is stated that a corporation may be organized, founded, controlled and managed by the state, and consequently cannot be taxed because it is a state agency.[3] Such organizations are not frequent, but their existence is recognized, and anomalous results follow. The state takes on another personality.[4]

231, 239; Gartside Coal Co. v. Maxwell, 22 Fed. Rep. 197. If it were lawful for the state to create a corporation of the character attempted under the unconstitutional law, the society organized under it will constitute a *de facto* organization. Coxe v. State, 144 N. Y. 396; State v. Howe, 1 Mich. 512; Chenango B. Co. v. Paige, 83 N. Y. 178.

[1] United States Bank v. Planters' Bank, 9 Wheat. 907.

[2] State v. Gibbs, 3 McCord (S. C.), 377; State v. Atkins, 35 Ga. 315; 1 Abb. 22; 10 Fed. Rep. 241.

[3] Trustees v. Woodward, 4 Wheat. 618; Nashville v. Bank of Tennessee, 1 Swan, 269.

[4] "It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. Thus, many states of this Union which have an interest in banks are not suable even in their own courts; yet they never exempt the corporation from being sued. The state of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all privileges of that character. As a member of a corporation, a government never exercises its sovereignty. It merely acts as a corporator, and exercises no other powers in the management of the affairs of the corporation than are expressly given by the incorporating act." Bank of United States v. Planters' Bank, 9 Wheat. 904. See *ante*, sec. 423.

CHAPTER XXVII.

PERSONAL RIGHTS.

SEC. 507. *Private Individuals.*— In pursuing the treatment outlined we have now reached the subject of civil rights, or rights of a member of the civil community. These are the same which Blackstone treats as the absolute rights of individuals,[1] or, as he expresses it, such rights as appertain to them merely as individuals or single persons (to which, however, he added, in a state of nature, they would be entitled to either in or out of society),[2] and which he also calls their political or civil rights, and defines as natural liberty *restrained* by human laws.

In our jurisprudence a different view is taken of civil liberty, it being the understanding of American jurists that civil liberty is natural liberty *secured* by law and augmented by it, and that government is an instrument to attain that object.[3]

These private individual rights which pass under the name of "liberties" were designated by Blackstone as absolute rights, or such rights as concern or are annexed to the persons of men.[4]

As has heretofore been pointed out and explained, the use of the word "absolute" in that connection did not conform to the vernacular, and Blackstone threw the matter into some confusion by undertaking to transplant a Latin expression used by civilians into the English law, and in that he followed the Latin language but did not comply in his translation with the idiom of the language from which he adopted the expression. He thereby created an idiom unjustifiable and difficult to understand.

The expression *rights of persons* or *personal rights*, which are such as concern and are annexed to the persons of men, is a part of our vernacular. It is peculiarly a vernacular idiom. We may not drop it or ignore the expression. An endeavor has been made to explain it.[5]

[1] *Ante*, pp. 116, 121, 146, 150.
[2] *Ante*, pp. 149–50.
[3] *Ante*, pp. 147–48.
[4] *Ante*, pp. 104–8.
[5] *Ante*, pp. 91–95, 105–109. For the benefit of the student we may be

Sec. 508. *Personal Rights.*— The expression "personal rights of individuals," as understood in American jurisprudence, embraces all rights connected with the person, as heretofore explained,[1] civil or political, of individuals, whether they be natural individuals, or artificial entities, or individuals. They usually pass under the designation of *civil rights.*

These artificial entities do not possess all of the rights of a natural person, nor is their *right* to exercise them so unlimited territorially,[2] but such as they possess do not differ in quality or sacredness from the same right secured to the individual. Security from unreasonable seizures and searches, the protection of just and equal laws, and due process of law belong to the corporation as well as to the individual.[3]

Sec. 509. *Various Designations of Persons.*— Hitherto the personalities which have been presented, although often borne by natural individuals, have generally been artificial in character, either in the aspect of the people as a corporate body, or magistrates in their corporate and official capacity, or artificial entities created by the state and endowed only with private rights.

The subject of individuals, under which is treated their classes and capacities, is usually treated in English and American jurisprudence under the title *natural persons.*

This designation, while in strict accordance with the *vernacular*, would, if regard is had to the meaning of the words in

pardoned for directing the attention to the definitions of the words *idiom* and *vernacular.* An *idiom* is a peculiar or local expression to which is ascribed a meaning differing from its natural signification in the language from which it is derived. Mr. Blackstone so changed the meaning of both *persona*, which he took from the Latin, and *absolute*, which he took from his own vernacular. It has been said idioms are the genius or peculiar cast of a language. The *vernacular* has a broader though similar meaning. This term also embraces the idea of locality. It is the language of the country of one's residence; it embodies all that which constitutes one's native speech. Our vernacular is the English language as it is used and understood in America. It is said that a vernacular idiom is seldom acquired by a foreigner, and the example under discussion justifies the assertion that a vernacular idiom adopted from a foreign language is seldom understood and is always difficult to understand.

[1] *Ante*, pp. 104, 108, 109, 118.

[2] Orient Ins. Co. v. Daggs, 19 Sup. Ct. Rep. 281; Blake v. McClurg, id. 165.

[3] G., C. & S. Fé Ry. Co. v. Ellis, 164 U. S. 150; Santa Clara Co. v. S. P. Ry. Co., 18 Fed. Rep. 385; affirmed, 118 U. S. 394. (The opinion in 18 Fed. Rep. is the most valuable.) Guthrie, Fourteenth Amendment, 53; Smyth v. Ames, 169 U. S. 466.

the language from which the titles are taken, involve a solecism.

The expression "natural persons," however, is in strict accordance with the English *idiom*, and a part of the well-settled American nomenclature. By "natural persons" is meant the different aspects in which individuals appear to the eye of the law irrespective of any artificial mask, cloak or personality.[1]

The inhabitant, resident, citizen, or dweller within our borders, all tacitly owe some nature and degree of allegiance, and are entitled to a reciprocal measure of protection; and it is an honor to our system of jurisprudence that, irrespective of race, religion or color, every man is, by our law, accorded full and unstinted protection in his private rights, simply because he is a man;[2] but a distinction between the rights of men in this regard is recognized on account of the relation which they bear to our territory and our constitution.

Sec. 510. *Classes of Men Recognized.*— American law, municipal and international, recognizes a distinction in some respect or degree between natives, denizens, aliens and citizens.

Natives — Indians.— In our jurisprudence, to the designation "native" should be ascribed a somewhat different meaning from the same word as used in Blackstone's Commentaries; for thus far, during all of our history, the aboriginal native inhabitants of the country have been dwellers among us and have a recognition in our laws, whereas in English jurisprudence the native aboriginal inhabitants had long since become extinct, and the term "native" is there used in the sense of those born to the allegiance — natural-born subjects; or, as popular phrase expresses it, "to the manor born."

These natives residing among us may, in strict accordance with the principles of our government, and under the wise pro-

[1] Speaking of a corporation, by the manipulation of whose stock one Searles became the sole owner of all of the capital stock, and against which corporation *quo warranto* proceedings to forfeit its franchise were brought, the court of appeals of New York said: "And yet it is argued that the corporation, the legal entity, has done nothing; that Searles was guilty, but that the *corporate robe which enveloped him* was innocent, and so he must be left to wear it undisturbed." People v. N. R. S. Ref. Co., 121 N. Y. 582. In another case the supreme court of the United States, treating of a municipal corporation, speak of the city as a *legal personality.* Walla Walla v. Walla Walla Water Co., 19 Sup. Ct. Rep. 81.

[2] Chinese Exclusion Case, 130 U. S. 581.

visions of our law, become citizens,[1] or they may preserve their distinct nationality and exercise their rights under their own codes of law, to which each man has given his voluntary consent.[2]

Sec. 511. *Aliens.*— Aliens are those owing paramount allegiance to another prince, potentate or nation. Aliens are of two principal classes: denizens and non-resident aliens. These non-resident aliens again have differing rights, depending upon whether they fall within the designation alien friends or alien enemies.

Aliens who have not attained denization have only such

[1] Roff v. Burney, 168 U. S. 218. They are neither aliens nor citizens of the United States, but are rather domestic subjects governed by their own laws. Id. They may for some purposes be treated as citizens by the states. Jackson v. Pintard, 20 John. 184.

[2] The Cherokee nation, for example, has an orderly, comprehensive, written constitution occupying thirty pages, and a clear, well-arranged and ample code of laws of four hundred and twenty-six pages, printed, published and promulgated under the authority of the national council. Other nations are equally well advanced in civilization. See Cherokee Nation v. Georgia, 5 Pet. 1; Cherokee Nation v. Southern Kansas Ry. Co., 135 U. S. 641; Johnson v. McIntosh, 8 Wheat. 543; Roff v. Burney, 168 U. S. 218. "In a case decided by the supreme court in 1846 it was held: 'The native tribes who were found on the American continent at the time of its discovery have never been acknowledged or treated as *independent* nations by the European governments, nor regarded as the owners of the territories they respectively occupied. On the contrary, the whole continent was divided and parceled out and granted by the governments of Europe as if it had been vacant and unoccupied lands, and the Indians continually held to be and treated as subject to their dominion and control. The United States have maintained the doctrines upon this subject which had been previously established by other nations, and insisted upon the same powers and dominion within their territory. It is too firmly and clearly established to admit of dispute that the Indian tribes residing within the territorial limits of the United States are subject to their authority; and where the country occupied by them is not within the limits of one of the states, congress may by law punish any offense committed there, no matter whether the offender be a white man or an Indian.' United States v. Rogers, 4 How. 572. And in another case, in 1855, the court decided that 'the Cherokee country may be considered a territory of the United States within the act of 1812, empowering any person or persons to whom letters testamentary or of administration have been, or may hereafter be, granted by the proper authorities in any of the United States or the territories thereof, to maintain any suit, etc., in the District of Columbia. In no respect can it be considered a foreign state or territory, as it is within our jurisdiction and subject to our laws.' Mackey v. Coxe, 18 How. 104." Quoted in 2 Whart. Int. L. 532.

rights (aside from the rules of international law) as the laws of our country accord them. Our citizens, though of kin to aliens, cannot transmit property to them except by the consent of the law. Neither can aliens inherit, excepting by the same sanction; and it is doubtful whether the alien can be the intermediary transmitter by descent of property from one of our citizens to another; that is, where a citizen would inherit from another citizen, not by direct descent, but by ascending to his alien ancestor and falling heir to his portion of the inheritance of another citizen.[1]

A distinction must be observed between taking and transmitting by way of *purchase* and acquiring and transmitting by *descent;* and it is generally held that an alien may purchase and hold until he is divested by the state by a proceeding known as "office found," and if he transmits it in the meantime the purchaser obtains a good title[2] as to every one *except* the state.[3]

[1] The distinction between direct and collateral inheritance and mediate and immediate descent is explained by Justice Story. In the same case he discusses the question whether a brother could inherit from a brother where the father was alien. Levy v. M'Cartee, 6 Pet. 102.

[2] Governeur v. Robertson, 11 Wheat. 332. See People v. Conklin, 2 Hill, 67; Levy v. M'Cartee, 6 Pet. 102.

[3] Phillips v. Moore, 100 U. S. 208; Fairfax v. Hunter, 7 Cranch, 619. In regard to the disabilities of aliens, Blackstone seems to have fallen into an error. He says: "As aliens cannot inherit, they are also disabled to hold by purchase." Vol. 2, p. 249. Again (at page 347), the language is used collaterally to the right to purchase or transmit by deed, but it has the appearance that a grant from the king operates as nothing. Laying aside this latter apparent error, which has been explained by Johnson, J. (11 Wheat. 351), the former one was clearly not the law of England, and is not the law of this country, for an alien could both hold and transmit by purchase; that is, by grant or deed. Mr. Justice Story says: "It is clear, by the common law, that an alien can take lands by purchase, though not by descent; or, in other words, he cannot take by the act of the law, but he may by the act of the party. This principle has been settled in the year-books, and has been uniformly recognized as sound law from that time. . . . Nor is there any distinction whether the purchase be by *grant* or by *devise.* In either case the estate vests in the alien, . . . not for his own benefit, but for the benefit of the state, or, in the language of the ancient law, the alien has the capacity to take but not to holds, and they may be seised into the hands of the sovereign. . . . But until the lands are so seised, the alien has complete dominion over the same. . . . *He may convey the same to a purchaser.* . . . In respect to these general rights and disabilities, we do not find that there is any admitted difference between alien friends and alien enemies. During the war the property of alien ene-

The common-law right or privilege of the alien to take by purchase is in many, if not most, instances affected by treaties between this and foreign nations, which permit the taking and allow the retaining for a reasonable length of time or for a fixed period.

It becomes the important and first duty of the lawyer, upon being consulted, to ascertain whether his client is a citizen, or whether the right of aliens to hold is involved, and if it is, to see that disposition is made of the property within the time and upon the conditions of the treaty obligations.[1]

Sec. 512. *Denizens.*— Denizens are those having a prior allegiance to some foreign nation, prince or potentate, who are domiciled within our jurisdiction and not naturalized, and who receive some sort of recognition of rights other than the universal rights of men to be protected from domestic wrong.[2] It depends upon the provisions of our laws whether, and to what extent, denization may be permitted, and what rights may be acquired thereby. In short, the residence and rights of denizens, other than those spoken of, may at any time be revoked, excepting in so far as treaty obligations may control, preserving to them, of course, whatever has been acquired, and

mies is subject to confiscation *jure belli*, and their civil capacity to sue is suspended. . . . But as to capacity to purchase, no case has been cited in which it has been denied, and in Attorney-General v. Wheeden and Shales, Park. Rep. 267, it was adjudged that a bequest to an alien enemy was good, and, after peace, might be enforced. Indeed, the common law in these particulars seems to coincide with the *jus gentium.*" Fairfax v. Hunter, 7 Cranch, 619.

[1] Scharpf v. Schmidt, 172 Ill. 255. See D'Graff v. Went, 164 Ill. 485; Ryan v. Egan, 156 Ill. 122; Jele v. Lemberger, 163 Ill. 368; Bevans v. Went, 155 Ill. 592.

[2] "Whenever, by the operation of law of nations, an individual becomes clothed with our national character, be he a native-born or naturalized citizen, an exile driven from his early home by political oppression, or an emigrant enticed from it by the hopes of a better future for himself and his posterity, he can claim the protection of this government, and it may respond to that claim without being obliged to explain its conduct to any foreign power; for it is its duty to make its nationality respected by other nations, and respectable in every quarter of the globe. 'This right to protect persons having a domicile, *though not* native-born or *naturalized citizens*, rests on the firm foundation of justice, and the claim to be protected is earned by considerations which the protecting power is not at liberty to disregard.'" Mr. Marcy, Sec'y of State, in Koszta Affair. Quoted in 2 Whart. Int. L. Dig., p. 484.

a reasonable period in which to remove and dispose of property.[1]

This designation is not often used in our books. It is occasionally encountered in legislation.

Denizens are a species of aliens not having cast off their allegiance, but, because of being permanently domiciled, owe an allegiance to the country of their denization.[2]

The denizen has no right to betray the country of his habitation, and he may be punished for treason for so doing.[3]

Sec. 513. *Citizens.*[4]— For a considerable period in the history of the United States, the question as to what inhabitants of our domain are citizens was a difficult one.

It was also a question upon which great minds differed as to who might become citizens. In fact, until the adoption of the fourteenth amendment, there was some doubt as to both these questions.

In this amendment, however, is given a definition of citizenship, and a provision is enacted from which it follows that a citizen of the United States, taking up his residence within a state, becomes a citizen thereof, with all its rights and privileges.

The according of privileges by a state does not necessarily make the one obtaining the privilege a citizen of the United States. An alien may still be allowed political privileges within a state without becoming a citizen of the United States;[5] but a state is no longer the sole judge of who shall become her citizens.

A citizen of the United States is a citizen of every state wherein he may choose to dwell.[6]

[1] United States v. Repentigny, 5 Wall. 211; Chinese Exclusion Case, 130 U. S. 581.

[2] State v. Hunt, 2 Hill (S. C.), 1-17; Carlisle v. United States, 16 Wall. 147.

[3] 2 Wilson's Works, 193; Carlisle v. United States, *supra.*

[4] See 2 Wilson's Works, ch. XI. "'Generally speaking,' says the great political authority, Aristotle, 'a citizen is one partaking equally of power and subordination.' A citizen, then,— to draw his description as *one* of the *people*,— I deem him who acts a *personal* or a *represented* part in the legislation of his country. He has other rights, but his legislative I consider as his characteristic right. In this view a citizen of the United States is he who is a citizen of at least some one state in the Union." 2 Wilson's Works, 273.

[5] United States v. Cruikshank, 92 U. S. 542.

[6] Guthrie's Fourteenth Amendment, p. 36. But one may be a citizen of the United States and not a

It is, however, apparent that not every one born within the United States thereby becomes a citizen.

Fourteenth Amendment.— Sec. 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. ¶ No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; ¶ nor shall any state deprive any person of ¶ life, ¶ liberty, ¶ or property, without ¶ due process of law; ¶ nor deny to any *person* within its jurisdiction the ¶ equal protection of the laws."

It was at an early time held that a citizen of the United States, residing in any state of the Union, was a citizen of that state,[1] but this decision was without much discussion, and upon a point of jurisdiction it is unsettled somewhat by remarks of the judges in the Dred Scott case.[2]

The court then held that the constitution of the United States did not operate to make one born of negro parents who were slaves, or whose ancestors had been slaves, citizens, notwithstanding birth, domicile and natural allegiance.

This decision, rendered in 1856, unlike most decisions, unsettled the law, and nothing short of a constitutional amendment could replace it upon an intelligible basis.

The qualifying phrase, "and subject to the jurisdiction thereof," excludes the children of aliens not permanently domiciled, and all persons subject to any other jurisdiction, such as children of foreign ambassadors, or Indian nations within our territory; but unless the condition of the parents is such that

citizen of any state, where he is a resident of a territory. Presser v. Illinois, 116 U. S. 252; United States v. Harris, 106 U. S. 629; Seddons v. Va. Tr. S. & C. I. Ry., 36 Fed. Rep. 6.

[1] Gassies v. Ballou, 6 Pet. 761.

[2] The Dred Scott case left the subject in this condition: It did not decide that negroes could not become citizens, but that a negro who had been a slave, or whose ancestors had been imported into the country and sold as slaves, whether emancipated or not, could not become a federal citizen, and, as such, entitled to the privileges guaranteed in the federal constitution. Justice Taney, in discussing this question, said: "We must not confuse the rights of citizenship which a state may confer within its own limits and the rights of citizenship as a member of the Union. It does not follow because one has all the rights and privileges of a citizen of a state that he must be a citizen of the United States. He may have all the rights and privileges of the citizens of a state and yet not be entitled to the rights and privileges of a citizen in any other state."

it draws the status of the child with it, all persons born within the United States are citizens thereof.[1]

Forfeiture of.— Obviously all the rights of citizenship may be forfeited, and so also may citizenship itself, either voluntarily, as by expatriation,[2] or involuntarily, by crime punishable by banishment; but in the latter case there is room to argue that he is still a citizen.

Sec. 514. *Naturalization.*— Citizenship in the United States is, as appears from the fourteenth amendment, and as is well understood by the history of the country, derived not simply from birth, but by naturalization.

Naturalization is the adoption into the national family and investing with the full powers of citizenship a person not born to the citizenship.[3] This process involves, in most instances, the revoking of some allegiance by which the individual is bound at the time of naturalization, and underneath it, and a fundamental part of the theory, is what is known as the right of expatriation.

Upon this question several of the personal sovereigns insisted that allegiance was both natural and conventional; but, whatever its origin or form, it was perpetual.[4]

The insistence of this nation upon the principle that it is the right of man to change his habitation and change his allegiance has prevailed until it may be said to be practically universal, and under it the subjects of all civilized nations have exercised and been protected in the right.

The national congress in given exclusive jurisdiction on the subject of naturalization. It follows that complete citizenship can be obtained only through birth, the general provisions of naturalization, or by virtue of being one of the people absorbed by treaty and thereby deriving the rights of citizenship. Congress has the right to determine who may become citizens.[5]

[1] Elk v. Wilkins, 112 U. S. 94. The case of United States v. Wong Kim Ark, 169 U. S. 649, shows the importance of that middle condition which the writer has ascribed to denizens. It was there held that a child born of Chinese parents who were *bona fide* and permanently domiciled here was a citizen.

[2] Marriage with an Indian a member of a tribe and not a citizen is a mode of voluntary change. Roff v. Burney, 168 U. S. 218.

[3] Boyd v. Thayer, 143 U. S. 162.

[4] *Ante*, sec. 145; 1 Wilson's Works, 278–81.

[5] Chinese Exclusion Case, 130 U. S. 581; Boyd v. Thayer, 143 id. 162.

Treaties.— While treaties are recognized as a part of the supreme law of the land, the provisions of a treaty, while binding as to the civil rights obtained under it, cannot bind future legislation curtailing the privileges therein contained relating to the right to become citizens.[1]

Sec. 515. *Civil Rights.*— In American jurisprudence, the term *civil rights* has taken the place of Blackstone's and Hale's expressions, *political* or *civil liberty*. It means the combined rights of a citizen or individual entitled to the protection of our laws.

They are so termed because they are understood to be the rights of a member of civil society.[2]

Their Various Kinds.— Under the constitution, individuals have what are recognized as political rights, in a sense different from the expression of Hale or Blackstone.

Suffrage.— The right of the individual to exercise a portion of the sovereignty under the provisions of the law is political rather than private in its nature,[3] but it is personal, and is embraced within the designation of "civil rights," and is within the meaning of that general word, "liberty" of the citizen. It is among the "privileges and immunities" of citizens within section 2 of article IV of the constitution.[4]

Under the American conception the individual suffers a violation of his liberty when he is deprived of his just and equal right to participate in political affairs.[5]

To Hold Office.— The right to become a candidate for office is equally a political right, and, as we pointed out in treating of

[1] Chinese Exclusion Case, *supra*.

[2] There is no distinction between civil and personal rights. All rights belong to persons, and all rights are civil; that is, rights within civil society. This word *civil* is a most happy substitute for Blackstone's *absolute*. It is as perfect a designation as the language can afford. Wilson quotes approvingly Burlamaqui's definition: "*Civil* liberty is nothing else but natural liberty, divested of that part which constituted the *independence* of individuals, by the authority which it confers on sovereigns, attended with a right of insisting upon their making a good use of their authority, and with a moral security that this right will have its effect." 2 Wilson's Works, 508. Independence is the condition of the free state; civil liberty is the condition of the free man, a citizen of a free state.

[3] Luther v. Borden, 7 How. 1.

[4] Blake v. McClung, 19 Sup. Ct. Rep. 165–69; Yick Wo v. Hopkins, 118 U. S. 370.

[5] Ashby v. White, Ld. Ray. 938; Blair v. Ridgley, 41 Mo. 173; State v. Cunningham, 81 Wis. 440; Civil Rights Cases, 109 U. S. 3; Williams v. Mississippi, 170 id. 213. The right to elect magistrates is an important

local self-government, is not to be denied the individual or to be confined to persons of any particular political or religious views.[1]

Jury Service.— Although the duty to sit upon juries is shunned and avoided as a burden, it is in a sense a part of the political privileges and liberties of the citizen, generally insisted upon, no doubt, by the accused for his private interest. It is, properly speaking, a privilege and a duty, which ought not to be lightly held or shunned for selfish motives.[2]

These political rights of the citizen may be protected directly by the state. In fact it is one of the great sovereign prerogative functions of the judicial department, at the instance of an individual or attorney-general, to protect these rights. Their denial or violation renders insecure all other rights.[3]

The fourteenth amendment protects the citizen in all classes of his civil rights, irrespective of his race, color, or previous condition of servitude. He has a cause of action against any person interfering with or depriving him of this right, and the law of no state nor the direction of any magistrate can constitute a justification or defense.

The great cases passing under the name of "The Civil Rights Cases" relate to interferences with rights of this nature.[4]

Sec. 516. *Personal Security.*— The Declaration of Independence affirms that there are certain inalienable rights. Among these, it is said in sweeping general terms, are life, liberty, and the pursuit of happiness.

It was not intended by this expression to affirm that these rights were abstract rights to be enjoyed by the citizen irrespective of civil society, or that they were absolute and above the control of civil society;[5] but it was no doubt intended to combat a position then affirmed, that by contracting the tie of allegiance the individual surrendered a portion of his liberty; for in the next sentence of that document it is asserted that to protect these rights governments were instituted.[6]

political right. Purdy v. People, 4 Hill, 384–91.

[1] Cases cited *ante*, pp. 513, 514.

[2] Gibson v. Mississippi, 162 U. S. 574; Holden v. Hardy, 169 U. S., at p. 383.

[3] State v. Cunningham, 81 Wis. 440; *ante*, p. 513.

[4] Holden v. Hardy, *supra;* Gibson v. Mississippi, *supra.*

[5] *Ante* (absolute rights).

[6] No one contends that the declaration was a declaration of *independence* by individuals; an existing society had no further use for *a government* which was found inadequate. They changed it. But society was not disturbed nor did the individual become *independent.* "'The inquiry,'

The expressions, "life, liberty, and the pursuit of happiness," are too general and comprehensive to convey a definite understanding of specific instances.

These Rights Not Absolute.— We readily comprehend that culpable conduct may forfeit life; that liberty is distinguishable from license or unrestrained freedom; and that the pursuit of happiness cannot, in political jurisprudence, be extended to prodigal wastefulness, and may be qualified by social obligations and the convenience and rights of others.[1]

Equal Rights.— The principle that all men are equal, with the further fact that no inequalities have been created by society, and the declaration that all shall have the equal protection of the law, and shall be subjected only to equal law, equal rights, and equal obligations, is the extent of American liberty.[2]

The purpose of the constitution is to mark out the orbit of governmental agencies; to protect every individual in his rights; secure them by just and equal laws and the due administration thereof, according to some established form and methods of procedure, and permit him to be interfered with only in accordance with some established system applied to all alike, which passes under the name of "due process of law."

Sec. 517. *Life.*— Life being a gift of the Creator, it would seem natural that, if any right might be termed absolute, the right to live is such; but aside from criminal offenses by which life is forfeited, and attempts to do violence which justify a killing in self-defense, there are situations in which it is justifiable to take the life of the innocent and where it is obligatory

he (Washington, Justice) says, 'is, what are the privileges and immunities of citizens of the several states? . . . What these fundamental principles are it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, *subject, nevertheless,* to such restraints as the government may prescribe for the general good of the whole.' . . . The description, when taken to include others not named, but which are of the same general character, embraces nearly every *civil right* for the establishment and protection of which organized government is instituted. They are, in the language of Judge Washington, those rights which are fundamental." Slaughter-House Cases, 16 Wall. 36–76.

[1] Holden v. Hardy, 169 U. S. 366; Orient Ins. Co. v. Daggs, 19 Sup. Ct. Rep. 281–84.

[2] Id.

to die; and this is not in the imperfect sense in which the only punishment lays in the conscience, but are duties for the violation of which the civil law may and does punish.

The familiar example of two persons, having no superior obligation upon either, being placed in a situation where one cannot live without the death of the other, justifies the killing of one by the other. This is by the law of nature, and is not enforced but merely recognized by the civil law; but under the contractual relation of carrier and passenger, in extreme peril, there is a primary obligation upon the seaman to absolutely surrender his life in order that the passenger may be saved, not merely by risking it in an endeavor to save the passenger, but by voluntarily leaping into the sea.

Again, in the case of the sailor and passenger each clinging to the same plank, the sailor has not the right to destroy the passenger.

The seaman is guilty of manslaughter who throws overboard from an overcrowded life-boat the passenger of his ship; so also, doubtless, the helmsman would be guilty of a breach of his contract, and punishable for resistance to superior officers, should he refuse to take the helm and stand by until a burning ship was beached — a rule of law which happily has never required enforcement in our law.

To the last extremity, to death itself, he must protect the passenger. To the encouragement of this it is that the whole fabric of the ship, to the last shred, must answer for the seaman's pay.

Sailing is his avocation; risk, exposure, death itself, his vocation.

In the military service, a part of the municipal law, the soldier may not save his life. "So," says Bacon, "the law imposeth upon every subject that he prefer the urgent service of his prince and country before the safety of his life," and he makes a maxim that the duties of life are more than life.[1] The physician may be placed where the innocent infant or the suf-

[1] The most painful example where these principles were enforced is the case of the sailor Holmes, who, to save a portion of his passengers, threw overboard a number of them, keeping only enough of the crew to manage the life-boat, and succeeded in saving the remainder of his passengers. He was indicted and convicted of manslaughter. United States v. Holmes, 1 Wall. Jr. 1; 26 Fed. Cases, 360.

fering mother cannot both be saved. He has, in such a case, no choice: his duty is to save her.

Killing in Self-defense.— The right to take a guilty life arises when one is attacked by another, where there is an apparent intention to kill or do great bodily injury. This is the law of self-defense.[1] It is a shield, and not a pretext for wanton killing, or a disproportionate return for a moderate attack showing no evidence of an intention to do great bodily harm.[2] Still it is not always a duty to retreat at the attack of the bully, or to submit to a slight beating rather than destroy an assailant. He may protect himself, and if his assailant persist to his death it is justifiable. One need not wait until the danger is certain; it is sufficient if it is apparent.[3]

Every man has a duty to protect his household; not merely his own kin, but all those within his gates, are of his household.[4]

If they are attacked he may defend them, and if driven to the necessity may even destroy the assailant. Nay, more, he may be bound to protect the honor of his household; and it has been held he has the right to do so to the extent even of killing the paramour of his wife or the debaucher of his daughter, discovered in the act, and may be excused if the killing, though not while in the act, is so immediately after discovery that the natural anger has not had cooling time.[5]

Every man's house is his castle. "It may be frail, its roof may shake, the wind may blow through it, storm may enter, the rain may enter, but the king of England may not enter; all his force dare not cross the threshold of the ruined tenement."[6]

In these eloquent phrases Chatham enforced the principle that, as against civil process, the outer doors of the humblest cottage are as moats and battlements. He who persists in entering without proper process of the law does so at his peril;[7] but it is not a sanctuary, nor a hiding-place for every man's

[1] People v. Hecker, 109 Cal. 451; 30 L. R. A. 403, note.

[2] State v. Vaughn, 141 Mo. 514. A neighborly fight should not degenerate into a murderous affray.

[3] People v. Hecker, *supra*.

[4] 3 Cooley's Blk. 3.

[5] Beggs v. State, 29 Ga. 723; Cooley, Torts, 167; Price v. State, 18 Tex. App. 474; 51 Am. Rep. 322, note.

[6] Cooley, Const. Lim. 364.

[7] Cooley, Const. Lim. 373, note. It is not to be understood that even trespass justifies a killing.

goods. The criminal warrant against the man must be obeyed.[1] The officer armed with a writ of replevin or criminal process may enter.[2]

Sec. 518. *Personal Liberty.*— The subject of personal liberty appears in an entirely different aspect under our jurisprudence from that which it presents under the English constitution as treated by the learned commentator on English law.

This results from various causes.

First. An entirely different conception of civil rights. No rights are recognized as absolute.[3]

Second. An entirely different conception of political rights. All the members of a community are equal. There is no absolute power.[4]

Third. Our dual system of government, on account of which each individual derives certain rights from national citizenship, and others from his state citizenship, and must look for protection to one or the other.

Fourth. A new conception of religious freedom.

It follows that the treatment of the subject of personal liberty, and in fact much of the law of persons, in the Commentaries of Blackstone, is in many respects diametrically opposed to the principles governing the subject under our law. The value of this part of Blackstone's Commentaries must be chiefly historical, and only practicable so far as it aids in the interpretation of certain phrases which still make a part of our constitutional system.

A New Treatment Required.— The above observation applies not only to Blackstone, but to a certain extent to all of our presentations antedating the adoption of the *post-bellum* amendments. By these amendments the constitution of the United States is essentially remodeled, not merely as to the condition of the unfortunate bondsmen, but as to the political and civil rights of all men, of all nations, conditions, colors and classes.[5] Without any poetic license it may be said that out of the strug-

[1] See Mechem, Public Officers, § 779.

[2] Id.; Cooley, Const. Lim. 364.

[3] Mr. Justice McKenna says in a very recent case: "It would be trite to say that no right is absolute. '*Sic utere tuo ut alienum non lædas*' is of universal and pervading obligation." Orient Ins. Co. v. Dagge, 19 Sup. Ct. Rep. 281 (1899).

[4] Yick Wo v. Hopkins, 118 U. S. 369.

[5] Yick Wo v. Hopkins, 118 U. S. 356. See Guthrie, Fourteenth Amendment, p. 107.

gle of the civil war came a new birth of freedom, a new Magna Carta,[1] as it has been termed, and new bulwarks of individual freedom and self-government.

For the first time is the self-evident political axiom of equality made to pervade every department of government. Only now is accomplished the great aim of the constitution as declared in the preamble — to establish justice.

Sec. 519. *British Liberty.*— Civil liberty in its best and highest sense is indigenous to British soil — an essential characteristic of the British people.

That liberty was in that kingdom for a time subverted is admitted. It was not destroyed. Each attempt to destroy it was marked by a new barrier against another encroachment, and an everlasting monument marking a new acquisition of a portion of the birthright.

The charters of English liberty were not mere concessions of new privileges, but declarations of principles based upon ancient fundamental English law,[2] and survive in our jurisprudence.

The aim of the architects of the new British constitution was protection of private right against encroachment of prerogative — the establishment of a fixed orbit of the legislative body.[3]

Sec. 520. *Liberty Under American Law.*— The student of American institutions lacks the proper vantage ground who fails

[1] Slaughter-House Cases, 16 Wall. 36–125.

[2] Sullivan's Law Lect., XVIII; 1 Lytton's Hist., pp. 42, 526. See also *ante*, secs. 29, 30, where the distinction between the object of the Magna Carta and the Petition of Rights — "Confirmatio Cartarum"—is pointed out.

[3] "No lawyer, I suppose, now supports the doctrine of Blackstone (1 Blk. Com. 164) that the dignity of the Houses, and their independence, are in great measure preserved by keeping their privileges indefinite." Stockdale v. Hansard, 9 Adol. & E. 1; 36 E. C. L. 1–121. "The power of king, lords, and commons is not an arbitrary power; they are the *trustees*, not the owners, of estate. The fee-simple is in us; they cannot alienate, they cannot waste. When we say that the legislature is supreme, we mean that it is the highest power known to the constitution; that it is the highest, in comparison with the other subordinate powers established by the laws. In this sense the word 'supreme' is *relative*, not *absolute*. The power of the legislature is limited, not only by the general rules of natural justice and the welfare of the community, but by the forms and principles of our particular constitution." Junius Woodfall's Pref. VI, VII.

to understand that the essential elements of the system were conceived and framed by men intensely British in their conceptions of right and liberty, and strong in their admiration of the British constitution, and who, in the beginning of the struggle which culminated in independence, sought not to amend it, not to subvert it, not to abandon it, but who claimed its protection and insisted upon its provisions.

Being compelled to establish a new government, they were placed in a situation to adopt new principles of constitutional law and new theories of government consistent with the principles of English liberty.

Political Equality.— Blackstone had faintly suggested that if there was a place wherein the British constitution might profitably be amended, it was in a wider diffusion of the principles of representation.[1]

Equality the Keynote of the System.— The constitution of the United States is based upon the idea of citizenship — that is, a society composed of equals; best expressed, possibly, by Wilson, who adopts Aristotle's meaning of the word "citizen" as one partaking equally of power and subordination. "He is a citizen, then — to draw his description as one of the people,— I deem him, who acts a personal or a represented part in the legislation of the country. He has other rights, but his legislative I consider his characteristic right."[2]

The idea is well expressed by Mr. Guthrie: "Our government was the first in the history of the world instituted upon the basis of civil equality and equal law. That *jus æquum* for which the Romans longed as embodying true freedom, that *egalité* for which the French have striven so hard and so blindly."[3]

Some invidious aspersions have been made against the national constitution, as originally adopted, because of its alleged

[1] 1 Blk. Com. 172.

[2] 2 Wilson's Works, 273. It is not to be understood that to be a citizen one must act a personal part in legislation. In fact, no one is permitted to do that. All is by representation.

[3] Guthrie's Fourteenth Amendment, p. 106. Mr. Guthrie cites and quotes 1 Wilson's Works, 275 (ed. of 1896): "But however great the variety and inequality of men may be with regard to virtue, talents, taste, and acquirements, there is still one aspect in which all men in society, previous to civil government, are equal. With regard to all, there is an equality in rights and in obligations; there is that '*jus æquum*,' that equal law, in which the Romans placed true freedom."

violation of the Declaration of Independence; but those who make them fail to observe that the constitution did not profess to introduce altogether new principles of private right, but to order anew and secure these by the organization of a new government. The new constitution, however, did contain provisions which it was supposed would check the spread of the institution of slavery.

It was not, however, until the adoption of the fourteenth amendment that the principles of the Declaration of Independence became an accomplished fact in the American constitution.

Slavery.— The thirteenth amendment destroyed the existence of slavery.

Involuntary Servitude.— That no remnant of inequality might remain, the same sweeping provision prohibited involuntary servitude.

New Meaning of Political Liberty.— It is plain that there is an essential distinction under our American system between political liberty and personal liberty in the narrower sense; that is, that the former has relation to the right of participation in government, while the latter is more essentially private and personal.

Another distinction is recognized between the private rights of individuals, which has been heretofore sufficiently explained; the distinction between the personal right, or the right connected with the person, as personal security, and that right which is called dominion, ownership or property.

Within the distinction of personal right falls a right much more difficult for the student to distinguish from property, namely, the right to acquire, hold and possess things or property, as distinguished from the thing or property which may be obtained by the result of such labor.

This is what Blackstone calls the third absolute right of every citizen — the right of private property,— meaning thereby the abstract right which one has to engage in his occupations, or to take, hold and possess.

Sec. 521. *Protection to Life, Liberty and Property.*— Prior to the adoption of the fourteenth amendment the citizen stood in a peculiar position and traced his constitutional guaranty to liberty to several sources.

First, the doctrines of the English constitution, sanctioned and adopted as a part of the American system.

These were evidenced mainly by the British constitutional documents, Magna Carta, Confirmatio Cartarum, Petition of Rights, etc., and the rules formulated in judicial decisions construing them; the bills of rights in the state constitutions, and the inhibitions in the United States constitution against state or congressional action.

It is essential to a proper understanding of these questions that these different sources be understood.

The Federal Constitution.— The second clause of the ninth section of article I of the federal constitution prohibits the suspension of the writ of *habeas corpus* by federal authority excepting when, in case of rebellion or invasion, the public safety may require it.[1]

The third clause of the same section absolutely prohibits the United States courts from passing a bill of attainder or an *ex post facto* law.

The seventh section prohibits the granting by the United States of any title of nobility.

The tenth section prohibits the state from passing any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.

The first clause of section 2 of article IV guaranties to a *citizen of a state* the privileges and immunities of citizens in any other state; but the section does not go so far as to guarantee the citizens of one state the same privilege in any other state that the citizen of the latter state would have.[2] The provision is indefinite, and has never been specifically defined; in fact, it has been the policy of the court rather to leave the matter undefined in order that in a special case justice might be attained.[3]

The first eight amendments to the federal constitution protected the citizen against action by the federal government, but gave him no security against state action.[4]

[1] Ex parte Milligan, 4 Wall. 2; Johnson v. Jones, 44 Ill. 142.

[2] A corporation is not a citizen within this clause. Blake v. McClung, 19 Sup. Ct. Rep. 165.

[3] Id. The most approved definition is one by Justice Washington in Corfield v. Coryell, 4 Wash. C. C. 371, quoted in Blake v. McClung, *supra*.

[4] Guthrie, Fourteenth Amendment, p. 3; McElvaine v. Brush, 142 U. S. 155; Ruggles v. Illinois, 108 id. 526.

They covered religious freedom; the right to bear arms; safety against the quartering of soldiers in private houses; personal security against unreasonable seizures and searches and general warrants; criminal immunity from unjust presentments, excepting by the course of the common law; protection to life, liberty and property, except when effected by due process of law; trial by jury in criminal cases, and in common-law cases where more than $20 is involved; security against excessive bail, excessive fines, cruel and unusual punishments.

Security Against the State.— The constitutions of the states were, until the adoption of the thirteenth amendment, the only protection of the citizen of the United States, the state, or citizen of the world at large, from the violation of his person or property by another individual professing to act under a state law, excepting the provisions of the federal statute hereinafter named.[1]

The law in reference to false imprisonment, libel and slander, trespass and other civil suits, which is hereafter fully treated, explains the nature of these violations and the remedies for their protection.

It will be seen that the federal constitution granted no control over state action relating directly to personal security,[2] excepting clause 10 of section 9 of article I, prohibiting any state from passing bills of attainder, *ex post facto* laws, or laws impairing the obligations of contracts.

The thirteenth, fourteenth and fifteenth amendments of the national constitution, however, rounded out and made complete the protection of the private individual, be he alien, denizen or corporation, from the deprivation of liberty, or denial of right under authority of law.

The thirteenth amendment abolishes once and for all slavery, and it strikes out any shift or device subjecting any man *sui juris* to the control of another person, excepting by his own contract, providing that involuntary servitude shall not exist anywhere in the United States excepting for crime.

[1] The present constitution does not extend to protecting against individual wrongs not professed to be rightfully performed under state law. Civil Right Cases, 109 U. S. 3.

[2] By this the writer intends that the interstate commerce clause, which protects the citizen in his right to interstate commerce, is public in its nature rather than an act relating to personal liberty.

The fourteenth amendment contains the fullness of equality and protection in favor of the private rights of the individual.

First, it defines citizenship.

Second, it provides the same immunity against the state which formerly existed against the United States, and denies the right of any state to enforce or make any law which should abridge the privileges or immunities of the citizens of the United States.

Third, it provides that no state shall deprive *any person* of life, liberty or property without due process of law.

Fourth, it provides that no state may deny to any person *within its jurisdiction equal protection of the laws.*

The fifteenth amendment protects the political liberty of the citizen in a particular direction only; that is, that the right of suffrage shall not be denied or abridged by either the United States or the state on account of race, color or previous condition of servitude.[1]

Sec. 522. *State and Federal Protection.*— It will be apparent to any one who carefully studies our constitution that there is a difference between the rights, privileges and immunities of citizens granted under the federal constitution as originally framed and the rights protected by these new provisions, and that the latter are much broader and more comprehensive than the former.

It has never been determined just what specific privileges are embraced within section 2 of article IV of the constitution. Mr. Guthrie observes that it must surely be those privileges and immunities which attach to citizens of the United States as such, and not as citizens of any particular state or territory embraced within the Union. He says it must be those privileges and

[1] *Summary of Provisions — Persons and Citizens.*— Corporations are considered citizens only within the statute relating to jurisdiction of courts. They are not within article IV, section 2, of the constitution. They are not *citizens* within the fourteenth amendment. They are *persons* within the fourteenth amendment. The state is not compelled to afford to all persons equal protection of the law, but only to those *within its jurisdiction.*

Privileges and immunities; protection by government; right to pursue calling and acquire property; right to ingress and egress; writ of *habeas corpus;* right to sue in courts; equal taxation; right of *suffrage.* The late case of Blake v. McClung, 19 Sup. Ct. Rep. 165, affirms all of the above. See Cummings v. Missouri, 4 Wall. 277; Smyth v. Ames, 169 U. S. 466.

immunities which belong to them under the government established by the constitution of the United States, and regulated by the laws of congress,—the privileges and immunities that James Wilson would have characterized as federal liberty. Among these privileges and immunities are the fundamental rights of the individual which are mentioned in the first eight amendments to the constitution.[1]

Without acquiescing fully in the idea that formerly the privileges and immunities were such only as derive their source or trace their title through the federal constitution, it is perfectly clear that there are several things not protected by this clause. Among them may be mentioned the following:

First, the rights of a person not a citizen of one state were not secure against unjust discrimination in another state.

Second, a citizen of a given state was not entitled to all of the privileges he may have enjoyed in the state of his first residence should he remove into a new state.

Third, the privileges of citizenship held were derived from the states, although the method of naturalization was regulated by the general government.

Fourth, it could apply only to natural persons; for, in the sense involved, artificial persons are not intended.

The new provisions have been frequently spoken of as a new Magna Carta, and they approach very close to it.

The last clause of chapter 29 of King John's charter, and chapter 28 of King Henry, is, "We will sell to no man, we will not deny or defer to any man, either justice or right" (*rectum vel justitiam*).[2]

It is not allowable to suppose that the two words above italicised mean the same, and so on examination it will be found that justice and right had well-established meanings. The word *jus-*

[1] Cooley's Fourteenth Amendment, p. 26.

[2] Chapter 29 of Magna Carta so frequently alluded to in discussions relating to this subject, is as follows: The last clause in Latin is, *Nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam.* The clause is sometimes translated, "to none will we sell, to none will we deny." Thaxwell's Longmead's Const. Hist. 109, per Coxey translates it "to none." The thirty-first chapter of John's charter made provision for all merchants, aliens as well as subjects. The twenty-ninth chapter of Henry is the same as the thirty-ninth and fortieth of John. The great charter is that of John (1205).

tice meant, at the time of Magna Carta, more nearly what we would call a right, or the right; while the word *rectum* more nearly the means afforded by the law to enforce the right, or what we would call the remedy; and this clause in the great charter enforces a remedy for every wrong, or guarantees due process of law.

For every right there must be a remedy, and so it is a maxim of the English law, *Ubi jus, ibi remedium.*

Sec. 523. *Equal Protection of Law.*— The phraseology of the last clause of section 1 of the fourteenth amendment goes beyond the Magna Carta, or any similar provision ever before adopted in any state of the Union.

It provides that no state shall deny to *any person within its jurisdiction* the *equal protection* of the laws.

The Declaration of Independence recognizes the equality of men before the law. The federal constitution had originally prohibited the nation and the states from conferring any title of nobility, but this did not prohibit discriminations, the giving of special privileges or class legislation.[1]

Distinctions of rank and honor are held to be not only justifiable but necessary, and were an established part of the English constitution,[2] and these distinctions of rank and honor had their corresponding privileges.[3]

The constitution now requires that all persons and all classes of persons shall be subject, in the same situation and condition, to the same law, with no less rights or greater burdens than are imposed upon any others.[4]

Sec. 524. *The Character of the Constitution Changed.*— We have heretofore pointed out that the great national objects were by the original constitution committed to the national

[1] Art. I, sec. 9, clause 7; sec. 10, clause 1. See 1 Wilson's Works, p. 393.

[2] 1 Blk. Com. 153. See observation on this point, 1 Wilson's Works, p. 392.

[3] Tables of Precedence, 1 Cooley's Blk. 405.

[4] Yick Wo v. Hopkins, 118 U. S. 356; Magoun v. Illinois T. & S. Bank, 170 id. 283. A tax imposed upon employees of a sum per diem for every resident alien employed is a denial of equal protection of law and contrary to the fourteenth amendment. Juniata Line Co. v. Fogley (Pa. St.), 42 L. R. A. 442. An ordinance or state law restricting a public contract to members of a union would come within the same inhibition. See Adams v. Breman (Ill.), 52 N. E. Rep. 314.

government, while matters of local and private concern were left to the states for regulation and protection.

This new constitution changed this principle of partition, and extended the protecting arm of the constitution to every person, natural or artificial, and to every subject of private right.[1]

Congress may by legislation secure the citizen in these rights and provide punishment for their violation, and this changes the power theretofore possessed from the mere negative authority of the courts to annul, to the positive power of congress to define and declare, the courts to expound, and the executive to enforce.[2]

Sec. 525. *Unreasonable Seizure and Search.*— Among the annoyances and grievances to which the people under some forms of government are subjected is the liability of having their houses or effects searched by the officers of the government, and at the time of the American Revolution general warrants were not uncommon authorizing the officers to search suspected persons and places without the designation of any particular person, place or crime.

The subject of writs of assistance and general search-warrants is of little importance at the present day, for the reason that no extravagant exercise of any such power need now be feared.[3]

Unfounded claims of right occasionally occur, but a claim is seldom made to search undesignated places and arbitrarily detain suspected individuals.

The fact that liberty in this respect is so thoroughly established renders it more difficult to define the limits of a just exercise of the acknowledged powers of seizure and search.

It is now well established that a search-warrant must be certain and definite as to the person and property to be searched and the thing to be sought for.[4]

Seizure and search mean something different from and more than mere personal and bodily taking.

[1] Yick Wo v. Hopkins, 118 U. S. 370.

[2] Civil Rights Cases, 109 U. S. 3; Ah Kow v. Nunan, 5 Sawy. 552. See Guthrie, Fourteenth Amendment, p. 107.

[3] The subject is historically treated in all of the works devoted exclusively to the subject of constitutional law. A reading of the case of Boyd v. United States, 116 U. S. 616, will furnish ample material for historical investigation.

[4] Cooley, El. Torts, 107–8; Grumon v. Raymond, 1 Conn. 40; 6 Am. Dec. 200.

The invasion of privacy by unjustly forcing or allowing a witness to testify in relation to matters of his own private concern is included,[1] and to unjustly declare that which to-day is a subject of property and traffic to be contraband is to seize the property, although the subject of property remains physically untouched.[2]

A person called upon to justify his interference with the person or property of another, if he admits the fact, is bound to show, by way of justification, some positive law which justified or excused him, and the law must be submitted to the judges of the courts, who shall determine the right and reasonableness of the action;[3] and it is not for the courts to liberally expound such statutes in order to include cases not clearly within their provisions.[4]

The only lawful mode of making a search upon the premises of any one is under the command of a search-warrant.[5]

The prosecutor, as an administrative officer of the law, has no right to seize or search the property of third persons not accused of crime.[6]

It is allowable to search the persons of individuals arrested

[1] Potter v. Beal, 49 Fed. Rep. 793. The complainant in this case brought a bill in equity alleging that a trunk then in the vaults of a bank, which was in the hands of a receiver, contained his private papers; that the receiver refused to surrender the same, and was about to be summoned before the United States grand jury with the papers to investigate a crime against the complainant. It was held under the fourth and fifth amendments to the United States constitution that the receiver could not give evidence as to the contents of the trunk, nor could a public investigation be had, because such an investigation would constitute an unreasonable seizure and search.

[2] Wynehamer v. People, 13 N. Y. 378. This is one of the most widely cited and universally approved cases. It should be carefully read by the student. Scott v. Donald, 165 U. S. 58.

[3] Boyd v. United States, 116 U. S. 616. The seizure or compulsory production of one's private papers to be used against him is equivalent to compelling him to be a witness in his own behalf, within the fifth amendment. Very frequently the provisions of the fourth and fifth amendments coalesce in a case. When the object of compelling a man to be a witness is merely to disclose the contents of papers, it is a seizure and search within the fourth amendment, as well as a violation of the fifth. Seizure and search of one's private papers is totally different from search and seizure of stolen goods, dutiable articles, and the like. Boyd v. United States, 116 U. S. 616.

[4] Newbury v. Carpenter, 107 Mich. 567.

[5] Cooley on Torts, 295.

[6] Newbury v. Carpenter, *supra*.

for the commission of crimes, and to take from him any weapon or evidences of a crime.[1]

Sec. 526. *Uniform Laws Not Required.*— It is not the intention of the fourteenth amendment to have the effect of compelling the various states to establish the same system of law, and in this manner provide uniform laws.[2]

Neither is it within the contemplation of the constitution that the law-making power of the states shall be shorn of its reasonable discretion in providing the classification of localities and imposing a different system of local self-government in different parts of the state.[3]

It is not every apparent diversity of law between different localities or different persons which will enable the national authorities to interfere, or the national courts to adjudge the state law invalid.[4] The states necessarily have a wide discretion; but if, under the guise of proper regulation, unjust discrimination and unequal laws are imposed upon the citizens of the state, or distinctions between non-resident and resident citizens of the United States are made, it is within the power of the federal judiciary to annul the law.

Ultimately the courts must judge of the reasonableness of such provisions.[5]

The Requirement of Equal Protection of the Law.— The expression is sometimes used, "the same law for the same *class* of persons;" but it is to be understood that natural persons cannot be classified in such a manner as to affect fundamental rights.[6] The business or calling in which the person is engaged may be the occasion for classification, but that is not classification of persons, but the classification of *objects* and the regulation of business, occupation or calling.[7] So the relation which one bears to another person or thing may be the basis of differ-

[1] Bank v. McLeod, 65 Iowa, 655; Langdon v. People, 133 Ill. 382; Newbury v. Carpenter, *supra.*

[2] Blake v. McClung, 19 Sup. Ct. Rep. 168; Holden v. Hardy, 169 U. S. 366.

[3] Holden v. Hardy, 169 U. S. 366; Missouri v. Lewis, 101 id. 22.

[4] Id. A provision of the Maryland constitution authorizing a court of Baltimore to provide rules, not authorized in any other part of the state, does not conflict with the fourteenth amendment. Chappell C. & T. Co. v. Sulphur M. Co., 19 Sup. Ct. Rep. 268.

[5] Williams v. Mississippi, 170 U. S. 213; Smyth v. Ames, 169 id. 466; Yick Wo v. Hopkins, 118 id. 356.

[6] Williams v. Mississippi, 170 U. S. 213.

[7] Orient Ins. Co. v. Daggs, 19 Sup. Ct. Rep. 281; Revell v. Annapolis, 81 Md. 1.

ent rights.[1] So also the natural or legal disabilities of individuals may be recognized — regulated.

Sec. 527. *Discrimination Against Women.*— What is here said is intended from the standpoint of sex simply, not the condition of married women, which will be spoken of hereafter.

That women are citizens is universally admitted. It is commonly asserted that suffrage is a franchise or a privilege, and the decisions of the courts go to that extent whenever the question has been specifically involved.[2]

On the other hand, the oft-repeated and approved definition of what are the privileges and immunities of citizens, given by Mr. Justice Washington, includes the enjoyment of the elective franchise according to the laws of the land.[3]

In England suffrage was an incident of a freehold interest in land, and under some circumstances a person might vote in the several precincts where he held land.

In no country has the discrimination against the political rights of women been more unjustifiable in policy, and so contrary to the principles of the form of government, as in the United States.[4] In no country has the law as to the private rights of women been more favorable.

We have seen that equality of right requires a voice in the choice of magistrates, and the right to a voice in the choice of representatives in the assemblies of the nation and state.

Under the Roman system every person was either the head of a family or under the dominion and control of a *pater-familias*.

It was in perfect accord with the principles of their system that the *pater-familias* should represent every member of his family, and there may be several reasons urged why a married woman might, in accordance with the principles of representation and equality, be denied the franchise, which would not apply to an unmarried woman.[5]

[1] Magoun v. Illinois T. & S. Bank, 170 U. S. 283.

[2] Minor v. Happersett, 21 Wall. 129.

[3] Corfield v. Coryell, 4 Wash. 380; Blake v. McClung, 19 Sup. Ct. Rep. 165.

[4] "The correct theory and the true principles of liberty require that every citizen whose circumstances do not render him necessarily dependent on the will of another should possess a vote in electing those by whose conduct his property, his reputation, his liberty and his life may be most materially affected." 2 Wilson's Works, 16.

[5] The late John Randolph Tucker, in an address, after reviewing the

Under the English system, the principle of representation, as has been mentioned, was attached to the freehold as an incident to the tenure, and this tenure depended upon the personal bond between the tenant, or inferior, and the superior lord, baron or prince, so that the principle of representation was never lost sight of, and its reciprocal bond never broken.

In America, however, the unmarried female has nothing more tangible at best than the *virtual* representation which her ancestors scoffed at, which Mansfield undertook to maintain, and which Burke and Pitt ridiculed, and the British yeomanry, English and American, repudiated as inapplicable to British institutions.

The policy of our law has been to extend the principle of representation as widely as the circumstances will admit. The law is, however, well settled that it rests entirely with the legislative power of the people, or the general assembly, under constitutional permission, to determine to whom and upon what conditions the suffrage shall be extended, and these views have been too long acquiesced in to be open to an argument based upon right.[1]

It is quite obvious that the privilege of citizenship could be enlarged to great advantage to the general public, and that the public needs the suffrage of the intelligent native-born woman quite as much as they need the privilege. It would not be required that the privilege should be further extended than to our native-born female citizens.[2]

Roman law, said: "I come now to the common-law system, which was established with a full knowledge of the Roman law, and with important modifications growing out of the feudal polity in respect to lands. The headship of the baron was a principle of this system, as it had been of the Roman law, and even of the community system, as we have seen. But his supremacy was emphasized by making the wife abide under the shadow of his wing. She was *feme covert*. He was her protector, bound to her support, and, even when he neglected it, liable for all necessaries furnished to her. Her contractual capacity was denied, for her security, her separateness, as a person, was ignored *quoad* the world." Virginia Bar Ass'n Rep., 1891, p. 198.

[1] United States v. Anthony (Susan B.), 11 Blatch. 200. In Minor v. Happersett, 21 Wall. 162, the whole subject is carefully considered and the above results declared.

[2] It is not within the province of the state legislature, in the absence of *constitutional* grant, to extend *universal* suffrage to all matters. Coffin v. Thompson, 97 Mich. 188; Scott v. Barry, 52 Kan. 1; 20 L. R. A. 699. But as to local matters which the legislature may delegate, it may permit

The tendency is in that direction. The franchise is gradually being given, and it is to be hoped that the spirit of equality will be extended until every person who owes an allegiance and is under obligation to pay taxes shall have a voice in the choice of magistrates and representatives.

Employment, Contracts and Professions.—Different considerations control these subjects. The right to contract, as such, is clearly a right of citizenship; but in the sound exercise of the police power, all persons, male and female, may be protected against their own indiscretion; and so laws applying only to females are proper, the classification being a natural one.

As to professions which are the proper subject of license and regulation, it cannot be said that a law which excludes women from their exercise is necessarily void.[1]

Happily the question may now be said to be settled in favor of admitting women to practice the professions on an equality with males.[2]

female suffrage. Brown v. Phillips, 71 Wis. 239.

[1] Bradwell v. State of Illinois, 16 Wall. 130; Ex parte Hall, 50 Conn. 131; 47 Am. Rep. 625; Ex parte Robinson, 131 Mass. 376.

[2] Ex parte Goodell, 48 Wis. 693; Foltz v. Hodge, 54 Cal. 28.

The practice of law by women is no longer in the experimental stage, but has reached the point of a successful demonstration. Most of the large cities have a number of women lawyers. In one of the rigid examinations introduced by the new rules in Illinois, the only applicant successfully passing the examination was a woman. Perhaps no better field exists for a test of the feasibility and desirability of allowing women to practice law than is afforded in Chicago.

The very honorable career of Mrs. Myra Bradwell must be an inspiration to her sex, and every intelligent lawyer freely admits that by the establishment of the first successful legal newspaper in the city she accomplished as much as any other person in the interests of the profession.

Among the living lawyers of Chicago, Mrs. Mary A. Ahrens stands at the head of her profession, is successful in every sense of the word, and exercises her functions with such dignity and ability that she daily receives the same courtesy and attentive hearing that is accorded any other member of the bar. She and the other members of the bar, of her sex, have demonstrated that no difficulty need be experienced on account of their presence in the court-room.

Mrs. Catherine Waugh McCullough is a successful and useful member of the profession.

Miss Cora B. Hirtzell fills satisfactorily and ably the office of assistant corporation counsel, performing her duties and functions with ability equal to any person of her years and experience.

Mary M. Bartelme holds the position of public guardian in the probate court of Cook county, perform-

Sec. 528. *Discriminations on Account of Race or Color.*—There is nothing in the constitution of the United States or the recent amendments which denies to the states the right to recognize the natural distinctions between the white and the colored races.[1]

These constitutional provisions do, however, absolutely prohibit any unequal discrimination as to rights, privileges or accommodations in public places, whether they be railway trains, depots, schools, churches or theaters. The accommodations need not be the same, but they must be equal.[2]

It is allowable to provide separate accommodations for the white and the colored citizen, and require that these shall be used by the different races respectively; but there must be no perceptible or substantial inequality in the provisions for one as against the other.[3]

Nothing tends so much to remove local prejudices as to thoroughly understand the real question, situation and distinctions, and perhaps some slight service may be done by directing attention to cases arising in northern states at an early day.[4]

ing her duties with fidelity and with ability above criticism.

The United States furnishes many more examples equally as creditable.

[1] Heard v. Railway, 1 Int. St. Com. Rep. 719.

[2] Smith v. Chamberlain, 38 S. C. 529, 19 L. R. A. 710; Ex parte Plessy, 45 La. Ann. 80.

[3] Id.; Separate Schools Case (Chrisman v. Mayor (Miss.), 12 S. Rep. 458). A railroad company which undertakes to provide such distinct accommodations is liable to a person of color insulted and annoyed by an intruding white man. Quinn v. L. & N. Ry. Co., 98 Ky. 231.

[4] In Roberts v. Boston, 5 Cush. 198, a case arising in 1849, Shaw, C. J., said: "Conceding, therefore, in the fullest manner, that colored persons, the descendants of Africans, are entitled by law to equal rights, constitutional and political, civil and social, the question then arises whether the regulation in question, which provides separate schools for colored children, is a violation of any of these rights." And the court held that it was not, saying, in conclusion: "It is urged that this maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste, founded in a deep-rooted prejudice in public opinion. This prejudice, if it exists, is not created by law and cannot be changed by law. Whether this distinction and prejudice existing in the opinions and feelings of the community would not be as effectually fostered by compelling colored and white children to associate together may well be doubted."

In another case arising before the fourteenth amendment, a Pennsylvania court says: "The right to separate passengers being clear, in proper cases, and it being the subject of sound regulation, the question remaining to be considered is whether there is such a difference between the white and the black races in this state, resulting from nature, law, and custom, as makes it a reasonable

The law relating to interstate commerce, however, restricts the rights of the states, or of the persons conducting the business of interstate commerce or carriage; and as to interstate passengers, no local rules can be made and enforced.[1]

In New York substantial discriminations were made between colored and white citizens as to the right of suffrage up to the year 1874.[2]

Sec. 529. *Religious Liberty.*— Religious liberty is sometimes spoken of as the fourth absolute right of citizens of the United States. The subject is not well understood. Like all other rights, it is essentially relative.

It means more than religious toleration, which might exist though the government support an established church.

The constitution of the United States is not the source of religious freedom. It merely, from the necessity of the case, recognized that the only safe course is to prohibit congress from making any law respecting the establishment of religion. It does not make any provision upon that subject for the states.[3]

It was originally left to the regulation of the states. The ordinance of 1787 of the Northwest Territory contained an important provision which has been the basis of similar declarations in many of the state constitutions.[4]

By an established church is meant one which is recognized

ground of separation." The court then proceeds to discuss these differences, taking care to say: "To assert separateness is not to declare inferiority in either. It is simply to say that, following the order of Divine Providence, human authority ought not to compel these widely-separated races to intermix." Concluding, the court said: "Law and custom having sanctioned a separation of the races, it is not the province of the judiciary to legislate it away. . . . Following these guides, we are compelled to declare that at the time of the alleged injury there was that natural, legal and customary difference between the white and black races in this state which made their separation, as passengers in a public conveyance, the subject of a sound regulation to secure order, promote comfort, preserve the peace, and maintain the rights both of the carriers and passengers." Railroad Co. v. Miles, 55 Pa. St. 209, quoted in Ex parte Plessy, 45 La. Ann. 80.

Since these amendments were adopted, the supreme court of Illinois has recognized that separate accommodations may be provided and their use enforced. C. & N. W. Ry. Co. v. Williams, 55 Ill. 187; 8 Am. Rep. 641.

[1] L., N. O. & T. Ry. Co. v. State, 133 U. S. 587; Hall v. De Cuir, 95 id. 485; Carrey v. Spencer, 36 N. Y. Sup. 886.

[2] People v. Rice, 135 N. Y. 492. See note, 41 Am. Dec. 645.

[3] Slaughter-House Cases, 16 Wall. 36; Story on Const., § 1879.

[4] Bloom v. Richard, 2 Ohio St. 390; State v. Board, 76 Wis. 177; Pfeiffer v. Board (Mich.), 77 N. W. Rep. 250.

as having the favor of the government and one which the government supports, and thereby indirectly compels all of the people to contribute to its support.

By the disestablishment which has taken place in the United States, the public — that is, the government — does not pretend to support any particular religion or denomination.

The constitution recognizes religion and the existence of many peculiar denominations and sects.

The prevailing religion of the Saxon people is made the basis of all the solemn promises of allegiance and official faithfulness, the sanctity of the oath in judicial proceedings, and an additional, though not essential, sanction to the marriage tie.[1]

In the nature of the case, divergent views upon religion are constantly coming in conflict.

It speaks well, however, for the advance of civilization and the wisdom of the idea of disestablishment that these collisions are not more frequent and violent.

It speaks well also for the spirit and independence which resents the slightest intrusion or the smallest encroachment upon the constitutional provision that no man shall be compelled to support any religion against his will, that the courts do not allow, upon any pretext, compulsory contribution towards any religious object.[2]

Religious views, however, are not admitted as a defense against prosecution for acts which are declared to be contrary to the policy of the law, and are made punishable by the criminal laws, or a recognition of which is essential to the administration of justice.[3]

The most frequent aspect in which the case is now presented is the reading of the Bible in the public schools, or the attempts more or less positive to introduce the teaching of the Christian religion in the public schools.

The courts are quite in harmony on the doctrine that the public school cannot in any sense be a medium for teaching

[1] Reynolds v. United States, 98 U. S. 148; Miles v. United States, 103 id. 304.

[2] The divergent views as to what use of the Bible in schools does and what does not violate the principle are well presented on either side by the cases of State v. Board, 76 Wis. 177, and Pfeiffer v. Board, 77 N. W. Rep. (Mich., 1898), 250.

[3] Miles v. United States, 103 U. S. 306; Reynolds v. United States, 98 id. 145; Mormon Church v. United States, 136 id. 1.

religious sentiments, but they are not in harmony upon the question whether the mere reading of the Bible, without comment, merely for the purpose of reading the Scriptures and paying respect to the peculiar religion, is a violation of religious liberty.[1]

It would probably be safe to affirm that no American court would hold that an explanation, incidentally given in the course of teaching history or literature, of the tenets of the Christian religion, Mohammedanism, Mormonism, or any other religion, would be a violation of the law, and something must be left to the discretion of those who are conducting the schools and to the courts in the matter; and the intention with which an act is done, and the extent to which it is carried, may be decisive of the matter.

Protection to Enjoyment of Religion.—The jurisprudence of the United States goes somewhat further than mere passive toleration and non-interference. It guaranties to every citizen the free enjoyment of his rights, and among these, religious worship; and the law recognizes that this right is not complete if a portion of the community may disturb another portion in their devotion or worship, or if an individual or sect may be reviled with impunity by any other person; hence the law in reference to disturbance of religious worship, blasphemy and Sunday labor in the vicinity of places of religious worship, etc.[2]

On the other hand, the violent and noisy assemblage of persons in public places may be prohibited or restrained in order that the public may enjoy its equal right to quiet and the use of such public places.[3]

NOTE.—"Due process of law" and "Trial by jury" will be treated with "Procedure."

[1] *Cf.* cases from Wisconsin and Michigan, cited above.

[2] Ruggles v. Johnson, 8 Johns. 290. It is very frequently said that Christianity is a part of the law of England, and so to a certain extent it is, and likewise recognized as a substratum or under-current of public opinion in American law; but it is not so in any sense that Christianity is thrust upon any person. On this general subject the curious may examine, besides the cases cited in this section, Rex v. Carlisle, 3 B. & A. 161; 5 E. C. L. R. 101; Rex v. Waddington, 1 B. & C. 26; Cowen v. Milburn, 2 Law R. Ex. (1867), 230; Reg. v. Ramsay & Foote, 48 Law Times (N. S.), 733 (1883); Updegraph v. Com., 11 S. & R. 394; Girard Will Case, 2 How. (U. S.) 198.

[3] The Salvation Army has abused others and been subject of abuse in this respect. See Frazier's Case, 63 Mich. 396; Elliott's Mun. Corp., § 238.

CHAPTER XXVIII.

DOMESTIC RELATIONS.

Sec. 530. *Scope of Subject.*—The subject of domestic relations embraces all of the natural relations, except political,[1] existing between individuals, which the law recognizes and regulates, and also all those dependent relations which, though formed by consent and contract, partake of something more than a mere contract relation, and give to the parties standing in these situations a permanent relation toward each other and a permanent status in the eye of the law.[2]

The specific subjects formerly embraced within this designation were in some measure, or to some degree, connected with the family or household establishment, and were designated as relations of husband and wife, parent and child, guardian and ward, and master and servant.

As to the latter topic, almost all of the features of the old relation of master and servant have disappeared, and only in the case of the domestic servant in the family can there be said to be the slightest resemblance in modern law to the old, and this is formal rather than substantial.

The acts and conduct out of which grew the relation of master and servant formerly created a status. The evolution of law has destroyed this status. There is no such status in our law as that of a servant, and there is no longer any reason for treating the subject among those *stati* of which it was one.

It belongs essentially to the subject of contracts of employment, although we still find modern treatises entitled "Master and servant."

So long as the designation does not mislead, it matters little

[1] Society has been heretofore treated as a natural as well as a political relation.

[2] This idea of status is the dominating principle of domestic relations. The thorough comprehension of it enables one to understand most of the decisions concerning interstate marriages and divorces which otherwise seem mere arbitrary edicts to serve the passing hour. The status, the relation toward the state, is public; the other phase, *inter partes*, is private. Nelson, Div. & Sep., §§ 2–7.

where the subject is treated, excepting that, being no longer a domestic relation, it should not be included in that title.

Sec. 531. *The Importance of Conception of Status.*— The importance of a just conception of the legal ideas intended by the word *status*, or *personam*, as heretofore explained,[1] is nowhere so manifest in our law as when considering the subject of domestic relations.

It is impossible to understand the decisions of our courts in relation to the subject of jurisdiction over cases involving marriage and divorce without understanding the modern conception of actions *in personam* and the notion of status.

In fact, status is the clue which unravels the otherwise apparently irreconcilable conflict between the courts.

In no branch of the law is more reliance placed upon ideas derived from the Roman law, and naturally so, because in the private relations of men the ideas of status are almost entirely confined to domestic relations.[2] In the English law the whole system of nobility involves the idea of status.

Sec. 532. *The Family.*— In our society the family is the center of social organization. The same was true under the civil[3] law, but in addition it was the unit of political organization. Under that system the *pater-familias* held dominion, not only over those joined to him by marriage or the ties of kinship, but over all persons and things within his establishment or under his hand, and he was their political representative.

In American law almost the reverse exists. The dominion of the head of the family is anything but complete, and his power to enforce authority reduced to the narrowest limits and permitted only in its mildest form.[4] He is in no sense the political representative of the members.

[1] *Ante*, pp. 111–15.

[2] "The chief varieties of status among natural persons may be referred to the following causes: 1, sex; 2, minority; 3, '*patria potesta*' and '*manus*' (with us all dependent members of a family); 4, coverture; 5, celibacy; 6, mental defect; 7, bodily defect; 8, rank, caste and official position; 9, race and color; 10, slavery; 11, profession; 12, civil death; 13, illegitimacy; 14, heresy; 15, foreign nationality; 16, hostile nationality. All of the facts included in this list, which might be extended, have been held, at one time or another, to differentiate the legal position of persons affected by them from that of persons of the normal type." Holland's Jurisprudence, 297.

[3] Holmes, Com. Law, 342.

[4] What would formerly have been moderate punishment would now be regarded as cruelty, and, if repeated, a good ground for divorce. Fulgham v. State, 46 Ala. 143; Com. v. McAfee,

In our jurisprudence, for some purposes, a family may exist where no relationship of blood or marriage has ever taken place, but this, though not anomalous under the civil law, is so under our system, and such family is recognized only for certain purposes of favor, such as exemptions.[1]

The properly-constituted family is the basis upon which the whole social fabric rests, and the inception of it is through the medium of marriage.

Sec. 533. *Marriage — Nature of.* — The relation of marriage is not like anything else in law. In whatever light it may be viewed it is peculiarly a relation or condition *sui generis.* From the very nature of things, therefore, attempts at definition have met with little success, because properly it is scarcely the subject of definition by differentiation from some supposedly similar relation, *e. g.*, contract. It can be described and its essentials

108 Mass. 458. Moderate chastisement of children is still a right and perhaps a parental duty.

[1] Ortolan's Hist. Rom. L. 128. "The Roman family, in the peculiar shape it assumed under the Jus Quiritium, was modeled on a civil rather than on a natural basis. The tie which bound members of the same family was not that of blood; it was their common position in the midst of an artificial system. For the formation of such a family a legal marriage was an indispensable preliminary; but it was only a preliminary, and the peculiar character of the family did not in any way flow from the tie. The head of the family was all in all. He did not so much represent as absorb in himself the subordinate members. He alone was *sui juris; i. e.*, had an independent will; all the other members were *alieni juris;* their wills were not independent, but were only expressed through their chief. The *pater-familias,* the head of the family, was said to have all the other members of his family in his power; and this power (*patria potestas*) was the foundation of all that peculiarly characterizes the Roman family. At the head of the family stood the *pater-familias* alone. Beneath him came his children (sons and daughters) and his wife, who, in order to preserve the symmetry of the system, was treated by law as a daughter. If a daughter married, she left this family and passed into the family of her husband; but, if a son married, all his children were as much in the power of the *pater-familias* as the son himself. Thus, all the descendants through the male line were in his power. Each of the daughters, as long as she remained unmarried, was also *sui juris;* but, directly she formed a legal marriage and thereby entered into her husband's family, she passed into the power of another. Hence it was said that a woman was at once the beginning and the end of her family, *caput et finis familiæ suæ,* for directly she attempted to continue it she passed into another family." Sanders' Justinian, pp. 28–89; Race v. Oldridge, 90 Ill. 250. The observations in this case on the meaning of the word *familia* are absurd, although the decision is clearly right. *Cf.* the above and Holmes' Common Law, pp. 342–43.

enumerated, but little is gained by comparing it with a contract. It has by some been termed a mere civil contract.[1] Going to the other extreme, it has been designated a sacred ordinance.

The House of Lords of England has expressed the view which seems most consonant with the facts, viz., that marriage is a status resulting from a line of conduct indicating the intention to assume the marriage relation. It is not a mere contract between two parties; its essence is a line of conduct, not a set of promises.[2]

Each of these different views, however, assumes an understanding of other things. Christian civilization maintains that marriage is the natural state. Modern Christianity maintains that monogamy is the only state conformable to nature and the will of Jehovah; others maintain that polygamy is equally natural, equally sanctioned by the Hebrew traditions.

Merely to suggest that the beautiful sentiment which lies at the basis of the Anglo-Saxon home found its first and best expression among that magnificent people whom Selden and others claimed to be the true ancestors of the Saxons,[3] it may not be unprofitable to direct attention to Homer's expression of what must have been the traditional notion of the Greeks:

> "There is no fairer thing,
> Than when the lord and lady with *one soul*,
> *One home* possesses."[4]

[1] Professor Maine says that this is an unfortunate designation. The habit is fast disappearing. Maine's Anc. Law, ch. 5, p. 165.

[2] Campbell v. Campbell (Breadalbane's Case), 1 Law Rep. (Scotch Appeals and Divorce), 182. It is peculiarly a status. 1 Austin, Jur. 711. Some courts adhere more closely than would seem reasonable to the view that marriage is a mere contract. See Voorhees v. Voorhees, 46 N. J. Eq. 411. See Stevens v. Stevens (N. J.), 38 Atl. Rep. 460. Serious consequences follow this view, *e. g.*: If the *contract* of marriage is void *when made*, subsequent conduct does not affect the status. "In all civilized society, this marriage by nature puts on a form of celebration, which throws the *vinculum juris* about the parties, making of their contract a civil status, an institution of society. Being constituted by law, as the result of contract, it becomes a legal corporate unity, formed out of nature's duality, indissoluble by mutual consent, and except by legal authority, when the public good and justice to the parties would be subserved by its dissolution. The law makes contract, status. The law cannot make the status without a contract between the parties. The parties cannot make, nor destroy, the legal status by their contract. The law alone can bind in the status of marriage as the result of their contract. The law alone can unbind. Whom law has joined together, man cannot put asunder." John Randolph Tucker, Va. Bar Ass'n Rep. 1891.

[3] See 1 Wilson's Works, 426–31; 2 id. 176–79.

[4] Od. VI, 182–85.

It is not to our purpose in any measure to discuss whether the permanent union of the sexes is according to or contrary to nature,[1] but to indicate precisely the nature of that condition recognized in municipal law as marriage.

Changing somewhat an expression of the learned jurist, John Randolph Tucker,[2] I would say that the consensus of civilized mankind,[3] *jus naturale*, *jus Dei*, *jus gentium*, *jus civile*,[4] have made the union of one man and one woman in family headship the primal relation of social life, the essential foundation of civilized polity, the foundation of purity, the mainspring of progress, the measure of happiness of the race. Civilized society is perfected through and by this relation. Such, at least, is the acceptable theory of American law.

In the same address he felicitously expresses his conception of marriage as "The natural duality of man and woman, incorporated[5] into a status of perpetual unity, *vinculo juris*, and only dissoluble by a decree of law — this is marriage."[6]

The Characteristics of a Marriage in the eye of municipal law are four: A status as distinguished from a contract. A perpetual relation as distinguished from a casual one. A unity of natural beings, resulting in an artificial entity — the family. A bond of the law *vinculo juris* as distinguished from the obligation of a contract. As to the perpetuity, that relates to the character of the relation, so far as the acts of the parties are concerned, analogous to the perpetual succession of a corporation.

Marriage is the most elemental of social relations. As so-

[1] The ancient Hebrew law, allowing husbands to put away their wives, does not compare favorably with the Greek sentiment. 1 Bishop, M. & D. 54.

[2] "The consensus of mankind, *jus naturale, jus gentium, jus Dei*, have made the union of one man and one woman in family headship the primal law of social life, the essential foundation of civilized polity, and the fountain of the purity, perpetuity, progress and happiness of the race. Man is a dual unit. The human unity is perfected through the human duality. *Eadem caro vir et uxor:* They twain shall be one flesh." Address before Va. Bar Ass'n, 1896, p. 198.

[3] The expression must be restricted; it cannot be universal. Our courts would no doubt recognize the rights of any one of several wives by a marriage valid where made.

[4] Laurence v. Id., 164 Ill. 371.

[5] The word "incorporated," whether by him so used, expresses very happily the idea of a new artificial capacity conferred by law — a *persona*.

[6] Marriage here means the condition, not the mode of attaining it.

ciety precedes government, so the family precedes society, and likewise the formative process of the family is marriage.

The supreme court of the United States quoted approvingly the language of Justice Appleton, speaking for the supreme court of Maine, as follows: "When the contracting parties have entered into the married state, they have not so much entered into a contract as into a new relation, the rights, duties and obligations of which rest not upon their agreement, but upon the general law of the state, statutory or common, which defines and prescribes those rights, duties and obligations. *They are of law, not of contract.* It was of contract (the consent, or engagement) that the relation should be established, but, being established, the power of the parties as to its extent or duration is at an end. Their rights under it are determined by the will of the sovereign, as evidenced by law."[1]

It is more than a contract. It requires certain acts independent of and beyond the contract.[2]

In truth, if the parties should contract *de præsenti* to enter into the marriage state, but at the same time add a condition that either might terminate it, or agree together that they should never sustain the essential relations of man and wife, their agreement would constitute marriage, but the condition would be void.[3]

SEC. 534. *Intent.*[4]— It is frequently said that consent is the essential thing in marriage,[5] but like many other general ex-

[1] Maynard v. Hill, 125 U. S. 190.

[2] Id.

[3] See Bishop, M. & D., §§ 301, 302.

[4] The proof of intent is another thing. See sec. 540, "Proof of Marriage."

[5] The two essentials of a valid marriage are capacity and consent. Voorhees v. Voorhees, 46 N. J. Eq. 411. This idea taken from the Latin is expressed in several forms, such as "*Nuptias non concubitus sed consensus facit;*" "*Consensus, non concubitus, facit matrimonium;*" "*Concubitus non consensus facit nuptias.*" Broom says: "Marriage is constituted by the *conjunctio animorum*, or present consent of the parties, expressed under such circumstances as by law required, so that, though they should, after consent so given, by death or disagreement or any other cause, happen not to consummate the marriage *conjunctione corporum*, they are, nevertheless, entitled to all the legal rights consequent thereon." The above maxim has been adopted from the civil law by the common-law lawyers, who, indeed, have borrowed (especially in ancient times) almost all their notions of the legitimacy of marriage from the canon and civil laws; and by the latter, as well as by the earlier ecclesiastical law, marriage was a mere *consensual* contract, only differing from other

pressions this consent is to be determined not merely by the subsequent declaration of one or both of the parties, but by their conduct and language, while the transaction, which may properly be termed the *res gestæ*, is taking place.

If the parties are both *sui juris* they must be held to intend the natural and probable results of their acts, and it is of no avail as preventing the fastening of the bonds of matrimony that the parties did not understand that such would be the consequences of their acts, or that one of them held a secret intent not to contract a marriage.[1]

Especially unjust would it be to allow one of the contracting parties to release himself or herself from the bond by a subsequent declaration of his or her intent; but it has been held that the declarations of both that they did not intend the marriage relation, in a case where no ceremony had been performed, was not conclusive upon the court, which could, and in that case did, hold the parties man and wife.[2]

Sec. 535. *Who May Marry — Capacity.*— Consent being of the essence of and one of the essential elements to a valid marriage, it follows that only such persons as are deemed, in the eye of the law, capable of giving a real consent can enter into it.

A lunatic or insane person cannot marry. Such marriages are sometimes said to be absolutely void, but it is doubtful if they may not bind until set aside.[3] As to infants, though of sound mind and physically capable at some time to marry, it has always been deemed lawful for the state to fix the age at which marriage may be contracted. In this country a marriage before the age of seven is void; between the ages of seven and twelve and fourteen it is voidable; after fourteen and twelve respectively, between a girl and boy, it is binding;[4] but notwith-

contracts of this class in being indissoluble even by the consent of the contracting parties. It was always deemed to be 'a contract executed without any part performance;' so that the maxim was undisputed and peremptory, *consensus, non concubitus, facit nuptias vel matrimonium.*" Broom's Legal Maxims, 505. See Reg. v. Millis, 10 Cl. & Fin. 719; Dalrymple v. Dalrymple, 2 Hagg. Cons. R. 54; s. c., 4 Eng. Ecc. 485; Brook v. Brook, 27 L. J. Ch. 401; s. c., 9 H. L. Cas. 193.

[1] Schouler, Dom. Rel., 41, 42.

[2] Stevens v. Stevens (N. J.), 38 Atl. Rep. 460.

[3] Wightman v. Wightman, 4 Johns. Ch. 343; 1 L. Ed. N. Y. Ch. Rep. 861.

[4] Parton v. Hervey, 1 Gray, 119. See 1 Bishop, M. & D., §§ 568–577.

standing they may be prohibited under penalty from marrying, or any other person be prohibited from performing a marriage ceremony for them, a marriage advisedly entered into after these ages is binding.

The Consent Must be Real.— It follows that nothing which deprives it of that character, as complete intoxication, obliterating the sense or knowledge of what is transpiring, or duress, prevents that full and free consent which is required.

Fraud.— Precisely upon the same grounds that an assent to any act procured by fraud deprives the assent of the quality of being free and intelligent, so fraud and deception may make a marriage voidable, and be ground for annulling it.[1]

Impotency.— The capacity to enter into the marriage state must be something more than mental. Though never so intellectually and physically strong in every other respect, the parties must be physically capable of complete copulation. Lacking in this, they are called "impotent," and a marriage may be annulled. Mere inability to create or conceive children will not, in this country, constitute such impotency as to constitute a ground for annulling a marriage; but any physical, nervous or mental peculiarity, absolutely preventing copulation, is cause for annulment.[2]

Sec. 536. *Disability — Consanguinity.*— Marriages between near relatives, either by consanguinity or affinity, are termed "incestuous." We may not know why, nor how, but observation proves that purity of the blood of the issue of such marriage is destroyed. Insanity and disease are certain accompaniments, and so it is said the law of nature condemns it. The *jus gentium* recognizes the law of nature, and the municipal law of all civilized countries absolutely prohibits incest and incestuous marriages.

Consanguinity, properly speaking, is a blood relationship; or in one word, kinship. Civilized nations do not always agree as to the degrees of remoteness or proximity within which marriages may be contracted.

In some jurisdictions one may marry his cousin, but not his uncle or his aunt. Marriages between nearer relationships than cousins are not permitted in any civilized country.[3] Upon

[1] See *post*, sec. —.

[2] 1 Bishop, M., D. & S., § 767.

[3] A marriage between uncle and niece is within the prohibited degrees; but such marriages are not absolutely void. They may be annulled

these points there is necessarily conflict of opinion, but certain principles receive universal assent, and it is believed that the opinion of an English jurist states the substantially common ground.

"All nations allow marriage contracts; they are *juris gentium*, and the subjects of all nations are equally concerned in them; and from the infinite mischief and confusion that must necessarily arise to the subjects of all nations, with respect to legitimacy, succession and other rights, if the respective laws of different countries were only to be observed, as to marriages contracted by the subjects of those countries abroad, all nations have consented, or must be presumed to consent, for the common benefit and advantage, that such marriages should be good, or not, according to the laws of the country where they are made. It is of equal consequence to all that one rule in these cases should be observed by all countries."[1]

The first general principle is that such marriages are valid, or not, according to the laws of the country where they are made.[2]

The admitted exceptions insisted upon are:

First. That marriages which are deemed by the *lex fori* contrary to the law of nature, as recognized in that particular jurisdiction, are not valid, though allowed in the foreign jurisdiction where the marriage was celebrated.

Second. As to its own citizens, marriage being a status, the law-making power of the state may declare what shall be recognized as marriage and what shall be deemed contrary to the policy of its laws.

Of the first class only two are recognized in the United States, viz.: polygamous[3] and incestuous marriages.

The second class, incestuous marriages, are those contracted

at any time during the life of both, but after the death of one they are held valid. Bonham v. Badgley, 2 Gilm. 622; 2 Kent, *82.

[1] Sir Edward Simpson in Scrimshire v. Scrimshire, 2 Hagg. Con. Rep. 395; Hynes v. McDermott, 91 N. Y. 451. It is altogether probable that a marriage solemnized anywhere according to the law of the domicile of the parties would be held in that domicile as good.

[2] Com. v. Lane, 113 Mass. 458, 463–66.

[3] But it will not do to say that polygamy cannot be recognized to any extent. For example, should subjects of the sultan of Turkey be allowed by treaty or statute to inherit, the relation of husband and wife, as to his subjects not domiciled here, might be recognized to include all his wives. What is meant is, that polgamy cannot be recognized as to any one domiciled in the United States. See Hutchins v. Kimmell, 31 Mich. 126.

between persons within the prohibited degrees of consanguinity, as recognized by our law.

These include all persons in the direct line of consanguinity,—grandfather, parents, children and other descendants, however remote from each other.[1]

In the collateral lines, brothers and sisters are always prohibited, but the absolute prohibition is not universal any further.[2] Beyond these degrees first cousins may marry without violating the law of nature, as so understood.[3]

Sec. 537. *Affinity.*— Affinity is that relationship which is not of kin, but arises by marriage, and its closest examples are the parents, brothers and sisters of the spouse.

It can readily be seen that, as there is no blood relationship, the same natural reasons do not exist against marriage in such cases. There has been much learned controversy over the validity of marriage between one and his deceased wife's sister, or *vice versa*, but unless prohibited by statute there is no objection to this practice.[4]

[1] For the English canonical table, see 1 Bishop, M. & D., § 739.

[2] Com. v. Lane, *supra.*

[3] Id.; Schouler's Dom. Rel. 28; Wightman v. Wightman, 4 Johns. Ch. 343; 1 Lawy. Ed. N. Y. Ch. Rep. 861. Chancellor Kent in this case says: "The general usage of mankind is sufficient to settle the question, if it were possible to have any doubt on the subject, and it must have proceeded from some strong, uniform and natural principle. Prohibitions of the natural law are of absolute, uniform and universal obligation. They become rules of the common law, which is founded in the common reason and acknowledged duty of mankind, sanctioned by immemorial usage, and as such are clearly binding. To this extent, then, I apprehend it to be within the power and within the duty of this court to enforce the prohibition. Such marriages should be declared void as *contra bonos mores.* But as to the other collateral degrees, beyond brother and sister, I should incline to the intimation of the judges in Harrison v. Buswell, Vaugh. 206; 2 Vent. 9, S. S., that as we have no statute on the subject, and no train of common-law decisions independent of any statute authority, the Levitical degrees are not binding as a rule of municipal obedience. Marriages out of the lineal line, and in the collateral line, beyond the degree of brothers and sisters, could not be well declared void, as against the first principles of society. The laws or usages of all the nations to whom I have referred do, indeed, extend the prohibition to remoter degrees, but this is stepping out of the family circle; and I cannot put the prohibition on any other ground than positive institution. There is a great diversity of usage on this subject. *Neque teneo, neque dicta refello.* The limitation must be left until the legislature thinks proper to make some provision in the case, to the injunctions of religion, and to the control of manners and opinion."

[4] Sutton v. Warren, 10 Metc. 451. A

Such marriages were even spoken of by the English courts as incestuous, but, with all due deference to the so-called best minds, such an epithet seems to be wholly out of place and absurd in that connection. However ill-advised in the parties or impolitic such unions may be, there is certainly nothing even analogous to incest in the marriage.

Upon these subjects the student need only examine the statutory provisions of his state.

Sec. 538. *Local Prohibitions.*— Aside from kinship and affinity, which are more generally recognized as appropriate grounds of limitation upon marriage, some states, as a penalty for misconduct during the marriage relation, prohibit the guilty party against whom a divorce has been granted, or the guilty party and the paramour, from marrying again within a specified time, or absolutely, though generally during the life-time of the injured party; and it is frequently sought to evade these provisions, or provisions requiring license and ceremony, by removing to another state merely for the purpose of celebrating a marriage, and returning, after the marriage has been performed, to the state of the domicile.[1] Such a marriage is valid unless prohibited by statute, and it depends upon the statute and its construction whether the marriage is absolutely void for all purposes or not.[2]

very learned controversy took place between the English and American courts upon this subject, which is presented in Com. v. Lane, 113 Mass. 458, at page 467. See also 1 Bishop on Mar. & Div., sec. 876.

[1] Com. v. Lane, 113 Mass. 458. In this case Lane, a resident of Massachusetts, was divorced there for his fault. A statute of that state prohibited the marriage of a guilty party without leave of court, and provided that he should be guilty of *polygamy* for a violation. It further provided that if the parties, residents of the state, went to another state in order to evade the statute, intending to return, the marriage should be void. Lane, while still a resident of Massachusetts, in due form, according to the state law, married in New Hampshire a resident of Massachusetts. He was indicted for polygamy. The court held that the intent must be proven, and in the absence of such proof the marriage was valid.

[2] Id. In later cases it has been held, where both parties intended to evade the law, that the marriage was void, and that either might have it annulled. Tyler v. Tyler, 170 Mass. 150. It has quite recently been held under that statute, reading "persons" in the plural, that both must have the intent or the marriage will be valid. Whippen v. Whippen, 171 Mass. 560. The discussion in the case is peculiarly instructive. The same principles are frequently applied. Pennegar v. State, 87 Tenn. 244. In Norman v. Norman, 54 Pac. Rep. 143, the parties took a steamer and had the ceremony performed on the high sea, but

Here the principle of state policy, that the status of its citizens is peculiarly within the control of the state, and that it is for its tribunal to determine whether this status has been legally changed,[1] and the other opinion above mentioned, that a marriage valid where celebrated is valid everywhere, is subordinate to the state control over the status of its residents.[2]

It may be readily understood that, marriage being a status, and one in which the state is interested as well as the parties, the first principle just mentioned is the paramount one, and it is for the state to decide upon the status of its own citizens; and the mere fact that the marriage on foreign soil is with a person a non-resident of the state, even, cannot aid or change the matter, as against a statute aimed at him, as to the status of a guilty party who is prohibited from marrying.

Sec. 539. *Marriage, How Formed.*— In the absence of a restrictive statute,[3] the manner in which marriage may be entered into and proved, and likewise the manner of its dissolution, depend in no small degree upon the view taken by the court of the nature of marriage.

First illustration: If it is held that marriage is a mere civil contract, it is plain that the circumstances, language and acts surrounding the inception of the relation at the time of and preceding the commencement of cohabitation, or surrounding the time when the marriage is claimed to have taken place, constitute the principal, if not the sole, subject of inquiry, and that all evidence of subsequent acts and conduct is relevant to and probative merely as indicating the existence of a contract at some time; that is, the inquiry is for a contract rather than a condition, the formal expression of an intent rather than the intent.

Second illustration: If, on the contrary, marriage is regarded as a status which results from conjugal conduct and connubial habit, it is plain that the marriage may arise by a deliberate contract contemporaneous with the beginning of cohabitation, or may be held to arise from connubial conduct and association

it was held unavailing. It was held that the high sea was not another country. The underlying principle is that the parties are bound by the law of their domicile. This case has no precise parallel. See Holmes v. Holmes, 1 Abb. (U. S.) 525; Fed. Cases No. 6,638.

[1] Whippen v. Whippen (Mass., 1898), 51 N. E. Rep. 174.

[2] In re Stull's Estate, 183 Pa. St. 625.

[3] *Post*, p. 647.

continued for such a length of time as indicates to the satisfaction of the court the intention of the parties to assume the status.

So the inception may be meretricious, and gradually change by conjugal association and conduct into a valid marriage.[1]

Results of the most serious kind depend upon these distinctions, and one is led to wonder why, in civilized society, courts will adhere to a technical expression and narrow view, which subjects the innocent and unconscious citizen to the stigma of illicit cohabitation, and the issue of a constant, upright and affectionate pair to the stigma of bastardy; yet some of our courts have advanced no further.[2]

It is difficult, in discussing the subject of this section, not to digress and discuss the subject of the next section, which relates to the proof of marriage.

Those courts which hold that marriage is a mere contract, hold that the common law requires parties who are under no legal disability and a contract substantially in the present time — that is, at the time of beginning the relation — that "we take each other now," and not that "we take each other at a future time;"[3] that there are two essentials to a valid marriage — capacity and consent. They do not require a ceremonial marriage, but insist upon a contract of marriage *per verba de presenti* as the beginning of the marriage relation (not necessarily at the beginning of cohabitation).

The adverse view requires conduct showing the assumption of the status. "Whatever," says the supreme court of Illinois, "may be the rule governing other contracts, the contract of

[1] See sec. 540.

[2] The case of Voorhees v. Voorhees, 47 N. J. Eq. 315, appears to rest only on Cartwright v. McGown, 121 Ill. 388, but the latter case has essential points of divergence and seems to be based on no precedent. See Nelson, Div. & Sep., §§ 2, 3.

[3] Stevens v. Stevens, 38 Atl. Rep. 460; Voorhees v. Voorhees, 46 N. J. Eq. 411. The absurdities to which this view may lead are well illustrated in a recent case in Illinois (McKenna v. McKenna, 73 Ill. App. 64), where the learned justice writing the opinion held, in substance, that although the man seeking cohabitation stated that "I take you now as my wife," it not appearing that the woman expressly assented to the proposal to be his wife, no amount of subsequent conduct could raise a presumption of marriage. This decision has been affirmed, the learned supreme court holding that the woman's assent, being merely by acquiescence, embraced only assent to copulation, not to marriage. 180 Ill. 577.

marriage is *jure gentium*, and consent and the assumption of the marriage status are all that is required by natural or public law."[1]

Formal Marriages.— The laws of civilized countries universally provide for some public celebration of marriage, but only in a few countries is such a ceremony as is provided by law absolutely essential to marriage.[2]

It is the rule in most of the states that, while the parties may be punished for not observing the law, the relation of marriage, once entered upon, is not to be declared void because of the non-observance of statutory directions.[3]

Marriage may be contracted or celebrated by a public wedding by a minister, or a private wedding in the same way, or by performing the ceremony in the presence of a magistrate in accordance with the forms of law, or a declaration in the presence of friends of the intention to take each other as man and wife.

Common-law Marriages.— Besides these formal modes, if the parties, by words, indicate their present mutual intention only to each other to become man and wife, followed by cohabitation,[4] they become immediately man and wife, but they may acquire this status without any of the above formalities; for if, in the absence of impediments, they associate together under circum-

[1] Laurence v. Laurence, 164 Ill. 371.

[2] No attempt will be here made to explain these statutory requirements of the different states. The general rule is that statutes prescribing the forms of ceremony and requisite steps are directory, unless the statute contains words clearly indicating that unless the formalities are observed the marriage is void. Meister v. Moore, 96 U. S. 76; Cartwright v. McGown, 121 Ill. 388. In California the code originally provided that marriage could be entered into by being solemnized, etc., or "*by a mutual assumption of marital rights, duties or obligations.*" A subsequent revision omitted these, and added that a noncompliance "*by others than the parties*" should not invalidate. It was held that there could be no more nonceremonial marriages in that state. Norman v. Norman (Cal., 1898), 54 Pac. Rep. 143.

[3] This was never so as to some states. See Com. v. Munson, 127 Mass. 459, where the ancient and modern law of that and several other states is given. See Denison v. Denison, 35 Md. 361. In Cheney v. Arnold, 15 N. Y. 345, it was contended that informal, non-ceremonious marriages were not valid at common law; but such is not the prevailing view in that state as to the common law.

[4] It is not necessary, if this intention is clearly proven, to show cohabitation. Carey v. Hulett, 66 Minn. 327; Jackson v. Winne, 7 Wend. 47.

stances which indicate the intention to form a permanent conjugal relation, they may be held to be man and wife irrespective of the secret intent of either or both. The marriage relation or status is one in which the state is vitally interested, and parties cannot complain if the courts hold that their acts shall be held to be the best evidence of their intent.[1] While it has quite generally been affirmed that a contract *per verba de presenti* constituted marriage, it never was the common law that a promise to marry in the future, *i. e.*, an engagement followed by copulation, constituted a marriage.[2]

Sec. 540. *Proof of Marriage — The Fact in Issue.* — The character of evidence, the requisite as to amount or quantum of proof, and the presumptions which aid or oppose the confirmation of marriage, are affected by the light in which the nature of marriage is viewed by the court; but the manner in which the issue arises,[3] and the effect of the decision, the real cause for conflict between the cases, is in most instances ascribable to a misconception as to what is the ultimate fact in issue on a question of common-law marriage.

As was stated in the last section, if the inquiry is directed as to whether an actual[4] contract of marriage has been expressly entered into, the proof must necessarily be directed to that as the fact in issue, and all presumptions and all evidence

[1] The adage, "Actions speak louder than words," is not a mere playground saw; it speaks a natural truth. Schouler, Dom. Rel. *41, 42. "When two persons agree to have commerce for procreation and bringing up of children, and for lasting cohabitation, that, in a state of nature, would be a marriage, and, in the absence of all civil and religious institutions, might safely be presumed to be, as it is properly called, a marriage in the sight of God." Lindo v. Belisario, 1 Hagg. Cons. 216, per Lord Stowell; Teter v. Teter, 101 Ind. 129; Stevens v. Stevens, *supra*.

[2] Cheney v. Arnold, 15 N. Y. 345. This must be taken to mean followed *immediately* by copulation, for it is no doubt the rule that an engagement followed by copulation is presumed to be marriage. Cartwright v. McGown, 121 Ill. 388.

[3] Collins v. Collins, 80 N. Y. 1; Lowery v. People, 172 Ill. 466.

[4] That is, the inquiry is as to a formal contract, although the proof of it may be by presumption from facts and circumstances. Voorhees v. Voorhees, 46 N. J. Eq. 411. This case presents the extreme view of the contract theory, and for that reason should be carefully considered. The New York cases cited do not sustain the decision or the reasoning. The case of Cartwright v. McGown, 121 Ill. 388, is distinguishable in part, but supports the decision and the reasoning. But the language of the opinion also supports the status theory.

relate to and bear upon the question of the existence or non-existence of such fact.

If, on the other hand, the question is one as to the voluntary assumption of the status, the presumptions and evidence relate to the intention of the parties and their acts as evidence of the status.[1] The distinction is radical. Under the first view the proof of an actual agreement or a ceremonial marriage while an impediment exists is regarded as good ground for refusing to allow proof of unbroken connubial habit with perfect constancy, extending for years after the impediment has ceased, to raise any presumption of the assumption of the status.[2]

Where the fact in issue is held to be whether, at any time before issue joined,[3] the marriage status has existed, the existence of the impediment only precludes the existence of the status so long as the impediment remains; but the evidence of prior conduct, affection, constancy and connubial habit may all be allowed full force as showing the desire and intent of the parties; and if this evidence shows a continuance of this conduct for a sufficient time after the removal of the impediment, if the parties know of its existence, to indicate that the parties intend to continue the relation, or continues without knowledge of the impediment and its removal, the marriage may and should be presumed at the earliest moment after removal of the impediment.[4]

[1] The latter is the more reasonable theory, and is supported by the greater number and weight of authority. See Teter v. Teter, 101 Ind. 129, and cases; also notes *sub;* In re Taylor, 9 Paige Ch. 611 (L. ed. N. Y. Ch. Rep.).

[2] The New Jersey court holds that all subsequent proof bears only upon the original contract. Voorhees v. Voorhees, 46 N. J. Eq. 411. The other extreme case cited in this case holds that, if the impediment was not known, then its removal allows the presumption to avail upon the removal of the impediment. Cartwright v. McGown, 121 Ill. 388. This reasoning really destroys the reasoning upon which both these decisions rest.

[3] This will of course always embrace the *res gestæ*.

[4] The one set of cases insists upon proof of a contract, the other upon proof of conduct indicating matrimonial intention. The one in effect shows that only by a contract expressed can marriage be entered into, the other that conduct may *impose the status*. One class expresses their view that conduct and repute are not marriage, but only evidence of it; but the other may reply that the express contract or a ceremony are not marriage, but only *prima facie* evidence of it. The one insists on proof of what is mere evidence of the fact in issue and only one of its modes of proof. The other on proof of the real thing in issue.

Sec. 541. *Means or Instruments of Proof.*— The various phases in which the question presents itself are of great importance. For example, one party may be seeking the dissolution of the contract against the other, or seeking relief based upon the existence of the contract; or, after the death of one, the rights of husband or wife may be asserted by the other;[1] or, in litigation, the question of the marriage of one of the parties, or some other person, may be drawn in question as the principal question, but collateral to the real issue; or the prosecution may be one by the state for bigamy or polygamy; or again, in any issue however formed, the effect of the finding, whether it be to show the commission of a crime by one or fix the status of illegitimacy upon the issue of marriage, will have weight with the court as to the existence of presumptions and the quantum of proof.[2]

Where Common-law Marriage is Not Recognized.— It is apparent that where the marriage is alleged to have taken place between citizens of and to have been consummated in a state or country where non-ceremonial marriages are void, the proof must show a ceremonial marriage.

Even in a country where such a marriage must be celebrated, the rule that a marriage valid where celebrated is valid everywhere is recognized, and a marriage solemnized or contracted in another state or foreign country without a ceremony may be recognized and enforced.[3]

Where marriage is deemed a mere civil contract, the evidence of this contract need not, except for some purposes,[4] be by di-

[1] Collins v. Collins, 80 N. Y. 1. All courts agree that this intention can be shown by a contract *de presenti, ceremonial or formal, or by a line of conduct showing that intention.* The court of Illinois says "it is impossible to fix a standard by which the evidence of marriage in every case should be determined, each case depending upon its own facts and attending circumstances. How the conduct and bearing of the parties are regarded by their friends and relatives, and by those with whom they associate (repute), introducing each other as husband and wife (assuming the status),— these are circumstances of more or less weight, as is the length of time the parties have lived together, and the like. Cartwright v. McGown, 121 Ill. 399. See also Port v. Port, 70 Ill. 484, and cases.

[2] Teter v. Teter, 101 Ind. 129.

[3] The Massachusetts cases will suffice to sustain this position. *Ante*, sec. 538.

[4] Some courts adopt the policy that on an application for alimony *pendente lite* there should be direct proof. Collins v. Collins, 80 N. Y. 1.

rect proof of the language of the parties, indicating a present intention to take each other as man and wife, but the marriage may be proven by facts and circumstances, admissions of the parties, holding themselves out as man and wife, or general repute in the neighborhood where they reside, in precisely the same manner as in those jurisdictions where marriage is held to be a status arising from conduct, language or acts indicating matrimonial intent.[1]

The chief difficulty lies in cases where a marriage ceremony has been performed, but it is void or voidable because of some impediment, such as a prior marriage, or in cases where the parties knowingly entered into an illicit cohabitation. In some jurisdictions, where there was an illegal ceremony performed, the parties seem to be in a worse situation than if the inception was illicit or meretricious, because it has even been held that both parties must have known of the removal of the impediment,[2] and after such knowledge shall by some act or change of conduct indicate an intention to re-contract.

It is universally held that where the inception is meretricious, it is presumed to continue meretricious until there is some proof of a change of condition or conduct.[3] The only difference between the holding is that in the one case the change should indicate an intention to contract anew, while in the other the change should merely indicate an intention to continue a permanent conjugal relation.[4] The difference is apparently very slight, but it is real, and of very serious consequence, because in the latter case the courts will hold that if the relation seems to have been affectionate and constant from the start, that the trial tribunal, whether it be jury or chancellor, may presume the intention at the first moment the impediment is removed, merely from the evidence of uninterrupted conjugal conduct for such a period as would satisfy the mind in case no impediment had existed; whereas, in the other tribunal, it must at least be shown that the parties continued the relation after knowledge by both that there was no longer an impediment.[5]

[1] Voorhees v. Voorhees, 46 N. J. Eq. 411. See Stevens v. Stevens, 38 Atl. Rep. 460.

[2] Voorhees v. Voorhees, *supra*.

[3] There is no conflict on the point. Elzas v. Elzas, 171 Ill. 632; Cartwright v. McGown, 121 id. 399; Hynes v. McDermott, 91 N. Y. 451; Collins v. Collins, 80 id. 1–9; Williams v. Williams, 46 Wis. 464.

[4] Id.; cases cited in next section.

[5] See next section.

There seems to be but one jurisdiction where the former view has been pushed to the extreme, and that is in the state of New Jersey, notably in the case of *Voorhees v. Voorhees*.[1]

The case cannot be defended upon authority, and none of the cases except *Cartwright v. McGown*[2] give even plausibility to the decision, and the latter case, although very similar in principle, is not precisely in point in fact, and is based upon no authority which goes to that length, while the reasoning of the case falls short of sustaining the decision.[3]

Sec. 542. *Proof — The English Rule.*— These cases do not pretend to be in conflict with the current of authority, but the case of *Voorhees v. Voorhees* is in direct conflict with the vast weight of authority.[4]

Where Marriage is Held to be a Status Arising from Conduct.— This view does not have its origin in the celebrated case of *Campbell v. Campbell*, otherwise called the Breadalbane case, but its finest exposition is there given.

In that case the ancestor, a scion of the House of Campbell,

[1] 46 N. J. Eq. 411.

[2] 121 Ill. 399.

[3] Nevertheless Cartwright v. McGown should be properly classed with Voorhees v. Voorhees. I doubt whether Voorhees v. Voorhees indicates the law of New Jersey at the present, and certainly Cartwright v. McGown is not a fair exponent of the law of Illinois as understood at the present time. In the New Jersey case an actual divorce existed when the second marriage was celebrated. It was fraudulent, but it existed. None existed in the Illinois case. After the marriage both of the first wives obtained divorces. That Cartwright v. McGown is not understood as applied in the New Jersey case is shown by a case decided by the appellate court of Illinois in 1896 — nine years later than the Cartwright case. A marriage ceremony was performed while both parties knew that a former marriage existed, but the parties lived together with matrimonial habit and repute for seven years after it was dissolved. The husband then brought suit to disaffirm and annul the marriage. Mr. Justice Waterman, delivering the opinion, says: "We are of the opinion that the chancellor was right in concluding that from and after the performance of the ceremony of marriage of the parties to this suit, and the entry of the decree of divorce of appellee from Salmonsohn, the intercourse between appellant and appellee was not meretricious. Appellee was then a marriageable woman, and however invalid the previous undertaking between appellant and appellee may have originally been, appellant's conduct in continuing for seven years thereafter to live with and hold her out to the world as his wife must be taken as a ratification of the marriage ceremony, performed with all solemnity by the Rev. Doctor Withrow. See Port v. Port, 70 Ill. 484."

[4] Perhaps Mr. Justice Garrison's dissenting opinion in Voorhees v. Voorhees, 20 Atl. Rep. 676, should be excepted from this statement.

eloped with the wife of a grocer, lived with her several years before the death of the husband, had a ceremony performed while he was known to have been alive, and there was no ceremony or change in their mode of life after his death. The claim of those attacking the marriage was that, it being certain that the inception was illicit and known to be so, and as there was no marked change in their relation, habits or repute, such relation continued its character, and must be presumed to so continue until proof of some marked change.

The lord chancellor, with the approval of his brethren, held that marriage is a status resulting from a line of conduct indicating an intention to assume the marriage relation, not a mere contract between two parties. Its essential is a line of conduct, not a set of promises.[1]

It was also urged in the Breadalbane case that the presumption from cohabitation could be allowed only as evidence of matrimonial consent at the origin of the cohabitation, and consequently such presumption could not obtain in that case; but Lord Westbury said: "You must infer the consent to have been given at the first moment when you find the parties able to enter into the contract."[2]

[1] Campbell v. Campbell (Breadalbane's Case), 1 Law Rep. Scotch and Div. 182.

[2] The lord chancellor, referring to the language of Lord Redesdale in Cunningham v. Cunningham, 2 Dow, 483, relied upon by counsel who contended against the marriage, says: "I gather that, notwithstanding the nature of the original connection there, had there afterwards grown up a general reputation that the parties had become man and wife, they (the court) would have been of the opinion that the evidence would have established the presumption of a subsequent marriage."

Campbell v. Campbell (Breadalbane's Case) was decided in 1867. In 1876 the House of Lords decided De Thoren v. Attorney-General, L. R. 1 App. Cas. 686. There one Wall and Sarah Ogg celebrated a ceremonious marriage, invalid because of an existing impediment, which was afterwards removed, both parties supposing there was no impediment. Lord Chelmsford delivered the unanimous opinion, and in it he said: "The question to be determined is whether there was a consent to a marriage between Williams Ellis Wall and Sarah Ogg, evidenced by habit and repute, *prior to the birth* of the elder of their sons. If there were no other question than this in the case, there would be no difficulty in giving an answer in the affirmative. But the appellant, although he admits that there had been such cohabitation of the parties as husband and wife as in ordinary case would have conclusively established the presumption of a marriage by consent, yet contends that the circumstance of a previous ceremony of marriage having taken place between the parties which was invalid, though unknown to them to be so,

The distinction is radical. The one gives matrimonial effect to matrimonial conduct wherever there is no impediment, and imposes the condition of marriage unless there is proof of meretricious association. The other opposes the policy of the law to infer marriage wherever circumstances will admit, and continues the illegal character irrespective of the conduct and apparent desire of the parties, no matter how innocent they may be.

Sec. 543. *Proof of Marriage — Presumptions.*— The *proof* of marriage is in most cases nothing more than the application of a set of presumptions. The performance of a ceremony, no matter how solemnly or publicly it takes place, amounts only to *prima facie* evidence of a marriage,[1] because it is always open to be rebutted by proof of non-consent on the ground *that it was a mere jest*, that either of the parties was unable to consent, was forced to consent, or that the consent was unreal because of mistake or fraud or duress.[2]

prevented that presumption. The ground of this argument is that the living together of the parties as husband and wife must be attributed to the invalid ceremony, and, therefore, that the habit and repute could not be evidence of any other consent." By the unanimous judgment of the House of Lords it was decided:

"1. That the subsequent cohabitation and reputation were not to be referred to the inefficient ceremony, even though the parties did not know of the removal of the impediment to their original marriage.

"2. Where parties are cohabiting matrimonially, but unlawfully, because of an impediment to their marriage, matrimonial consent must be presumed to have been interchanged as soon as the parties were enabled, by the removal of the impediment, to enter into the contract.

"3. The ceremony, although invalid, was a consent by the parties to a cohabitation which was matrimonial in character, and their subsequent cohabitation was proof of a continuing consent thereto." See dissenting opinion of Garrison, J., Voorhees v. Voorhees, 20 Atl. Rep. 676. The case of De Thoren v. Attorney-General is precisely in accord with the decision in Stein v. Stein, 66 Ill. App. 526, and Cartwright v. McGown, 121 Ill. at p. 504, is also in accord. It is believed that the reasoning in all the cases denying the presumption after the removal of the impediment is erroneous because directed to a wrong conception of the fact in issue.

[1] In Cartwright v. McGown, *supra*, it is said that where a celebration is once shown, the contract, the capacity and validity, *in the absence of proof* to the contrary, will be *presumed*.

[2] Clark v. Field, 13 Vt. 460; Hutchins v. Kimmell, 31 Mich. 126; Jackson v. Winne, 7 Wend. 47. In Aymer v. Roff, 4 Johns. Ch. 343, a girl of twelve years alleged that she did not understand the nature of the ceremony, and her alleged husband was restrained from all association with her till the question of her understanding could be ascertained. "Mere words without any intention corresponding to them will not make a marriage or any other civil contract. But the words are the evidence of

The same is true of a written statement of an agreement *de presenti* to take each other as husband and wife.[1]

Where the only proof in the case is of continuous cohabitation, the presumption is that it was lawful.[2]

Where to this proof is added some affirmative proof of holding themselves out as husband and wife, it adds so much to the force of the presumption, and length of time strengthens the probative force of the presumption.[3]

This presumption of marriage from connubial habit is one of the strongest known to the law, and is to be repelled only by clear evidence.[4]

Evidence of repute — that is, the reputation of the parties among their acquaintances as to whether they are man and wife — is always admissible, and such proof strengthens the force of the presumption from connubial habit.[5]

Where the inception is illegal or illicit, the ordinary presumption of continuance applies until there is a change in the circumstances, but a very slight change will be seized hold of in order to presume the marriage.[6]

Where an actual ceremony or an actual contract *per verba de presenti* is shown, the burden of proof is upon the party attacking the marriage to show its invalidity, and every presumption will be indulged to uphold it.[7]

such intention, and if once exchanged it must be clearly shown that both parties intended and understood that they were not to have effect. . . . Marriage itself is a proceeding *in rem*, and constitutes the parties man and wife; divorce is also — it dissolves an existing marriage." McClurg v. Merry, 21 N. J. Eq. 225.

[1] Carey v. Hulett, 66 Minn. 327.

[2] Bishop on Mar. & Div., ch. 8; Myatt v. Myatt, 44 Ill. 473; Elzas v. Elzas, 171 id. 632.

[3] Cunningham v. Cunningham, 2 Dow, 482; Johnson v. Johnson, 114 Ill. 611; Elzas v. Elzas, *supra*.

[4] Hynes v. McDermott, 91 N. Y. 451.

[5] De Thoren v. Attorney-General, 1 App. Cas. L. R. 686; Hynes v. McDermott, *supra*. Such repute need not date from the first copulation. A divided repute may weaken the strength of the evidence of reputation (Bishop, Mar. & Div., sec. 936); but it depends upon circumstances, and it is not properly a divided repute where the repute is different in different localities. Gall v. Gall, 114 N. Y. 109.

[6] Campbell v. Campbell (Breadalbane's Case), 1 Law Rep. Scotch and Div. 182. The lord chancellor there held that the change need not be in the conduct of the parties, but a change in the conditions. For example, removal of impediment by death or divorce or change *in repute* would warrant a presumption of marriage.

[7] There is no conflict on this point. Cartwright v. McGown, *supra;* Fleming v. People, 27 N. Y. 329.

Sec. 544. *Conduct as Evidence of Marriage.*—In the search for, and production of, evidence to sustain the affirmative of a disputed issue of marriage, or to negative the issue, it seems that no part of the transaction, however solemn or however trifling, but falls within the designation *conduct.* Every word and act tends to prove or disprove the essential state of mind called "consent." However, the courts have differed as to the nature of marriage; no court has directly held that in theory even there must be actual words used to contract. On the contrary, all seem to agree that words are not under all circumstances necessary, but that it is sufficient if the parties, by conduct mutually understood, or in any way, indicate their intention to accept each other as husband and wife.[1] Even in the case of a common-law marriage, it is not always necessary to show cohabitation following the agreement; that is, if the agreement *de presenti* is clearly shown, marriage results. Cohabitation and repute are distinct means of proof.[2] The performance of a ceremony is conduct powerfully probative of the essential intent, but not conclusively so. Even the words there spoken, the bowing of the head in assent, are nothing more nor less than declarations or acts—parts of the *res gestæ.* Holding each other out in public as man and wife, by appearing as such publicly, or introductions, are mere declarations.[3] And it is because of such conduct that repute, or matrimonial habit, as it is sometimes called, is allowed to be shown; that is, allowing the apparent anomaly of proof of how friends, neighbors, relatives and acquaintances regarded the parties,[4] because it is connected with the conduct of the parties; but it is plain that if the most solemn act cannot be conclusive, then the introduction by one or the other, or causing it be understood in the neighborhood that they are husband and wife, is not conclusive, but it may still be shown that the cohabitation is meretricious, and that the public conduct is merely for the purpose of deception, or arises from any motive, such as a desire to avoid

[1] Bishop, Mar. & Div., sec. 229; Teter v. Teter, 101 Ind. 129.

[2] Casey v. Hulett, 66 Minn. 327.

[3] Port v. Port, 70 Ill. 484.

[4] This would seem to contravene the maxim *res inter alios acta,* which requires that in ordinary cases no hearsay evidence or declarations of third parties not in the presence of the parties can affect them. This rule must be examined as a part of the subject of evidence.

criminal punishment or inconvenience.[1] Again, conduct militating against the marriage relation, such as an agreement between the parties to a clandestine or a common-law marriage to keep the matter secret, and a performance of this agreement by denial of the marriage, is not conclusive against the issue.[2] Indeed, it has been held that where the parties, who had lived together several years in apparent connubial constancy, separated, and the wife married another man, who sued to annul on the ground of this first marriage, the declarations of both could not outweigh their conduct and repute.[3] A multitude of circumstances may exist in a single case making for or against marriage; but it is sufficient here to emphasize the importance of regarding every act and transaction within the *res gestæ* as a part of conduct indicating the intention to assume the marriage status, or tending to show the contrary, and that in weighing the evidence after it is all in, the doctrine of presumption plays an important part.[4]

Sec. 545. *Dissolution—Annulment of Marriage.*— Once the nature of marriage and the manner of compassing it are understood, it is quite clear that it is beyond the power of the parties, without the interposition of the law, to remove the bonds of matrimony and change their status.

[1] Port v. Port, 70 Ill. 484, citing Becking's Appeal, 2 Brews. (Pa.) 202. In Port v. Port the court quite clearly show that it is not always what the parties say that must determine, but that all of the facts, circumstances, words and conduct must be weighed. In that case they say: "The conduct of Port in introducing appellant as and calling her his wife, when considered in connection with other evidence, proves merely a desire to avoid the odium and danger to which they would have been exposed if the truth had been known, and hence does not impair the force of the other testimony, direct and conclusive as it is in its nature."

[2] Bishop, M. & D., secs. 252, 488; Laurence v. Laurence, 164 Ill. 370; Carey v. Hulett, 66 Minn. 327.

[3] Stevens v. Stevens, 38 Atl. Rep. 460.

[4] *Ante*, sec. 543. The court in the opinion in Port v. Port, 70 Ill. 484, 490, referring to the urgency of counsel and the citation of cases where an invalid ceremony had been performed, says there is this distinction between the present case and those referred to by counsel where it was held that the fact that the parties had doubts as to the validity of the marriage did not prejudice her rights: *in those cases something had been done intended as a marriage.* This seems to be the keynote of the inquiry: Was what was done intended as a marriage; not simply intended, but were the acts indicative of that intent.

It will be equally clear that there is a plain distinction, both in the nature of the proceeding and its effect upon the rights of the parties, as to the nature of dissolving the bonds or declaring them severed. A marriage absolutely void in its inception cannot be made the grounds of a defense or the basis of any right whatever.[1] But it is equally plain that an apparent relation of that kind may be so great and annoying and inconvenient that the law should afford some means of publicly evidencing its invalidity.[2] Hence it has uniformly been held that in America the court of equity may cancel and set aside a void marriage.[3] Likewise a pretended marriage, or a seeming marriage, may be set aside on the ground of fraud, or mistake, or duress, or any of the grounds which entitle the parties to annul the marriage from the beginning. Lack of capacity, duress and mistake are easily understood as grounds for annulling marriage. But what is the fraud which constitutes such grounds is more difficult. It is sometimes claimed that there is a tacit representation that the female is chaste, and, if she has never been married, is a virgin; but this is not the rule.[4] Men are not allowed to contract this relation without inquiry and then annul the marriage because of subsequent discoveries. In fact it is doubtful if deceit in reference to conduct prior to the marriage is ground for annulment, the better view being that it is not.[5] But deception of this nature as to a material fact, *e. g.*, the condition as to pregnancy or present chastity, is material, and the marriage may be set aside because of such false representations as to that. If the complaining party knows of lewdness, he cannot complain; or if he has grounds for belief of such a condition, he must inquire, and inasmuch as he chooses to deal in the imperfect, he cannot afterward have relief because it was worse than he supposed.[6]

Sec. 546. *Legislative Divorces.*— Divorce is the sundering of the bonds of matrimony rather than annulling the marriage.

[1] Cartwright v. McGown, 121 Ill. 388.

[2] Wightman v. Wightman, 4 Johns. Ch. 343; *ante*, p. 638, note 3.

[3] Id.; Reynolds v. Reynolds, 3 Allen, 606; Long v. Long, 77 N. C. 308; Currie v. Currie, 24 N. J. Eq. 522.

[4] Reynolds v. Reynolds, *supra*. Where a woman concealed the birth of a bastard child, the court refused to set aside the marriage. Smith v. Smith, 8 Oreg. 100.

[5] Carris v. Carris, 24 N. J. Eq. 516.

[6] Long v. Long, 77 N. C. 308; Steele v. Steele, 96 Ky. 382.

It proceeds upon the ground that there is a valid marriage. It has been generally held that, unless some express limitation appears in the state constitution, it is within the power of the legislature to grant divorce; and while the practice finds no favor at the present time, the power may exist in some states, and it cannot be said that under no circumstances is it unjustifiable.[1] The practice is so infrequent as to require no further notice than to suggest that in a great emergency the relief might be sought in legislation.

Sec. 547. *Judicial Divorce.*— The ordinary method of dissolving the bonds of matrimony is by judicial proceeding on the equity side of the court.[2] It is obvious that there are causes of divorce which consist in conduct naturally incompatible with the marriage agreement, and which must be considered violative of it, or incapacities unknown to one or both of the parties, and it would seem entirely consistent with religious sentiment and secular policy that divorce should be granted on these grounds.

Adultery is the most direct violation of a Christian marriage, while impotency absolutely prevents the consummation of marriage.[3]

Cruelty is a relative term, and it follows that certain degrees of violence which would be considered highly oppressive and brutal by certain persons might not be deemed so by others; but a very common statutory ground for divorce is extreme and repeated cruelty, or cruel and inhuman treatment.[4]

[1] Maynard v. Hill, 125 U. S. 190. At an early day in New York, while it was a colony, the governor in council exercised the power. Burtis v. Burtis, Hopk. Ch. 557. *Cf.* Bingham v. Miller, 17 Ohio, 445.

[2] It is preferable to treat the question of jurisdiction with the subject of equity jurisdiction and procedure. See Barrere v. Barrere, 4 Johns. Ch. 187; Burtis v. Burtis, Hopk. Ch. 557.

[3] It is ordinarily contemplated that the impotency shall be natural or incurable, and that it existed at the time of marriage; but this does not require congenital incapacity, but impotence resulting from evil practices is within the rule. See Griffith v. Griffith, 162 Ill. 368, and cases; 1 Bishop, M. & D. (5th ed.), sec. 332. The English common law required cohabitation for three years, after which the impotence and incurability are deemed proven. Id.

[4] As a rule, a single act of violence or cruelty will not constitute sufficient ground for divorce, but an act accompanied with prior or subsequent conduct indicating the intent to persist in outraging the feeling of the complaining party, and of such a character as if persisted in will materially affect the health of the abused party, should be sufficient, even under

Desertion or abandonment is a reasonable and natural ground for granting a divorce. Ordinarily it is usual to provide that the desertion shall extend over a considerable period of time, sufficient to indicate a settled intention to abandon.[1]

It is not uncommon to allow divorce for conviction of infamous crimes.

In addition to these ordinary causes, the statutes may provide for, and the courts recognize, other grounds.

It does not follow that, because the statutes are settled law as evidenced by decisions of the state declaring that certain conduct shall be ground for a divorce, a divorce must always be granted if the circumstances presented have existed; that is, the conduct of the complaining party may warrant a refusal to grant a divorce; where, for example, adultery is committed with the acquiescence or connivance of the complaining party, or where the evidence complained of has been condoned, or where the complaining party is likewise guilty of the same offense, or one of a similar kind or grade. In such cases the divorce may be refused because of the connivance or fault.

a statute requiring *extreme* and repeated cruelty. Fizette v. Fizette, 116 Ill. 328; Palmer v. Palmer, 45 Mich. 150. It is not for the courts to add new grounds or extend the nature of them beyond the intention of the statute, and hence the courts are not subject to criticism for seeming narrowness. See Sharp v. Sharp, 116 Ill. 307. The statutes of some states provide for divorce on account of cruelty, whether by personal violence *or otherwise*. This provides for those cases of refined cruelty whereby the weak may torture the strong, or the cruelty may be inflicted without resort to physical violence. Charges of unchastity (Walton v. Walton (Neb.), 17 N. W. Rep. 392; Bahn v. Bahn, 62 Tex. 518), denial of paternity (Driver v. Driver (Ind.), 40 N. E. Rep. 401), charging wife with incapacity to consummate the marriage (Berdolt v. Berdolt, 77 N. W. Rep. 399), unkindness while ill known to be injurious, and intercourse communicating disease (Morehouse v. Morehouse, 70 Conn. 420), are examples of cruelty without physical violence.

[1] In the absence of express words in a statute, an abandonment, even though support is continued, is desertion. Elzas v. Elzas, 171 Ill. 362. If the statute requires desertion and neglect to support, both elements should combine. Stewart v. Stewart, 78 Me. 548. Persistent refusal to have sexual intercourse, unless for valid reasons, even if continued for a period equaling the statutory period of desertion, has been held not to constitute desertion, and this seems to be the weight of authority. Segelbaum v. Segelbaum, 39 Minn. 258; Fritz v. Fritz, 138 Ill. 436. These decisions are based upon a long line of authority without any real dissent. The whole subject may readily be tried by the citations afforded in these cases.

Sec. 548. *Divorce, Classes of.*— A legal separation may be decreed by the court, and the offending party compelled to perform certain of the marital duties, without granting complete divorce. A judicial decree completely severing the marriage tie, or, as it is termed, *a vinculo matrimonii*, extinguishes entirely the marriage relation and changes the status of the parties.[1] A separation from bed and board, or, as it is termed in some jurisdictions, divorce *a mensa et thoro*, does not dissolve the marriage tie, but compels the offending party to observe the relations of marriage and at the same time live separate and apart from the complaining party.[2] The complaining party is, in the vast majority of cases where separation from bed and board is asked, the wife; but it cannot be said at this time that under no circumstances would the court grant a separate maintenance to the husband.

Sec. 549. *Condonation.*— Condonation is the forgiveness of an offense which would otherwise constitute ground for divorce.

The better doctrine at the present time is that the condonation is conditional, not only that there shall be no recrimination of the specific act, but that there shall be no transgression of the marital rights and duties of any other kind which would justify divorce or separation; and it follows that if an act which would constitute a ground for divorce is condoned and the party persist in the abuse or violation, it revives the original act.[3]

Sec. 550. *Recrimination* is a defense by way of retort that the complaining party has himself been guilty of some act which is a defense to the divorce. While it is not always necessary that recrimination should be of precisely the same kind, it must equal in grade the offense charged in the bill.

For example, desertion and cruelty, which are themselves

[1] Cole v. Cole, 142 Ill. 19.

[2] These separations are so termed in New York. Barrere v. Barrere, 4 Johns. Ch. 187, and note; L. Ed. N. Y. Ch., vol. 1, p. 809; Van Voorhis v. Brintnall, 86 N. Y. 18; 40 Am. Rep. 506. They are similar to the suits for separate maintenance in other states. The wife in such cases provides for her support by contract, which is enforceable, or the courts of equity are quite generally given full power to compel the husband to maintain her by paying alimony to her. These matters are regulated by statute.

[3] Hoffmire v. Hoffmire, 3 Edw. Ch. 173; 7 Paige, 60; Davis v. Davis, 19 Ill. 334; Sharp v. Sharp, 116 id. 509; Johnson v. Johnson, 14 Wend. 637.

grounds for either a separate maintenance or divorce, do not constitute a sufficient recriminatory defense to a bill charging adultery.[1]

Sec. 551. *Interstate Divorces.*— Marriage being a status, every state assumes the right to declare and fix the status of its actual residents; and in analogy to the doctrine universally recognized, that a marriage valid where celebrated is valid everywhere, it is with equal unanimity adopted as a rule that a divorce valid where granted will be recognized everywhere.[2]

The fundamental principle, then, which underlies the granting of divorces is that every state determines the status of its residents. It follows as a corollary that no state has the power to directly change the status of non-residents.[3]

There is no contrariety of opinion upon this question of the power of the state over non-residents.[4] The state has no power in any or all of its departments to affect the status of non-residents, and a divorce granted where neither party is a *bona fide* resident, or in favor of a party not a resident, is void absolutely and may be ignored collaterally.[5]

It is now the accepted doctrine that a divorce may be granted irrespective of where the marriage took place, and irrespective also of the place where the offense which is made the ground for the prayer for a divorce was committed.[6]

[1] Gordon v. Gordon, 141 Ill. 160; Bast v. Bast, 82 id. 384; State v. Goodenow, 65 Me. 32.

[2] Pennoyer v. Neff, 95 U. S. 715; Barrett v. Failing, 111 id. 523.

[3] State v. Armington, 25 Minn. 29; Thelan v. Thelan, 78 N. W. Rep. 108. "To each state belongs the exclusive right and power of determining upon the status of its resident and domiciled citizens and subjects in respect to the question of marriage and divorce, and no other state nor its judicial tribunals can acquire any lawful jurisdiction to interfere in such matters between any such subjects when *neither of them* has become *bona fide* domiciled within its limits; and any judgment rendered by any such tribunal under such circumstances is an absolute nullity. Ditson v. Ditson, 4 R. I. 93; Cooley, Const. Lim. 400, and notes; Kerr v. Kerr, 41 N. Y. 272; Hoffman v. Hoffman, 46 N. Y. 30; Hanover v. Turner, 14 Mass. 227." State v. Armington, 25 Minn. 29.

[4] "Now I understand the rule to be that, to give the courts of any state jurisdiction over the marriage relation between a husband and his wife, one of the parties at least must have a domicile within that state. Some of the judicial decisions make further requirements, but no court has ever held that any less could be demanded." Cooley, J., in People v. Dawell, 25 Mich. 247.

[5] Brown on Jurisdiction, sec. 75. The fact of residence is essentially jurisdictional. Thelan v. Thelan, 78 N. W. Rep. 108.

[6] Brown on Jurisdiction, sec. 76; Cheely v. Clayton, 110 U. S. 705.

It frequently happens that the parties to divorce proceedings are residents of different states, and this is no obstacle to jurisdiction, provided the complaining party is a *bona fide* resident of the state where the proceedings are had.[1]

The conflict of law which arises in these cases, and which is embarrassing alike to students and lawyers, is as to the divergent views upon the question whether a state having jurisdiction of the complaining party may, by a valid decree of divorce, affect the status of non-residents.

In most of the states it is held that where, by a valid proceeding, the husband or wife is declared to be divorced, the result is to cause the other party to be an unmarried person wherever he may reside.[2]

The novice reading this for the first time will readily assent to the view that one without a husband or wife is an unmarried person. Strange, however, as it may seem, it has been held and is insisted upon by a long and unbroken line of decisions in the state of New York that a divorce in a foreign state, which is not the state of residence of defendant who resides in New York, unless he appears and defends,[3] does not affect the status of the resident of New York, but he is still considered to be a married person, and this irrespective of any question of fraud,[4] but simply upon the ground that no state excepting New York has any jurisdiction to affect the status of the citizens of New York.

[1] Dunham v. Dunham, 162 Ill. 589; Baker v. People, 76 N. Y. 78. These are among the most notable cases in the books.

[2] "Marriage, as understood among civilized people, is the union of one man with one woman, and if valid where celebrated is valid everywhere; and it would seem to follow from the 'full faith and credit' clause of the constitution of the United States, and it ought to follow as a matter of logic and from the comity of states, that where that union is lawfully dissolved in one jurisdiction where one of the parties is in good faith domiciled, and in honest compliance with its laws, it should be treated as dissolved everywhere (1 Nelson on Divorce and Sep. 65)." Dunham v. Dunham, 162 Ill. 588–607.

[3] In Re Kimball, 155 N. Y. 62, a letter sent as an appearance was held not to be sufficient appearance.

[4] All the courts hold that fraud in obtaining jurisdiction invalidates the decree. Thurston v. Thurston, 58 Minn. 279; Dunham v. Dunham, 162 Ill. 589.

[5] Baker v. People, 76 N. Y. 78. In this case Baker's wife obtained a divorce from him in a foreign state, he not appearing; he subsequently married and was prosecuted for bigamy. The court held, irrespective of the

The New York courts, however, do not insist upon what would seem to be a necessary corollary from their position, namely, that the voluntary appearance of both in a foreign state without *bona fide* residence will not give jurisdiction, and they allow the foreign state to affect the status of both parties where both parties appear.[1]

The numberless decisions to be found in our reports present a hopeless maze, unless the underlying principles are kept clearly in view. Perhaps the clearest idea may be given by presenting in contrast the conflicting views and policy represented by the state of New York, and the reasoning of the supreme court of Illinois, which represents clearly the opposing and, as the author believes, the more reasonable position.

Up to a certain point the reasoning of the courts of Illinois and New York is alike, both courts agreeing that the condition of marriage is a status, and that every state has the right to adjudge the status of its own citizens, and each admits that one state cannot *directly* adjudicate the status of persons not citizens or domiciled within its jurisdiction.

The New York court, however, insists that a decree of another state which declares a woman no longer the wife of B., a citizen of New York, may affect her singly, but cannot affect his status, and leaves him a married man.[2]

fact that she was divorced, that he was not, and convicted him. See Jones v. Jones, 108 N. Y. 415; Williams v. Williams, 130 id. 193; In re De Garman's Estate, 86 Hun, 390; 33 N. Y. Supp. 502.

[1] Hunt v. Hunt, *supra*. In this case the husband and wife were originally domiciled in Louisiana; she left him without good cause and hence did not acquire a new domicile; he sued her in Louisiana, gave constructive notice, and she appeared and defended in a subsequent suit by her. The New York court held she was bound by the Louisiana decree. This case is not contrary *in decision* to any other. See De Meli v. De Meli, 120 N. Y. 485.

[2] It is submitted that the reasoning upon which the New York doctrine is based is superficial, the logic poor, the policy unwise. Other courts likewise hold that each state controls the status of its citizens, but those dissenting from the New York doctrine add that if one state says its citizen is no longer the husband or wife of an individual, he no longer has a wife, and because not having a wife he is single. The New York rule says he is married although he has no wife or husband living. The one reasoning gives full faith and credit to the decrees of every other state. This reasoning tends to harmony, security and honesty; the other to conflict, insecurity, danger and fraud. The one includes every element which may properly be said to constitute an element in the problem; the other ignores a most essential one, viz.: that a consort is essential to the married state.

Here, however, the point of divergence begins, and it is submitted that the learned court of New York omitted an important element in the equation, which the court of Illinois properly regarded as of the utmost importance, namely, that, in order to be married, one must have a wife or husband; and while admitting that it is true that the court of one state could not *directly* affect the status of a non-resident, not a citizen, nevertheless it may indirectly arrive at the same result by taking away an essential element of that status by acting upon an essential part of the corporate duality located within its jurisdiction, holding that a valid decree that the husband or wife within its jurisdiction is no longer the husband or wife of the non-resident removes the necessary concomitant of the married state, namely, the consort.

Sec. 552. *Interstate Divorce — Domicile of Wife.* — The general rule is that the domicile of the wife follows that of the husband; but to this rule there is a well-understood exception, that, where the conduct of the husband is such as to justify a separation, she may obtain a separate domicile, and consequently it is universally held that the wife may have a separate domicile for the purposes of divorce. It is only upon this reasoning that the wife could ever acquire a *bona fide* residence in another state than that of her husband, and but for this rule the husband might so constantly change her domicile as to prevent her residing a sufficient length of time in a state to procure a divorce.[1]

Sec. 553. *Effect of Divorce — Alimony.* — Unless otherwise provided by local law, a decree of divorce by a court having jurisdiction of the cause and of the parties, dissolving the bond of matrimony, puts an end to all obligations of either party to the other, and to the right which either has acquired by the marriage in the other's property,[2] except so far as the court granting the divorce, in the exercise of an authority vested in

[1] Barrett v. Failing, 111 U. S. 523; Hunt v. Hunt, 72 N. Y. 217.

[2] "Accordingly it has been generally held that a valid divorce from the bond of matrimony, for the fault of either party, cuts off the wife's right of dower, and the husband's tenancy by the curtesy, unless expressly or impliedly preserved by statute." Barrett v. Failing, 111 U. S. 523.

A divorce forfeits the rights of the offending party conferred by an antenuptial contract or jointure. Jordan v. Clark, 81 Ill. 466; Clarke v. Lott, 11 Ill. 105.

it by the legislature, orders property to be transferred or alimony[1] to be paid by one party to the other.[2]

Alimony is an allowance for the support of the wife. In estimating and awarding the amount of alimony or property to be so paid or transferred, the court of divorce takes into consideration all the circumstances of the case, including the property and means of support of either party, all of the property of both being within the control of the court; and the order operates *in personam*, by compelling the defendant to pay the alimony or to convey the property accordingly, and does not of itself transfer any title in real estate, unless allowed that effect by the law of the place in which the real estate is situated.[3]

Sec. 554. *Ante-nuptial Contracts.*—In England, where greater care is taken in reference to the disposal of estates and more prudence in reference to marriage alliances than is common in America, except possibly in cases where titled foreigners marry American heiresses, it was quite common, before the celebration of marriage, for persons to make provision one for the other, or either for the other.

A marriage settlement entered into in good faith without a specific design to hinder and delay creditors is valid as a transfer of the husband's property, even as against existing creditors, if they had no lien; and this was true whether the wife was aware of the indebtedness or not. In order to make

[1] Alimony may be granted on proof of a common-law marriage, and evidence of reputation, *i. e.*, that the parties are reputed to be husband and wife, is admitted. See Purcell v. Purcell, 4 Hen. & M. 511; Jenkins v. Bisbee, 1 Edw. Ch. 377; vol. 6, Lawy. Ed. N. Y. Ch. 178; Wilson v. Wilson, 49 Iowa, 544; Vreeland v. Vreeland, 18 N. J. Eq. 43; Brinkley v. Brinkley, 50 N. Y. 193; Bowman v. Bowman, 24 Ill. App. 165.

[2] Equity may order the income of trust fund for defendant's use to be applied on alimony due her. See Wetmore v. Wetmore, 149 N. Y. 520; Clinton v. Clinton, L. R. 1 Prob. & Div. 215; Watkyns v. Watkyns, 2 Atk. 96; Head v. Head, 3 id. 295.

[3] Barrett v. Failing, 111 U. S. 525. See also Barber v. Root, 10 Mass. 260; Hood v. Hood, 110 id. 463; Rice v. Lumley, 10 Ohio, 596; Lamkin v. Knapp, 20 Ohio St. 545; Gould v. Crow, 57 Mo. 200; 4 Kent, Com. 54. The same result follows a valid decree of a foreign state. Thoms v. King, 95 Tenn. 60. Where a bill is brought where plaintiff resides, lands of defendant, brought within the jurisdiction by averments in the petition, may be awarded as alimony, though they lie in another county. The court has power to award land as alimony on constructive notice to defendant, where such award is asked in the bill, and the publication notice contains a description of the land. Wesner v. O'Brien, 56 Kan. 724.

such a contract invalid, it was essential that the wife participate in the intent to defraud.[1]

One may make a valid ante-nuptial contract to dispose of his property by will in a particular way.[2] The theory of the unity of the persons of husband and wife, and the fact that the marriage extinguished all contracts and debts between them, is not extended to ante-nuptial contracts, and these are enforced by courts of equity in favor of either party.

It is apparent that this contract, which is prior to and contemporaneous with marriage, always exists in some form, either as an implied contract incident to the engagement and marriage according to the law of the place, or as modified by express provisions in reference to future property rights.

The rules which should govern such cases have been formulated by Judge Story in his work on the Conflict of Laws. He says: An express contract covering fully every point is generally admitted to govern all the property of the parties, not only in the matrimonial domicile but elsewhere.

Where there is no express contract, or none governing the very point arising, the question is surrounded with much difficulty. An express contract will generally govern movable property everywhere, but can be allowed to affect immovable property only in conformity with the law *rei sitæ*.

Where an express contract applies in its terms only to property then owned, and there is a change of domicile, the law of the new domicile governs future acquisitions. Where there is no express contract, the matrimonial domicile governs only their present property so long as they remain there, but all personal property becomes governed by the law of their domicile if changed. Where there is no change, such a contract applies to future as well as to present property, unless expressly otherwise provided.[3]

Sec. 555. *Effect of Marriage on Status of Wife.*— The theory of English law, which is the starting point from which most of the modern law departs, regarded the fact of marriage as merg-

[1] Otis v. Spencer, 102 Ill. 622; McGowan v. Hitt, 6 S. C. 602; 92 Am. Rep. 650.

[2] Long v. Hess, 154 Ill. 482.

[3] These views of Judge Story are approved and applied in Long v. Hess, 154 Ill. 482; Fuss v. Fuss, 24 Wis. 256; Castro v. Illies, 22 Tex. 479. The review of authorities in Long v. Hess is late and exhaustive.

ing, in a certain sense, the personality of the wife into that of the husband.

Her existence, for all purposes, was not lost sight of, nor was she completely within the control of the husband when she changed her position from that of a child within her father's family and control, or of a person *sui juris*, if she was of age and single, to a member of the family of her husband.[1] The hand of her sovereign was still with her, and, as in the case of all other persons under disabilities, over and above her husband stood the king as her protector, representing the law of England, and she as well as all persons under any degree of disability were considered as special wards of the king's court of chancery, which was always open to them by bill or petition; and in this court she might have redress against her husband or against third persons untrammeled by his control.[2] So that, whatever her disabilities, the theory of the English law did not place her completely within the power of her husband.

Mutual Contracts of Husband and Wife.— The theory that their personalities became blended, and that the husband became *dignior persona*, the person of greatest power and dignity, upon whom rested the responsibilities of a family and in whom resided the control, created an inequality which, in general, amounted to a disability existing between the parties to contract with each other, and so they could not buy or sell from each other.[3]

In perfect accord with this theory was the wife's entire disability to contract with third persons, because she could make no contract which did not affect her person or her property, both of which were within her husband's control.

There are, however, two important exceptions. If the husband departed the realm or was outlawed, so that in a sense he became civilly dead, the wife was allowed to engage in trade and to contract.

If he deserted her and neglected or refused support, her contracts for necessaries became binding upon him, and were valid against herself.[4]

[1] See In re Burres, 136 U. S. 604.

[2] Spence, Eq. 595; Drake v. Storr, 2 Freem. 205; Martin v. Fitzgibbon, 17 Ch. D. 454; Rupp v. Meier, 33 Gratt. 97.

[3] This disability was not complete. See Shepard v. Shepard, 7 Johns. Ch. 57; Book 2, Lawy. Ed., p. 219, note; Randall v. Randall, 37 Mich. 563.

[4] Arthur v. Broadnax, 3 Ala. 557;

Effect of Marriage on Property.[1] — The wife's personal property, whether chattels or choses in possession or in action, became the husband's, with the exception of certain articles of personal adornment and convenience, which passed under the name of "paraphernalia." These she might own, enjoy and dispose of.[2]

37 Am. Dec. 707; Love v. Moyneham, 16 Ill. 277; 63 Am. Dec. 603 (1855); Wright v. Hayes, 10 Tex. 130; 60 Am. Dec. 200 (1853). The court, in this case, said that the rigor of the law as to the rights of the wife are greatly relaxed, and now it is the general rule that if a wife is deserted, or if the husband leaves the state, or is *civiliter mortuus*, she may contract, sue and be sued as a *feme sole*. Gregory v. Paul, 15 Mass. 31; Starrett v. Wynn, 17 S. & R. 130.

In addition to these general exceptions there were in England local customs which allowed a *feme covert* to act as a sole trader. Of this custom the South Carolina court said:

"The right of a *feme covert*, with the consent of her husband, to carry on a separate trade, is sanctioned by the usage of the country and the current of judicial decisions, and is evidently derived from the custom of London, and that custom, translated from the *liber albus* in the town clerk's office, is as follows: 'When a *feme covert* of a husband useth any craft in the said city, on her sole account, whereof the husband meddleth nothing, such a woman shall be charged as a *feme sole*, concerning everything that toucheth the craft, and if the husband and wife be impleaded in such case, the wife shall plead as a *feme sole*, and if she is condemned, she shall be committed to prison until she has made satisfaction, and the husband and his goods shall not, in such case, be charged nor impeached.' Lavie et al. v. Phillips et al., 3 Bur. 1776. This custom, like all others which derogate from the common law, is to be taken strictly and not extenuated by construction, and it seems that if the husband in any manner intermeddle or concern in the trade of the wife, the case will not be protected by the custom. He may, however, determine his wife's trading in the future, but not in retrospect; 'nor can he do any act to injure her creditors, who are entitled to be satisfied out of her property in trade; but after those demands are satisfied he may, by law, possess himself of the surplus of her property, for the custom does not extend to this point, *it regarding only trade and commerce.*' Langham v. Bewett, Cro. Car. 68; Lavie v. Phillips, 3 Bur. 1782.

"In the incorporation of this custom into our system of jurisprudence, it must be, in the absence of any legislative enactments, judicial decisions or general usage to the contrary, be understood as having been adopted with all its restrictions and limitations, as well as its privileges and immunities; and in relation to this case, it is only necessary to refer to the limitation that it regards trade and commerce only. The cases of McGrath v. Robinson, 1 Eq. Rep. 445, and Miller v. Tollison, Harp. Eq. Rep. 145, are relied on as showing that the custom has been so extended as to enable the wife to acquire a separate property by other means than that of trade and merchandise." McDaniel v. Cornwell, 1 Hill (S. C.), 429.

[1] See last section, "Ante-nuptial Contracts."

[2] Cooley, Blk. (3d ed.) 442, n.

The effect of marriage upon the real estate of both will be considered under "the means of acquiring interests in lands."

If the wife were so fortunate as to have creditors when she married, the husband became liable for her debts.

Neither was a wife in all respects a free gift without faults, because upon the theory that every act of the wife was induced or coerced by the husband, or performed with his consent, he was liable for all her torts,[1] although not punishable for all her crimes; neither was she excused from her crimes except by express proof of physical coercion.

Sec. 556. *The Modern Law.*— The effect of the modern law is not so much a modification of the common law as a subversion of it.

The whole theory and foundation upon which the rules of the common law are based are the unity of husband and wife, his supremacy over her, his right to her property, his power to guide and to guard, his obligation to support and protect. These are all either entirely swept away or reduced to the mildest form. He has no power to guide, though he still has the right to protect and the obligation to maintain.[2] He is un-

[1] Morgan v. Kennedy, 62 Minn. 348. These rules have all been modified by statutes, which preserve the identity of the wife and her power and control over her own property. The divergency of the views is excellently stated in the case just cited. Some courts hold that the statutes changing the rights, duties, powers and obligations of married women, wholly silent as to the removal of the husband's liabilities, impliedly have that effect. Martin v. Robson, 65 Ill. 129; Norris v. Corkill, 32 Kan. 409. This conclusion is reached by applying the maxim, "The reason for the law ceasing, the law itself ceases;" but generally there is something in the statute which amounts to an implication from the words used rather than a resultant from the greater right granted to the wife. The Minnesota court says: "Again, the current of authority is opposed to the views expressed in these decisions, even in jurisdictions where statutes have been very sweeping, and have completely emancipated the wife and her property from the control or interference of her husband. Without elaborating we cite some of the cases: Knowing v. Manley, 57 Barb. 479; Fitzgerald v. Quann, 33 Hun, 652; affirmed, 109 N. Y. 441; Quick v. Miller, 103 Pa. St. 67; Choen v. Porter, 66 Ind. 195; Ferguson v. Brooks, 67 Me. 251; McElfresh v. Kirkendall, 36 Iowa, 224; Zeliff v. Jennings, 61 Tex. 458. See also Seroka v. Kattenberg, 55 Law J. Q. B. 375." Morgan v. Kennedy, 62 Minn. 348.

[2] Livingston v. Hammond, 162 Mass. 375. A very forcible expression of the effect of these modern statutes is given in Harman v. Old Colony Ry. Co., 165 Mass. 100. There a married woman sued for personal injury, and it was held that impair-

able to enforce his views, and powerless to protect her against improvident bargains or the faults of third persons.

Since the married women's acts have been passed, the whole relation seems changed. The property which is in her possession is presumed to be hers.[1] Her earnings are her own. The unity of the husband and wife is entirely destroyed. They have separate legal estates, separate contracts, debts, injuries, for which she may sue. She need not join her husband in suits for trespass to her person or property. She may even prosecute a suit against him for an unlawful interference with her property.

For injuries to her person she may sue for her own benefit, and he cannot release the damages. She may be sued at law upon her contracts relating to her separate property. She may now execute a valid lease of real estate without joining her husband. This contrast is very strikingly made in the case referred to in the note.[2]

Sec. 557. *Married Woman's Contracts — Limitations.* — Notwithstanding the sweeping effect of modern married woman's acts, her status as a married woman still avails her to some extent and precludes her from exercising certain powers.

ment of her power to labor and earn was a *damage* to her. See Morgan v. Kennedy, 62 Minn. 348.

[1] The presumption at common law followed the universal fact that, except by some special ante-nuptial agreement, all property held by both belonged to him. Reeves v. Webster, 71 Ill. 308; Peters v. Fowler, 41 Barb. 467. This presumption was not allowed in Pennsylvania where she sued *a mere trespasser*. Hoar v. Aix, 22 Pa. St. 381. In New York it is held that the statute changes the presumption. Allen v. Cowan, 23 N. Y. 502. This presumption does not apply against his creditors and as to property acquired during coverture. As to property obtained from him, see Seitz v. Mitchell, 94 U. S. 580. *The burden is on her* in such case to show the *bona fides* of the transaction.

[2] Martin v. Robson, 65 Ill. 129. Mr. Justice Thornton seems to view with sadness the ruins of the past. He says: "The ancient landmarks are gone. The maxims and authorities and adjudications of the past have faded away. The foundations hitherto deemed so essential for the preservation of the nuptial contract, and the maintenance of the marriage relation, are crumbling. The unity of husband and wife has been severed. They are now distinct persons. . . . They are one in name, and are bound by solemn contract, sanctioned by both divine and human law, to mutual respect; should be of the same household, and one in love and affection. But a line has been drawn between them, distinct and ineffaceable, except by legislative power. His legal supremacy is gone, and the sceptre has departed from him." Martin v. Robson, *supra*.

Contracts between husband and wife which are against public policy — for example, an agreement to separate or in contemplation of future separation — are void.[1] After separation has actually taken place, a contract regulating their mode of life and the division of property or means of support is valid.[2] Not every contract which a married woman signs is *prima facie* binding upon her separate estate. For example, if she signs a note, it is presumed rather that she is acting for her husband,[3] but it is open to proof that she intended to bind herself or her property.[4]

An agreement to do, for or on account of her husband, what she is obliged to do by law is without consideration, or perhaps void on the ground of public policy.[5] For example, notwithstanding her right to employ all of her time in her own affairs, an agreement by which she is to be paid for keeping house is void;[6] or where she contracts with public officers to care for her husband, who is sick or insane, she cannot recover on such a contract.[7]

Third persons, however, have no right to treat the wife as the agent of the husband without express authority, and she is not authorized to collect his debts.[8]

Sec. 558. *Her Interest in Her Husband.*— It has been pointed out that, on account of the disability caused by coverture, the wife could not bring an action alone; and so at common law she could have no redress against one who deprived her of her husband's affections, or of the care which she had a right to expect that he would give her.

A few states still adhere to the common-law rule and deny the right of action.[9]

In accordance, however, with the liberal tendency of modern law in its treatment of married women, the wife is allowed to maintain an action for the alienation of her husband's affections

[1] Greenhood, Pub. Pol. 486; Walker v. Walker, 9 Wall. 743.

[2] Randall v. Randall, 37 Mich. 563.

[3] The peculiar wording of statutes must affect this question. See Grand I. B. Co. v. Wright (Neb.), 74 N. W. Rep. 82; Thompson v. Weller, 85 Ill. 200.

[4] Stenger Benev. Ass'n v. Stenger (Neb.), 74 N. W. Rep. 846; First Nat. Bank v. Grosshaus (Neb.), 75 N. W. Rep. 51.

[5] Mich. Trust Co. v. Chapin, 64 N. W. Rep. 334.

[6] Id.

[7] Green v. Green, 41 Iowa, 88.

[8] Husche v. Sass, 67 Ill. App. 245.

[9] Doe v. Roe, 82 Me. 503; 8 L. R. A. 833; Morgan v. Martin, 42 Atl. Rep. 354; Duffies v. Duffies, 76 Wis. 374.

and the consequent loss of his society, assistance and support. The action in some states is based on the loss of the *consortium*,[1] precisely as where an action is brought by the husband for alienation of his wife's affections, and her right to recover is held to flow from the general principle of law that, where there is an injury and damage, there must be a remedy.[2]

In other states, however, the action is allowed on the ground of the removal by statute of the disabilities of the wife.[3] These cases, however, must not be looked upon as authority for the right of a married woman to maintain an action against another woman in the nature of *crim. con.*[4] The principles which sustain these actions for alienating the affections of the husband will not extend, however, to the support of an action for seduction, such as the husband might at common law maintain.

A suit for alienating the affections is based upon and requires

[1] That is to say, the society, companionship, affection, assistance and fidelity of the husband. Cross v. Grant, 62 N. H. 675; 13 Am. St. Rep. 607.

[2] Bennett v. Bennett, 116 N. Y. 584; 6 L. R. A. 553; Westlake v. Westlake, 34 Ohio St. 621; Fort v. Card, 58 Conn. 1; 6 L. R. A. 829. In Bennett v. Bennett, *supra*, the court reasoned thus: "His right to the conjugal society of his wife is no greater than her right to the conjugal society of her husband. Marriage gives each the same right in that regard. Each is entitled to the comfort, companionship and affection of the other. The rights of the one and the obligations of the other spring from the marriage contract, are mutual in character, and attach to the husband as husband, and to the wife as wife. Any interference with these rights, whether of the husband or of the wife, is a violation, not only of a natural right, but also of a legal right, arising out of the marriage relation. It is a wrongful interference with that which the law both confers and protects. A remedy not provided by statute, but springing from the flexibility of the common law, and its adaptability to the changing nature of human affairs, has long existed for the redress of the wrongs of the husband. As the wrongs of the wife are the same in principle, and are caused by acts of the same nature as those of the husband, the remedy should be the same."

[3] Cooley's Elem. of Torts, 81; Mehroff v. Mehroff, 26 Fed. Rep. 13; Warren v. Warren, 89 Mich. 123; 14 L. R. A. 545; Holmes v. Holmes, 133 Ind. 386; Clow v. Chapman (Mo.), 26 L. R. A. 412; Hodgkinson v. Hodgkinson (Neb.), 61 N. W. Rep. 577.

[4] Kroessin v. Keller (Minn.), 62 N. W. Rep. 438. The court in this case said there is, and invariably must be, a marked distinction between an action charging a defendant with having induced and enticed the husband to withdraw his support from his wife, and to abandon and desert her, and one similar to *crim. con.* See, however, Seaver v. Adams, 66 N. H. 142, where it was held that an action of this nature would lie, the court relying on Westlake v. Westlake, 34 Ohio St. 621, and other cases cited above.

proof of the withdrawal of support and association, but the suit for seduction was based upon the trespass impliedly committed against the wife and her inability to consent. This fiction has never been indulged as to the husband, and in the nature of things such a presumption would rarely accord with the fact.

The action must be allowed upon broader grounds, if at all; but whatever palliation or excuse the male sex may offer because of supposed enticement, the presumption of law no doubt accords with the actual fact that there is seldom such thing as seduction of a man by a woman. The remedy in such cases is divorce, separation and alimony against the husband.

Sec. 559. *Parent and Child.*— The relation of parent and child is a natural one, and many of the rules in regard to the rights and liabilities are based upon natural law, although corroborated and controlled by the civil law.

In fact, in the eye of the law, the relation or status of parent and child may be formed by the joint operation of the law and the act of the parties by what is known as adoption.

The natural condition of a child is to have parents of both sexes, but in the eye of the law children are those born in wedlock, or legitimate, those who become children by adoption, and children born out of wedlock, who are regarded as *nullius filius*, child of no one, so far as the ordinary and usual rights and obligations of parent and child are affected.

Though a child be actually born in this unfortunate condition, there are several ways in which the disability may be removed, the most natural one being the celebration of marriage between the parents.[1]

The legislative power of the state, unless restrained, has the right to legitimatize children born out of wedlock, or the process of adoption may place the child within the station either as to his natural parents or others who may adopt him.[2]

[1] In a number of states in this country, though not in England, marriage and subsequent recognition makes legitimate a child born of the parties before the marriage. Blackburn v. Crawford, 3 Wall. 175; Jones v. McNicoll, 12 Ohio St. Rep. 302, 36 Ohio L. J. (No. 11).

[2] In England bastards can be legitimated by act of parliament only. So in this country an act of the legislature, generally passed on the application of the father, will legitimatize. The effect of legitimation is to confer on an illegitimate child the status of one born in lawful wedlock. McKamie v. Baskerville, 2 Pick. (Tenn.) 249.

Presumption of Legitimacy.— The modern law presumes that every child born in wedlock is legitimate. This presumption may be overcome by proof showing conclusively that it is impossible that the husband is the father of the child.[1]

Thus the presumption may be overcome by showing impotence of the husband, or by proof of non-access. But evidence to establish illegitimacy must be of such a character as to exclude all doubt.[2]

The presumption still holds though the parties are living apart by mutual consent, though it is otherwise if there has been a decree of divorce; and it cannot be rebutted by proof of the wife's adultery while cohabiting with the husband.[3]

Sec. 560. *Adoption.*— Adoption is the process whereby one person takes another into the same relation that would be occupied by a child born in marriage. In the United States proceedings by adoption are regulated by statute.[4]

Generally speaking, a man having a wife is not allowed to adopt a child without her consent, although the power of the legislature in this respect is subject only to express limitation.

On the other hand, if the child has a parent or parents or guardian, it is usual that the consent of both the parents, or, in the absence of these, the consent of the guardian, should be obtained, because the relation of parent and child is so sacred

[1] Formerly, by the English law, if the husband was within the four seas, *i. e.*, within the realm, at any time during pregnancy, the issue was presumed to be legitimate. Rex v. Murray, 1 Salk. 122. The presumption extends not only to a child born during the continuance of a valid marriage, but also to a child born within such time after the dissolution thereof that his mother's husband could have been his father. Reynolds' Stephen's Law of Evidence (3d ed.), 147.

[2] Head v. Head, 1 Sim. & Stu. 157; Banbury Peerage Case, 1 Sim. & Stu. 150; Egbert v. Greenwalt, 44 Mich. 245; 38 Am. Rep. 260. The access here spoken of is to be understood to be such as gives an opportunity for sexual intercourse. "Once the marriage is proved, nothing shall be allowed to impugn the legitimacy of the issue short of the proof of facts showing it to be impossible that the husband could be the father. Access is presumed unless the contrary be plainly proved." Patterson v. Gaines, 6 How. 588.

[3] Hemmenway v. Towner, 1 Allen, 209.

[4] In re Thorn's Estate, 155 N. Y. 140. It is sometimes said that adoption is the conferring of the status of a natural-born child upon the child of another. That this definition is imperfect will be readily seen when it is recalled that there is nothing to prevent a man from adopting his illegitimate child. In re Gregory's Estate, 35 N. Y. Supp. 105.

that the right of either party ought not to be cut off without the consent, or at least due process of law, by a hearing before some competent tribunal.[1]

When the child has reached such an age as in the eye of the law enables it to express some intelligent choice, statutes usually provide for the consent of the child, but such choice is not controlling.

The rights of parents in their children are not cut off by divorce, nor by divorce awarding the custody to either, and this does not excuse a compliance with the statute requiring consent of parents, in the plural, to show the consent of the parent to whom has been awarded the custody of the child.

The method of adoption is generally by a judicial proceeding before some tribunal selected by the legislature, usually in a court of record, and the procedure is by a petition in the first instance praying the privilege of adoption, followed by a notice to all the parties interested, and a decree or order of the court spread upon the record that the child is adopted.

Rights of Adopted Child.— In many states the statutes regulating the adoption confer on the adopted child all the rights of a child by birth.[2] In other states, however, distinctions are made, especially with regard to rights of succession on the death of the adopting parent. Thus, in Illinois an adopted child can inherit from the adopting parent only, and not from lineal or collateral kindred of such parent.[3]

Rights of inheritance are acquired only by a substantial compliance with the prescribed statutory formalities in the ceremony of adoption,[4] and an adoption according to the laws of one state will confer the right of inheriting lands in a sister state.[5] The right to inherit is not destroyed by a second adoption after the death of the first adopting parents.[6]

Sec. 561. *Parental Duty.*— The law imposes upon the parents the duties of protection, of maintenance, of education. Though

[1] Schiltz v. Roenitz, 86 Wis. 31.

[2] In re Newman, 75 Cal. 213; 7 Am. St. Rep. 146; Markover v. Krauss, 132 Ind. 294; 17 L. R. A. 806.

[3] Keegan v. Geraghty, 101 Ill. 26; Helms v. Elliott, 89 Tenn. 446; 10 L. R. A. 535.

[4] Renz v. Drury, 57 Kan. 84.

[5] Gray v. Holmes, 57 Kan. 217. Unless by the statutes of the former state rights are conferred which are inconsistent with the laws of descent in the latter. Keegan v. Geraghty, *supra*.

[6] Patterson v. Browning, 146 Ind. 160.

a parent owes to the child the duty of protecting him from the wrongful violence of others,[1] the child has no remedy against the parent for non-performance of this duty.[2]

The duty of the parent to support his child is an imperfect obligation, since for its non-performance the child has no remedy against the parent. The bonds of nature are relied on, being in most cases sufficient to insure its performance; but in order to provide for those unusual cases, and to enforce this obligation and prevent those who are unable to support themselves from being made a public charge, the law gives a remedy against the parent in favor of one who furnishes the necessaries of life, and for the neglect of this duty punishes the parent by indictment;[3] and in some instances statutes have provided special remedies against the parent.[4]

The obligation of the father to support his child ceases by the common law as soon as the child becomes of age. The statute 43 Eliz., referred to in the note, had no application to step-children.

If a minor child, voluntarily and without cause, abandons his home, the father is not liable for his care or support, the duty of maintenance resting upon him only within the home which he provides.[5]

A child born out of matrimony had, at common law, no claim upon the parent.[6]

The father has no power over an illegitimate child, and can be charged for his support only upon contract.[7] By statute,

[1] *Ante*, p. 611.

[2] His only remedy is against the person guilty of the wrongful act. Rogers v. Smith, 17 Ind. 323; 70 Am. Dec. 483.

[3] Fletcher v. People, 52 Ill. 395.

[4] The first statute of this nature was 43 Eliz., ch. 2, amended by 5 Geo. I., ch. 8, which provided that the father, mother, grandfather and grandmother of poor, old, blind, lame and impotent persons should maintain them; and it was provided that, if a parent abandoned his children, the municipal authorities might sell his goods for their relief. The statute 43 Eliz. is regarded as part of the common law of this country, but in many states its provisions have been re-enacted. 1 Blk. 448.

[5] Gotts v. Clark, 78 Ill. 229; Angel v. McClellan, 16 Mass. 28.

[6] Simmons v. Bull, 21 Ala. 501; 56 Am. Dec. 257. Illegitimate children, known to the law as bastards, are not regarded as children for civil purposes. By the common law they cannot inherit from the parents. Blacklawn v. Milne, 82 Ill. 505; Stoltz v. Doering, 112 Ill. 238; Brewer v. Blougher, 14 Pet. 178. But, born or unborn, they might be legatees or devisees.

[7] Marlett v. Wilson, 30 Ind. 240.

however, in England and in most of the states of this country, it is provided that the mother may enforce from the father sufficient maintenance for the illegitimate child.[1]

Duty to Educate Children.— The duty of the parent to provide an education for his children is regarded as a most important one, and the breach of it is attended with serious consequences to the family and to the state. The child, however, has no action against the parent to compel the performance of this duty. It is presumed that the affection and anxiety which the parent naturally feels for the future welfare of his offspring will operate with sufficient influence to impel him to perform this obligation.

It has been held that, where a third person furnishes the child with an education, with the father's knowledge and consent, the latter is bound to reimburse such person for his outlay.[2]

Compulsory Education.— The right to an education at the public expense is not a legal right unless made so by statute; but in the exercise of its proper power as *parens patriæ*, in compliance with acknowledged public policy, the states universally provide schools which all can attend, and in most cases make instruction free to all, and many states make attendance compulsory upon all children of certain ages.[3] This is the common or free-school system which has been heretofore considered.[4]

In England the law recognized the right of a father to have his child educated in his own religion.[5] The theory of our institutions, however, precludes any interference in the matter of religious instruction.[6]

Sec. 562. *Parental Right to Custody and Control.*— The authority and rights of the parent over his children are based upon natural reasons, and result also from his duties.[7] The father, at

[1] Schouler, Dom. Rel. 385.

[2] Thompson v. Dorsey, 4 Md. Ch. 149.

[3] See Com. v. Roberts, 159 Mass. 372; State v. McCaffrey (Vt.), 37 Atl. Rep. 234; People v. Ewer, 141 N. Y. 129.

[4] *Ante*, sec. 447.

[5] Hawksworth v. Hawksworth, L. R. 6 Ch. 539.

[6] People v. Gates, 43 N. Y. 40. In this case the mother of a female child sought to have it removed from the custody of the Shaker community. It being conceded that the temporal wants of the child were properly cared for, and that she was being educated in "habits of industry, sobriety and virtue," the judge said this was all the state could demand, and refused the removal. See *ante*, p. 629.

[7] Osborne v. Allen, 26 N. J. L. 388.

common law, has the paramount right to the custody and control of his minor children without regard to sex and with a slight qualification as to those of very tender years. The right is not absolute, however, and may be lost by abandonment, ill usage, immoral habits, or inability to provide for his children.[1]

During the father's life the authority of the mother remains in abeyance, but on his death she succeeds to his rights over the child.[2]

The principal point to be considered by the courts, when the question arises on *habeas corpus* proceedings or otherwise, as to who shall have the custody of the child, is the welfare of the child itself. In deciding this question, the age and sex of the child and the character and surroundings of the parents will be taken into consideration, as well as other circumstances of the particular case which would have any bearing on the child's comfort and well-being.[3]

Courts of equity have the authority, upon divorce proceedings, to make such order for the care and custody of children and their suitable maintenance during the pendency of the suit, and, when the decree is granted, for their subsequent custody, as may be deemed proper and necessary. Some authorities hold that if a decree of divorce is rendered by which no provision is made for the custody and support of the children, the father's duties and obligations remain the same as before divorce.[4] The mother, generally, is entitled to the custody of an illegitimate child and is bound to maintain it.[5]

It was formerly held that a man owed no duty to, and had no right to exact services from, a child of his wife by a former husband,[6] but there seems no reason why, when persons assume the family relation, all the rights and liabilities of that relation should not be held to be incident; and so it is the general rule that if one receives infant step-children into his family, they are, until they attain majority, in the position of children so

[1] Ahrenfeldt v. Ahrenfeldt, Hoff. Ch. 497; King v. Greenhill, 4 Ad. & El. 625.

[2] Osborne v. Allen, *supra;* Ohio & Miss. R. R. Co. v. Tindell, 13 Ind. 366.

[3] Sheers v. Stein, 75 Wis. 44; 5 L. R. A. 781; Sturtevant v. State, 3 Neb. 463; Corrie v. Corrie, 42 Mich. 509; Jones v. Darnell, 103 Ind. 574; In the Matter of Waldron, 13 Johns. 418; Mercein v. People, 25 Wend. 64; Giles v. Giles, 30 Neb. 624.

[4] Cilly v. Cilly, 99 Mo. 292.

[5] Freisner v. Symonds, 46 N. J. Eq. 521.

[6] Worcester v. Mordant, 14 Pick. 510.

far that they cannot claim compensation for services, or be required to pay for support.[1]

Correction of the Child.— The extent of the authority of parents over their children has varied greatly in different ages and under different systems. By the early Roman law the father had the power of life and death over his children as well as over his slaves. The common law gave the parent only the right of moderate correction of his child. For an abuse of his authority in this respect a civil action would not lie at the suit of the child, but was punishable criminally. The idea of what would be excessive punishment has been greatly modified by the progress of intelligence and refinement. The question of excess is one for the consideration of the jury.[2]

Teacher and Pupil.— The right of correction in a moderate degree extends to persons standing *in loco parentis*, as a teacher. A teacher, like a parent, is liable only when the punishment is excessive.[3]

The teacher — *i. e.*, the school — is an instrument substituted in place of the parent by the mutual consent of the state and the parent, and for the time being stands *in loco parentis* for the special purpose, and at some reasonable point in the transition from the home to the school the child passes from the control of one to the other, but the teacher has the right to control beyond the limits of the school-yard.[4]

Sec. 563. *The State as Parens Patriæ.*— Under our theory of government the duties and powers formerly exercised by the sovereign as *parens patriæ* have devolved upon the state.[5] By virtue of this power the right of the parent to the custody and services of his child is subject to the control of the state, to be exercised from considerations of public policy for the good of the child in the matter of education and for protection against

[1] Smith v. Rogers, 24 Kan. 140; 36 Am. Rep. 254; Gorman v. State, 42 Tex. 221.

[2] And depends upon the age and health of the child and other circumstances of the particular case. Johnson v. State, 2 Humph. 283; 36 Am. Dec. 322; Osborne v. Allen, 26 N. J. L. 388; Smith v. Slocum, 62 Ill. 354; Com. v. Coffey, 121 Mass. 66; Neal v. State, 54 Ga. 281. See, however, State v. Jones, 95 N. C. 588; 59 Am. Rep. 282.

[3] Linder v. Seaver, 32 Vt. 114; 76 Am. Dec. 156; Boyd v. State, 88 Ala. 169; 16 Am. Rep. 31; Danehoffer v. State, 69 Ind. 295.

[4] Deskins v. Gose, 85 Mo. 485.

[5] Dodge v. Cole, 97 Ill. 338; Mormon Church v. United States, 136 U. S. 1.

being employed in occupations immoral in their tendency, or for which his age unfits him.[1]

In the important case of *People v. Ewer*[2] the court well explained the principles underlying this whole question in the following language: "The proposition is indisputable that the custody of the child by the parent is within legislative regulation. The parent, by natural law, is entitled to the custody and care of the child, and, as its natural guardian, is held to the performance of certain duties. To society, organized as a state, it is a matter of paramount interest that the child shall be cared for, and that the duties of support and education be performed by the parent or guardian, in order that the child shall become a healthful and useful member of the community. It has been well remarked that, the better organized and trained the race, the better it is prepared for holding its own. Hence it is that laws are enacted looking to the compulsory education by parents of their children, and to their punishment for cruel treatment, and which limit and regulate the employment of children in the factory and the workshop, to prevent injury from excessive labor. It is not, and cannot be, disputed that the interest which the state has in the physical, moral and intellectual well-being of its members warrants the implication and the exercise of every just power which will result in preparing the child, in future life, to support itself, to serve the state, and, in all the relations and duties of adult life, to perform well and capably its part."[3]

The power of the state in such cases is undoubted, but its exercise is limited by the constitutional guaranties of liberty and due process of law.[4] The thirteenth amendment applies to all persons, and prevents the creation of an actual servitude under the guise of protection.[5]

Sec. 564. *Parent's Action for Injury to Child.*— At the common law a parent might maintain an action for an injury to the child. This action, however, was based, not upon the parental relation, but upon the relation of master and servant,

[1] People v. Ewer, 141 N. Y. 129; Sheers v. Stein, 75 Wis. 44; 5 L. R. A. 781; Green v. Campbell, 35 W. Va. 698.

[2] 141 N. Y. 129.

[3] See 2 Addison on Torts, § 1256.

[4] People v. Turner, 55 Ill. 280; 8 Am. Rep. 645; House of R. v. Ryan, 37 Ohio St. 197.

[5] Id.; Turner, In re, 1 Abb. (U. S.) 84; McLean Co. v. Humphrey, 104 Ill. 378.

and a recovery was limited to damages for being deprived of the child's services. If, therefore, from immaturity or other cause, the child was not in a position to render service, the parent could maintain no action for an injury to him, because under the theory of the law there was no pecuniary loss.[1] The recent cases, however, manifest a leaning toward a more liberal and more reasonable doctrine, and it may be said to be the American rule that the right of action is based upon parental relation.[2]

There are various wrongs in which the parent's right of action may arise, as, for example, by enticing the child away;[3] by forcibly abducting the child;[4] by beating, or otherwise purposely injuring the child, or by negligent injury disabling the child from labor;[5] and in case of a female child, by seduction.

Actions for Wrongs to Female Children.— Cases have arisen in which damages have been asked from one who was instrumental in enticing a daughter from her parents and procuring her marriage to a third person. The right of action in such case has been allowed, but the damages are restricted to the time which elapsed previous to the time when the marriage actually took place.[6] It is, however, a sound rule, and one based on broad grounds of public policy, which denies the action in such case, if the girl be of the age of legal consent, for the reason that "the law of marriage entirely overrides the general principles of right of the parent to the services of the child."[7]

A parent suing for the seduction of a daughter actually at the time a member of his household must base his right to recover upon the loss of service.[8] Though the daughter were not

[1] Grinnell v. Wells, 7 M. & G. 1033; Southern R. R. Co. v. Covenia (Ga.), 40 L. R. A. 253.

[2] Under this rule the father may recover not only for loss of services, but for the consequential loss and expense and time in care, nursing, etc., of the child without regard to age. Netherland Am. St. Nav. Co. v. Hollander, 59 Fed. Rep. 417; Clark v. Bayer, 32 Ohio St. 299; 30 Am. Rep. 593; Dennis v. Clark, 2 Cush. 347; 48 Am. Dec. 671; Cuming v. Railway Co., 109 N. Y. 95.

[3] Butterfield v. Ashley, 6 Cush. 249.

[4] McGee v. Holland, 27 N. J. 86; 72 Am. Dec. 341.

[5] Horgan v. Pacific Mills, 158 Mass. 402.

[6] Jones v. Tevis, 4 Litt. 25; 14 Am. Dec. 98.

[7] Hervey v. Moseley, 7 Gray, 479, 66 Am. Dec. 515.

[8] White v. Nellis, 31 N. Y. 405.

at the time a member of her father's household, if he has the right to recall her home he may maintain the action.[1]

But this is only the nominal ground, it being sufficient to show that the father is at the time entitled to the services of the daughter.[2] In estimating the damages there may be taken into account the loss of the society of the daughter, the injury to the parental feelings, and the shame and mortification attendant on such a wrong, in addition to any pecuniary expense which the parent has sustained for care, medical attendance, etc.[3]

Alluding to the legal fiction which has survived from an early period of the law, the courts have declared it to be at variance with the sentiments and conscience of the age,[4] and the fiction has been abolished by statute in some states, it not being necessary there for the parent to rest his action upon the loss of service.[5]

By the weight of authority in this country the father may maintain the action, though at the time the daughter was living away from home, if he has retained the right to control her services, though she were actually in the service of another.[6] In England, however, the action is not allowed under such circumstances.[7]

Sec. 565. *Statutory Action in Favor of Kindred for Sale of Intoxicants.*— Statutes of recent date in many states give to the parent or child an action against any one who has sold intoxicating liquors, which sale has resulted in a consequential injury to person or property or means of support. Such statutes were unknown to the common law and are strictly construed.[8]

Sec. 566. *Actions for Death of Husband, Wife or Kindred.*— At common law, if the same act which deprived the father of

[1] Kennedy v. Shea, 110 Mass. 147; 14 Am. Rep. 584.

[2] Lawyer v. Fritcher, 130 N. Y. 239; 14 L. R. A. 700.

[3] Cooley's Elements of Torts, 83; Blanchard v. Illsley, 120 Mass. 487; 28 Am. Rep. 535; Scarlett v. Norwood, 115 N. C. 284.

[4] Ellington v. Ellington, 47 Miss. 329.

[5] Franklin v. McCorkle, 16 Lea, 609; 57 Am. Rep. 244; Fry v. Leslie, 87 Va. 269; Stoudt v. Shepard, 73 Mich. 588.

[6] White v. Murtland, 71 Ill. 250, 22 Am. Rep. 100; Lavery v. Crooke, 52 Wis. 612; 38 Am. Rep. 768; Simpson v. Grayson, 54 Ark. 404.

[7] Dean v. Peel, 5 East, 49; Gladney v. Murphy, 26 L. R. Ir. 651.

[8] Cruse v. Aden, 127 Ill. 231; 3 L. R. A. 327; Friend v. Durks, 37 Mich. 25.

the services of his child resulted in the death of the child, the recovery could be for loss of services for such time only as elapsed between the time of injury and the death, and for the necessary expenses incurred for medical attendance, care and nursing.[1]

There was no right of action springing from the death itself. If the death was instantaneous there was no redress. But this defect of the law was remedied in England by Lord Campbell's Act, passed in 1846, which has been substantially followed in most of the states of this country. Under these acts there can be no suit when the deceased himself, if death had not ensued, could not have maintained one; as, if he had accepted satisfaction for the injury previous to death.[2]

Statutes, however, are in force in some of the states of the Union which give to some designated beneficiary a right of action that only comes into existence after the death and which is not the survival, continuation or enlargement of any pre-existing right.[3]

Sec. 567. *Family Rights Concerning the Dead.*— Appropriate obsequies and proper disposition of the remains of the dead are recognized as within the protection of the law.[4] This being so, the duty of according it must fall on some one. And this is a duty which is enjoined by society.[5] So it has long been held that it is not only the duty but the paramount right of the husband to bury the corpse of his wife.[6] In analogy to this rule it is held in some states that prior to burial the widow has the superior right to designate the place of interment of the body of her deceased husband, but that her control ceases at the burial, and that thereafter the care of the grave and control over the further disposition of it belongs to the next of kin.[7] In other states, however, a different rule exists. Thus,

[1] Hyatt v. Adams, 16 Mich. 180; Sherman v. Johnson, 58 Vt. 40.

[2] Littlewood v. Mayor, etc., 89 N. Y. 24; 42 Am. Rep. 271.

[3] Cooley's Elements of Torts, 94.

[4] Chapple v. Coope, 13 M. & J. 252.

[5] Regina v. Stewart, 12 Ad. & El. 773.

[6] Durell v. Hayward, 9 Gray, 248; 69 Am. Dec. 284; Cunningham v. Reardon, 98 Mass. 538; 96 Am. Dec. 670. If, however, the husband is unable to bear the charges of the wife's burial, they must be met out of her separate estate if she has any. Gould v. Moulahan, 53 N. J. Eq. 341.

[7] Wynkoop v. Wynkoop, 42 Pa. St. 293; 82 Am. Dec. 506. In Larson v. Chase, 47 Minn. 307, the court said: "That the right of the surviving wife (if living with her husband at the time of his death) is paramount to

in a recent case in Rhode Island, it was decided that a widow had a right to remove the body when it had been buried by the next of kin in a particular cemetery against her wishes;[1] and if one dies possessed of an estate, the first duty of the executor is to bury his decedent. One who fulfills this duty in the absence or neglect of the executor may recover his disbursements from the executor.[2]

It is also the duty of the father to bury his child.[3]

By the common law the person who bore the expenses of the funeral had a right of property in the shroud or other apparel of the dead.[4] The common law did not recognize property in the dead body, and its recognition of the rights of the family as an aggregation of persons in respect to the burial of the dead was very faint and uncertain.

The supreme court of Indiana holds, however, that a corpse is property, in the strict meaning of the term, and that the bodies of the dead belong to the surviving relatives in the order of inheritance; that they have the right to dispose of them as property, and that the courts of the state possess the power to protect the relatives in the exercise of the right of burial.[5]

There is a strong tendency to show regard for the feelings

that of the next of kin is in accordance, not only with common custom and general sentiment, but also, as we think, with reason. The wife is certainly nearer in point of relationship and affection than any other person. She is the constant companion of her husband during life, bound to him by the closest ties of love, and should have the paramount right to render the last sacred services to his remains after death. But this right is in the nature of a sacred trust, in the performance of which all are interested who were allied to the deceased by the ties of family or friendship, and if she should neglect or refuse it, of course the courts would have the power to regulate and control its exercise." See also Secord v. Secord, 31 Leg. Int. 268; F. K. Carey in 19 Am. L. Rev. 263; Jno. F. Baker, in 10 Alb. L. J. 71. It was said in Snyder v. Snyder, 60 How. Pr. 368, that an inflexible rule preferring the widow to the children would sometimes produce outrageous consequences, and that the question must be solved upon equitable grounds. In that case the claim of the son was preferred.

[1] Hackett v. Hackett, 18 R. I. 155; 19 L. R. A. 558. In Pierce v. Swan Pt. Cem. Prop., 10 R. I. 227, the widow's right was denied on the ground of long acquiescence.

[2] Patterson v. Patterson, 59 N. Y. 575; 17 Am. Rep. 384.

[3] Regina v. Vann, 8 Eng. L. & Eq. 596.

[4] 2 Cooley's Blk. 429; Meagher v. Driscoll, 99 Mass. 281; 96 Am. Dec. 759.

[5] Bogert v. Indianapolis, 14 Ind. 134; Renihan v. Wright, 125 Ind. 536; 9 L. R. A. 514.

of surviving relatives by allowing them to exercise complete control of the disposition of the body.[1] Thus, in several late cases, damages have been recovered for the unlawful mutilation and dissection of the body of the plaintiff's husband.[2] The authorities, however, are not uniform on this proposition.[3]

Sec. 568. *Guardian and Ward.*— The rules regulating the relation of guardian and ward under the Roman system grew out of the laws relating to inheritance. In the early status of the Roman law the father owed no duty to account to a higher authority for his actions in dealings with his child, and the responsibility of the guardian at that time was little, if any, greater; but with the advance towards civilization and the accompanying development of the law, the duties of a guardian were considered as approximating those of a trustee.

Guardians under the Roman law were either tutors or curators.

The tutor was one upon whom devolved the care of the estate when the child was *sui juris*,[4] but incapable by reason of immature age of properly administering his affairs. He derived his authority either from testamentary appointment, under operation of law, or by the appointment of a magistrate.

The curator was one who fulfilled the duties of a guardian from the time when the child passed the age of pupilage till

[1] Probably under the power which courts will exercise in some cases to enjoin the doing of an act calculated to wound the sensibilities of an individual, where the doing of the act is wholly unjustifiable, even though the existence of any property, as that term is usually applied, is not involved, a relative may have an injunction to prevent an act of desecration or mutilation. See Schuyler v. Curtis, 147 N. Y. 434.

[2] Larson v. Chase, 47 Minn. 307; 14 L. R. A. 85; Foley v. Phelps, 37 N. Y. S. 471. And where a cemetery association disinterred and removed the body of a child, the father was allowed to recover damages for outraged feelings and mental suffering. Kirkfield v. Mt. View Cem., 12 Utah, 76.

[3] See Cooke v. Walley (Colo.), 27 Pac. Rep. 950. In this case the right of action was denied where a physician had held an autopsy on the body of the deceased, who had died suddenly, in order to ascertain the cause of death before making out the certificate required by law. See also Young v. College of Physicians, 81 Md. 371. These cases, however, were decided in view of the positive requirements of the statute. In Griffith v. Charlotte & A. R. Co., 23 S. C. 25, there was held to be no authority in the administrator to maintain an action against a railway company for negligent mutilation of the body of the testator.

[4] That is, when he was freed from the control of the parent.

he reached his majority, and he might be appointed for the whole time or for a special transaction. The object of his appointment was to preserve the estate, and his chief duty was to advise and counsel with the ward in matters connected therewith.[1]

Classes of Guardians.— The old English law recognized guardians by nature, for nurture and in socage, or by the common law.[2]

The duties of the guardian by nature, or for nurture, were such as pertained to the person and custody of the ward, his education and maintenance, and devolved upon the parents.[3]

Guardianship in socage was a relation incident to the ownership of land and arose where a child under the age of fourteen years was entitled to an estate in lands. It devolved upon the next of kin to whom the inheritance could not possibly descend.[4] This species of guardianship has existed in this country in the state of New York, where the time of its duration and the person who might be appointed were regulated by statute.[5]

In this country guardians are either by nature, by testamentary appointment, or by judicial appointment. The subject is generally regulated by statute. The authority of guardians by nature extends only to the person and not to the estate of the ward. The father is guardian by nature, and after his death the mother, except in the case of an illegitimate child.[6] Such a guardian can have authority over the minor's estate only by appointment.[7]

By an early English statute[8] the parent was given the power to name by deed or will the person who should act as guardian of his minor child, living or likely to be born. This statute has been substantially adopted quite generally in this country, but the power of appointment is commonly restricted to per-

[1] Morey's Roman Law, 252 *et seq.*

[2] Other species of guardianship known under the old system it is unnecessary to mention for the reason that they were either local or soon became obsolete. Schouler's Dom. Rel. 390 *et seq.*

[3] See "Parent and Child," sec. 561. Guardianship by nature extended to all the children and continued to the age of twenty-one years. Guardianship by nurture existed as to children other than the heir apparent and ended at fourteen years.

[4] 1 Blk. Com. 461.

[5] Beecher v. Crouse, 19 Wend. 306; Emerson v. Spicer, 46 N. Y. 594.

[6] See *ante*, sec. 562, where it is pointed out that the mother is regarded as the guardian of such an one.

[7] Perry v. Carmichael, 95 Ill. 519.

[8] 12 Car. II., ch. 3.

sons capable of making a will, and if the appointment is made by deed the instrument must be of a testamentary character.[1]

A testamentary guardian has control over the estate as well as the person of the ward. A person will be considered a guardian by testamentary appointment if, though the instrument does not expressly name him as such, its terms confer upon him the duties and powers of a guardian.[2] The duties thus imposed upon the guardian are personal in their nature, and the appointment by the court of the same person confers no additional power, unless such a supplementary appointment, complying with certain required formalities, is prescribed by statute.[3]

Upon petition presented to the proper tribunal, a guardian will be appointed by the court on the proper hearing. Courts of equity have jurisdiction in such cases, but the power to make the appointment generally devolves under statute upon the orphans' or surrogate's court.

The father, if living, otherwise the mother, will generally be appointed, and the next of kin will be preferred to a stranger;[4] but the court will consider first of all the interest of the child and make an appointment accordingly.[5]

The appointment having been once made will not be disturbed unless it is shown that the court abused its discretion. When two or more are appointed as joint guardians, if one of them dies or is removed, the survivors continue in office.

The authority of a guardian is local merely. His appointment confers no power beyond the limits of the state in which the appointment is made. On grounds of comity, however, a guardian appointed in one state will sometimes be allowed to bring suit in the courts of another. As a general rule, how-

[1] Generally the father has the first right to appoint. If he dies without having exercised the right, then the mother may. A grandfather has not the right. Hoyt v. Tilton, 2 Edw. Ch. 202.

[2] Capps v. Hickman, 97 Ill. 429; Macknet v. Macknet, 9 C. E. Greene (N. J.), 447.

[3] Wadsworth v. Connell, 104 Ill. 369. Frequently the statute requires that before a testamentary guardian can act — where duties connected with an estate devolve upon him, — he must file a bond, unless it is requested in the will that no bond shall be demanded. See Thompson v. Thompson (Ky.), 47 S. W. Rep. 1088.

[4] Moorehouse v. Cooke, Hopk. Ch. 226.

[5] Luppie v. Winnans, 37 N. J. Eq. 245; Cowls v. Cowls, 8 Ill. 435.

ever, he has no standing in the courts of a foreign state, and cannot sue, as guardian, a citizen of another state, even in the federal courts.[1] The usual method is to procure the appointment of an ancillary guardian. In the exercise of comity the domiciliary guardian will in most cases be appointed.[2]

A guardian as such has no right to claim the services of the ward, and so he will be allowed to make a reasonable charge for the ward's support. He may, however, waive this right by previous agreement, but such an agreement must be clear and explicit.

If the father, however, is the guardian, he, having a right to the services of his child, cannot look to the ward's estate to reimburse him for the expense of the child's maintenance, if he is able to support him properly.[3]

The guardian, as such, is not an agent, but stands to the ward in a position of trust and confidence, and the influence which the former will naturally acquire over the latter will be presumed to continue for an uncertain time after the guardianship ceases. The relation being a confidential one, the courts will carefully scrutinize all dealings between the parties, and if it appears that the guardian has used his position to obtain an undue advantage of the ward, the transaction will be set aside.[4] The mere fact that, on the settlement of the guardian's accounts, the ward executes a release, will not prevent a court of equity from giving relief on the ground of fraud.[5]

The guiding rule of the guardian's conduct must always be to advance the interest of his ward.[6] In the management of the ward's estate he must guard against loss by the exercise of ordinary care. If loss results from his mismanagement or carelessness, he will be liable.[7] But so far as he acts in good faith he will not be held accountable for loss resulting from mere error of judgment.[8]

On entering upon his duties, the guardian must reduce to possession the ward's property of every kind.[9] In some states

[1] Smith v. Madden, 78 Fed. Rep. 833.
[2] Hoyt v. Sprague, 103 U. S. 613. Whart. Confl. of Laws, § 266.
[3] Moore v. Moore, 31 S. W. Rep. 582.
[4] Webb v. Branner, 52 Pac. Rep. 429.
[5] O'Connor v. O'Connor, 37 Atl. Rep. 634.
[6] Bond v. Lockwood, 33 Ill. 212.
[7] Sanders v. State, 49 Ind. 228; Leonard v. Barnard, 34 Wis. 105.
[8] McElheny v. Musick, 63 Ill. 328; Windon v. Stewart, 43 W. Va. 711.
[9] Pierce v. Prescott, 128 Mass. 140.

he has authority under the statutes to demand and sue for the ward's personal property in his own name.[1] In others, suit must be brought in the name of the ward; and generally, suits concerning realty must be prosecuted in the ward's name and not in the name of the guardian, as is the case in guardianship in socage.[2]

Guardianship will be terminated by the death of either party; by the majority of the ward,[3] and, if the ward be a female, by her marriage, and, it is sometimes held, by the marriage of the guardian, if the guardian is a woman; by the resignation or removal of a guardian, or by the expiration of the term of a testamentary guardian.

The rule that the marriage of the ward terminates the guardianship is not applicable to guardianship of the estate, but of the person, for it is inconsistent with the conjugal rights that a married woman should be under any other guardianship than that of her husband.[4]

Removals of guardians and the cause therefor are matters now regulated almost entirely by statute, but, in the absence of statutory provisions on the subject, every guardian is responsible for his conduct to the court of chancery and may be removed for abuse of his trust;[5] but to justify a removal there must be shown positive misbehavior on the part of the guardian, or want of integrity in his dealings with the property of his ward. A mere error of judgment, which the guardian subsequently corrects to the best of his ability, will not justify a removal. Always in examining such questions the courts will look closely into the facts of the particular case and act upon discretion.[6] The court will not decree a removal of the guardian because the ward has taken a dislike to him and will have no dealings with him.[7] It is discretionary with the court whether a guardian will be allowed to resign, depending upon the condition of the guardianship and the best interests of the ward.

When the time comes for the termination of the guardianship, the guardian will not be released until he has rendered a

[1] Ind. Order, etc. v. Stahl, 64 Ill. App. 314.

[2] Mueller v. Benner, 69 Ill. 108.

[3] In re Kincaid's Est., 52 Pac. Rep. 492.

[4] Montoya De Antonio v. Miller (N. M.), 34 Pac. Rep. 40; Decker v. Fessler, 146 Ind. 16.

[5] In re Andrews, 1 Johns. Ch. 99.

[6] MacGill v. McEvoy, 85 Md. 236.

[7] France v. Franz, 4 Ohio (N. P.), 278.

satisfactory account of his management of the ward's estate. This is called a final account, but in addition it is required that the guardian shall render intermediate accounts. In many states statutes direct that these intermediate accounts shall be rendered yearly, while in other states they are to be made at such times as the court directs.[1]

Sec. 569. *Apprenticing or Binding Out of Minors.*— In every community there are, on account of the vicissitudes of life, indigent persons who are unable by their own exertions to care for and provide for themselves. In many cases the statutes providing for the support of indigent paupers, irrespective of age, afford the necessary and appropriate relief, but in many other cases there are persons who are minors whom it would not only be unnecessary but injurious for the state to place under the conditions of pauperism.[2]

Although not being able to support themselves, or the circumstances being such that others are willing to assume the responsibility of their care and support, most states, by statute,[3] provide for the establishment of a permanent *quasi*-domestic and *quasi*-contractual relation between these persons and adult members of the community, either by way of adoption, which has heretofore been spoken of, or by way of what is called binding out or apprenticeship, by which the minor is required to become a member of the family, or to serve the person to whom he is apprenticed until he attains his majority, or until such other time as the statute may fix, or until the trade he was apprenticed to learn was acquired,[4] in exchange for which he received nurture and support, and very frequently a fixed sum in money and designated apparel. Each state has its own statute providing for the apprenticing of children.[5]

[1] Curtis v. Devoe, 53 Pac. Rep. 936. See further, Action of Account; also, Schouler, Dom. Rel. 389, 488.

[2] Apprenticeship, being in the nature of a servitude, can only be entered into by persons under disability and because of public policy. Cooley, Const. Lim., p. 363, n. 2.

[3] At common law the parents, or even the wife, if deserted, could assent to an indenture which would apprentice her child. People v. Gates, 43 N. Y. 40.

[4] The minor had the capacity to make such a contract with the consent of his parents. Cooley, Const. Lim. (6th ed.) 413; Purviance v. Shultz, 16 Ind. App. 94; Pardey v. Am. Ship W., 19 R. I. 461.

[5] See Wigly v. Mobley, 101 Ga. 124; Moore v. Allen, 72 Miss. 273; Darling v. Iron Works, 26 Oreg. 405.

PART II.

THE LAW OF THINGS.

PROPERTY AND CONTRACTUAL RIGHTS.

CHAPTER XXIX.

THINGS (OR PROPERTY).

Sec. 570. *Scope of the Subject.*— In this second great department of law, our inquiry is directed to the acquisition, dominion, ownership and disposition of things, or, as it may be expressed, the law of property in things.

Considerably more than the proportionate space has been devoted to the first part of the work, not because of its greater importance, but because the treatment is entirely novel *as applied to American law*, and because it differs materially in many particulars, both as to method and principles, from any institutional work upon our law that has heretofore appeared. On this account it has been thought desirable to devote considerable space to making fundamental distinctions as clear as possible.

As to the remaining titles of our law — Things, Actions (or Procedure), and Criminal Law,— while it is to be hoped that something is added as to clearness and somewhat of substantial improvement in matter, it must be recognized that the subjects which make up these great departments have been so frequently and ably treated as to leave the thing most to be desired, such an outline as will enable the student to understand the elementary principles which govern these subjects and to perceive the unity of the whole and the relation of the parts to each other, leaving him to acquire that intimate and exhaustive comprehension of the innumerable rules which flow from the general principles by a study of some of the many excellent treatises in which our law abounds.

Sec. 571. *Meaning of the Word "Thing."* — If our efforts have been successful in explaining the nature and meaning of the words "thing" and "property" for the purposes of classification and division, the reader understands that by this word "thing" is meant anything which, according to our law, may become the object of a right.[1]

[1] *Ante*, pp. 106–108.

In this sense it is not necessarily opposed to the word "person" or "personality," in the legal sense of capacity. Personality is an attribute of the individual. A thing is the possession of an individual. The individual is the possessor; these others are possessed by him.[1] The one is his personality, the other his property. Life and liberty are personal rights not depending on personality. Property is a right in a thing. Things contrast with personal rights rather than with personality.

To be a thing in the eye of the law it is not necessary that that which is so denominated shall be tangible or visible.[2] In a broad sense, the word "thing" takes in every right, but in the sense in which it is to be used *in our law*, as an estate, property, ownership, or the rights of property, in contrast with those mere personal rights of life and liberty, it is narrowed in the scope of its meaning so as to exclude all those valuable and sacred rights which have heretofore been treated, and to include only those valuable interests one may have outside of himself, or, as Blackstone said, "unconnected with the person."[3]

Sec. 572. *"Thing" and "Property" Distinguished.*— The endeavor heretofore has been to make clear the distinction between the right of dominion and the thing owned, which marks the distinction between property and the subject of property.[4] Schouler, in his "Personal Property," says: "Whoever reads Blackstone's chapter on 'Property in Things Personal' should perceive that he confounds two senses of the word "property," one signifying the thing possessed, the other the right of possession.[5]

It is essential to a just conception of either personal rights and relations or property that these distinctions be thoroughly mastered and constantly kept in mind. Every right must be a personal right in the sense that it belongs to a person, natural or artificial, and the object of every right must in some sense be a thing; but there is a clear distinction between the right which has for its object rights flowing from status, or something necessarily attached to the person of the possessor, or

[1] See Bouvier's Law Dic. (Rawle's Ed.), title "Things." *Person* is there used in the sense of the *individual.*

[2] *Ante*, pp. 119, 124; Hale's Analysis, sec. XLI; Holland, Jur. 86; Cincinnati v. Hafer, 49 Ohio St. 60; People v. Tioga, 19 Wend. 73.

[3] *Ante*, p. 126; 1 Ham. Blk. 332.

[4] Sec. 96.

[5] 1 Schouler's Pers. Prop. (3d ed.), sec. 11.

incident to his personality, and a right the object of which is a thing tangible or intangible which is not necessarily personal, but attaches to some other definite person or thing as its object.[1]

Sec. 573. *Acts May be Things.*— In this sense the actions of others which do not merge the personality of the owner may be called things or property, and in this sense "property" may embrace everything which may minister to the wants or pleasure of another which does not come by a merger of personality.[2]

To enforce this idea the opinion of the supreme court of the United States was quoted that the term "property" embraces all valuable interests which a man may possess outside of himself; that is to say, outside of his life and liberty,[3] which expression may be modified by adding to the phrase outside of himself, "*and his domestic relations*," which are, however, in a sense a part of himself.[4]

Attention has been heretofore directed to the distinction between the conception in the eye of the civil law and the common law meaning of the word "thing," that all rights of whatever kind or character are in the former deemed "things," while in the latter system, all which a man might acquire of others and

[1] Upon this distinction rests the rule that actions for injuries affecting the person are not assignable and do not survive the death of the injured. People v. Tioga, 19 Wend. 73.

[2] *Ante*, pp. 118–19. W. A. Watt, LL. B., D. Phil., Glasgow, in a learned disquisition on the theory of contract, says: "Contract *must* deal with conduct. We must be allowed to buy human activity. We must be allowed to deal in human brain and muscle so long as contract exists. I sell my actions quite legitimately, and have no right to quarrel with the purchaser because he is buying human flesh and blood. If any suggestion lurks in our minds that, whilst contract can legitimately deal with property, with external objects, it cannot deal with what we may call human products, that must be dismissed. Indeed it has only to be stated clearly to be dismissed. All the property that forms the matter of contract has been so related to human life as to become part of it. From the legal point of view it has been taken up into the unity of an obligation." Theory of Contract, p. 14. See *post*, § 616, M. & S.

[3] *Ante*, p. 126.

[4] Even as to the right and interest which husband and wife and parent and child have in each other, by way of right of society, protection, support, service, etc., they even have been classed as property (Jane v. Jane, 39 Hun, 40, approved in Warren v. Warren, 89 Mich. 123, 14 L. R. A. 545); but I do not so class them, for the reason that they are more properly personal and are incident to status rather than ownership.

insist upon having and protecting by the law of the land were termed "rights," but not all rights were by that system regarded as things.[1]

Sec. 574. *Classes of Things.*— The English law narrowed the civil-law conception of things to include only (1) *estates in land* or real property; (2) *personal property*, consisting of (*a*) *chattels*, i. e. property in tangible things, and (*b*) *choses*, i. e. rights respecting intangible things, arising through transactions with or growing out of the conduct of others, and which created an obligation termed in the English law a *chose*.

These three species of things mark the extent and boundary of the English law of things. In this system of classification American law coincides with the English rather than with the Roman, although the extent of the things embraced within the denomination *chose* has broadened somewhat, and the conception of the distinction between the right and the object of the right has become clearer and better defined than under the English law as presented in the Commentaries of Blackstone.

Sec. 575. *Property.*— Our law abounds in learned disquisitions concerning the nature and origin of property, wherein it is supposedly traced from its earliest forms to its present stage of refinement.

It is often affirmed that the right is a natural one, and that its original form is a title by occupancy. It will be found on examination that these disquisitions may all be resolved into unsupported theories, or opinions founded upon some prior theory.

It seems, however, natural that what a man, or any other of God's animals, occupied, he might use until some other dispossessed him. If we may judge the original nature of individuals by the conduct of communities as they now appear, it would seem natural that at one time title deeds consisted in the power to defend.

It may be regarded as certain that there was no known recognition of ownership other than possession until society had advanced somewhat towards civilization, and that no matter how long one may have used and enjoyed, there was no known means of perpetuating his right to the enjoyment until there arose that combination and community between individ-

[1] *Ante*, pp. 109, 119, 125; Deshler v. Dodge, 16 How. 622.

uals known as society. And even after societies had been formed, it was not originally the practice to allow an ownership distinct from possession.[1]

If one occupied a certain space, the air which surrounded him he might use, the water which he might require he might take, the land which he might occupy he would not be divested of except by superior force. The movable things which he had acquired were precisely in the same situation. His pre-emption documents were his weapons, and his tenure his ability to defend.

It is claimed that the first forms of property were community property allowing to the individual the usufruct.[2] Experiments of that kind have been tried in America, but have been unsuccessful.[3]

Property, in the modern sense of the right to possess, enjoy and control, distinct from actual possession, does not derive its origin from nature, although the existence of such rights may be said to be conformable to nature.[4]

Wilson quotes approvingly the sentiment of Paley that the real foundation of property is municipal law.[5]

Chancellor Kent also says that "whatever may be the theory on the subject, yet, in point of fact, as far as we know, property has always been the creature of civil institutions; that by the ancient law of all the nations of Europe, the *bona fide* possessor of goods had a good title as against the real owner, in whatever way, whether by force, fraud or accident, the owner may have been divested of the possession; and such was the law so late as the middle of the last century."[6]

We have heretofore directed attention to the opinion of Judge Marshall that the law of property in its origin and operation is an offspring of the social state, and not an incident of a state of nature.[7]

It may therefore be safely affirmed that, for all practical

[1] 2 Kent, Com. *320.

[2] Id.

[3] These were at Virginia and New Plymouth. 2 Wilson's Works, 493.

[4] See 4 Burr. 2365.

[5] 2 Wilson's Works, 483.

[6] 2 Kent, Com. *320.

[7] *Ante*, p. 126. Sir James McIntosh says: "Property is indeed in some sense created by the act of the public will, but it is by one of those fundamental acts which constitute society." Quoted in Dodge v. Woolsey, 18 How. 331–375. All of these opinions go to confirm the view that all civil rights result from the formation of civil society.

purposes, only one of the incidents of property is acquired by mere possession, namely, the right to use,— an incident falling far short of that perfect right to possess, enjoy and transmit[1] which is recognized and protected by our law of property.

Sec. 576. *The Several Kinds of Property.*— Property is a generic word. Its two principal species are denominated in our law "real" and "personal." The denomination "real" is highly artificial, and seems to have had its origin in the Anglo-Saxon law rather than in Roman jurisprudence.[2] It includes lands and things appertaining thereto, as distinguished from chattels tangible and choses; and while under our system the boundary line has been worked out with infinite care and considerable certainty, it is obvious that land is no more actual or real than are tangible chattels, and that what is called a chattel real is more intangible than a real chattel.

The ownership of land as allowed by the English law was not denominated real *property*, but real *estate*. Movable things and choses might be owned in property, but one could acquire at most only an estate in land, and this was termed real *estate*, not real *property*. The classification of things under the English law then is "estates" (in land) and "personal property."

Each of these species of property is again classified into subordinate sub-classes. As to the subdivisions of real property, they will be mentioned in connection with that title, and we may here enumerate the things in which a qualified interest or absolute property may be acquired.

Sec. 577. *Light and Air* are obviously subject to nothing more than use, but, in order that a reasonably perfect enjoyment of an estate in land may be had, the law protects that ownership from unreasonable deprivation of light or pollution of air, deeming contiguous erections cutting off the light, and

[1] Wynehamer v. People, 13 N. Y. 378.

[2] The origin of this classification is not certain. The classification is supposed to have been derived from the forms of action real and personal. By the former, the real thing could be restored and the plaintiff put in possession; by the latter, it could be restored or damages awarded. The former originally extended only to land; the latter to chattels. Hence, land was called real property because a real action would lie for it, and chattels were called personal property because a personal action only would lie for them. In forms of action, through the feudal system, the terms used were "lands, tenements and hereditaments." The word "real," as denoting a species of property distinguished from "personal," was not used till the feudal system had lost its hold. 1 Ham. Blk. 335; 1 Saund. 347.

unreasonable occupations tainting the air, nuisances, for which the owner has several modes of relief.[1]

Sec. 578. *Water.*— No one can obtain a property in the water of running streams,[2] although he may acquire an interest in its use greater than that of others, so that it cannot be said that such water is common alike to all; for the riparian owner of a non-navigable stream has the right to exclude others from its use and enjoyment to the extent of his boundary, and he may freely use the waters for the purposes of husbandry and manufacture, and may divert a portion of it temporarily for that purpose, or diminish somewhat the volume of its flow,[3] or to some degree pollute it. But in all these respects, what shall be the extent of the reasonableness must be and is left to the determination of the local law as administered by the courts; and the boundaries of such reasonable use may be defined and their transgression restrained, so that after all, as to non-navigable streams, the interest which one may have in the water itself is really an incident to his ownership in the land, and should be treated with the subject of real property.[4]

Sec. 579. *Animals.*— According to the supposed design of the Creator, it is assumed and maintained that certain animals are domestic by nature, while others are *ferœ naturæ*, or naturally wild. This view seems confirmed by the experience that some animals take kindly to association with men, while others refuse to be domesticated.

Cattle is the generic name for domestic animals. It may include all the species,[5] and even fowls[6] and birds.[7]

Property in wild animals which have been captured and tamed depends upon the degree to which they have been domesticated.[8] It is not recognized further than the right of possession, or under such degree of control, or such proximity of pursuit, that the former possessor may be said to have lost entirely his power

[1] The general subject of "Nuisance" in the law of actions covers this subject. See Cooley's Elements of Torts, 248, 250 *et seq.*, and cases there cited; also, see "Easements," *infra*.

[2] Sweet v. Syracuse, 129 N. Y. 316; Acquackanonk Water Co. v. Watson, 29 N. J. Eq. 369.

[3] Id.; Blanchard v. Baker, 8 Me. 253.

[4] Lyon v. Fishmongers Co., 1 App. Cases, 642; Emporia v. Soden, 25 Kan. 421; Pool v. Lewis, 41 Ga. 162; 5 Am. Rep. 526; Cooley's Elements of Torts, 240, 241. See "Riparian Rights."

[5] Randall v. Railway Co., 104 N. C. 410; Decatur Bank v. St. Louis Bank, 21 Wall. 294.

[6] State v. Bruner, 111 Ind. 98.

[7] Colam v. Pagett, 12 Q. B. Div. 66.

[8] Armory v. Flyn, 10 Johns. 102.

over the animal, or where, in the act of taking wild animals as game, the hunter has brought the quarry under some degree of captivity, or attained what may be said to be striking distance.[1]

Dogs.— Dogs have been regarded differently at different times and by different courts, but there seems to be no difference of opinion at the present time but that a dog is the subject of property,[2] and that the owner may be liable for injuries inflicted on others in person and property, and that he has the right to the protection of the law.[3]

The natural increase of female animals belongs to the owner at the time when the increase is brought forth, unless modified by contract or custom.[4]

Sec. 580. *Copyright.*— Perhaps a better illustration of the power of municipal law to create property out of abstract things is the well-recognized species of property in literary labors and ideas of men, in which the laws of most modern nations recognize such a special interest and right as is called property. Copyrights and patents are property; they are not choses, but things in possession.[5]

The common law of Great Britain recognized and protected

[1] Pierson v. Post, 3 Caines' Rep. 175; Buster v. Newkirk, 26 Johns. 75; Gillet v. Mason, 7 Johns. 16.

[2] By the common law the interest which one could have in a dog was but a qualified or base property. The ownership could be protected by civil remedies, but was not of such a nature that a dog was the subject of larceny. By statute, however, in England and in many of our states, there may be property in dogs for criminal as well as for civil purposes. See Sentell v. New Orleans & C. R. Co., 166 U. S. 698; Com. v. Maclin, 3 Leigh, 809; Graham v. Smith, 100 Ga. 434; 40 L. R. A. 503, and note; Blair v. Forehand, 100 Mass. 136.

[3] An old saying is that "a dog is entitled to his first bite, but a bear is not." That is, the owner of a domestic animal is not liable for an injury committed by it of such a nature that it was not to be expected from the nature and habits of the animal. But after the owner has knowledge of the vicious propensities of the animal, as, for example, that his dog is in the habit of attacking persons, or worrying sheep, he will thenceforth be liable for a failure to keep the animal secure. May v. Burdett, 9 Ad. & El. 100; Muller v. McKesson, 73 N. Y. 195; 29 Am. Rep. 123; Brice v. Bauer, 108 N. Y. 428; 2 Am. St. Rep. 454; Knowles v. Muller, 74 Mich. 202; 16 Am. St. Rep. 627; Jones v. Cary, 9 Houst. 246.

[4] Under the maxim *partus sequitur ventrem*, in accordance with the Roman law. N. W. Nat. Bank v. Freeman, 19 Sup. Ct. Rep. 36; Hull v. Hull, 48 Conn. 250; 40 Am. Rep. 165; Kellogg v. Lovely, 46 Mich. 131; 41 Am. Rep. 151. And so the owner of the dam may mortgage unborn increase. Sawyer v. Gerrish, 70 Me. 254; 25 Am. Rep. 323.

[5] 11 Law Quar. Rev. 64; 2 Kent, *372; Frazier v. Frazier, 121 Ill. 147.

the literary productions at all times before publication of the individual, guaranteeing to him the exclusive right, privilege or franchise of first putting them in tangible shape and publishing them to the world.[1] After publication, however, the common law affords no protection, and the modern law of copyright in *published* works depends entirely on statutes.[2]

It is frequently a question of great nicety to determine just what communication to others constitutes such a publication (before copyright is secured) as will destroy the author's exclusive right.[3]

To entitle an author to the protection of the copyright statute, his work need not be wholly original in the sense that it is entirely the creation of his own mind. Compilations of common material may be protected,[4] or a representation of things in existence;[5] but the work must be more than merely trivial,[6] and must not be libelous,[7] immoral,[8] or seditious.[9] Mere ideas

[1] Duke of Queensberry v. Shebbeare, 2 Eden, 329. As to rights in unpublished dramatic compositions, see Keene v. Wheatley (Am. Law Reg., 1861), 33 Fed. Cas. 7644. The ancient learning upon the subject of copyright is all gone over in the arguments and opinion in Millar v. Taylor, 4 Burr. 2303 (A. D. 1769).

[2] 8 Anne, ch. 19 (1709); Justice Yates' judgment in Millar v. Taylor, 4 Burr. 2365, which became the law of England; Donaldson v. Becket, 4 Burr. 2408; Jeffries v. Boosey, 4 H. L. Cas. 867; Wheaton v. Peters, 8 Pet. 491. The statute of Anne protected printed books only. The protection now given to prints, musical and dramatic compositions, etc., is the result of subsequent legislation. Coleman v. Watten, 5 Term R. 136. The same is true of the statutes in this country. The first act (1790) was limited to maps, charts and books. 1 Stat. at Large, 124. This has been gradually enlarged until it now includes books, maps, charts, dramatic or musical compositions, engravings, cuts, prints or photographs, or negatives thereof, paintings, drawings, chromos, statues, statuary, and models or designs intended to be perfected as works of the fine arts. Rev. Stat. U. S., sec. 4952.

[3] Lectures delivered or the production in drama to an audience is not necessarily a publication. Drummond v. Artemus, 60 Fed. Rep. 339; 2 Kent, *378. Issuing copies to those under contract, not to use except in a restricted way, does not make the matter public. Jewelers' M. Agency v. Jewelers' Pub. Co., 84 Hun, 12.

[4] Lawrence v. Dana, 4 Cliff. 1; Fed. Cas. 8136; Banks v. McDivitt, 13 Blatchf. 163; Fed. Cas. 961; Jarrould v. Houlston, 3 K. & T. 708.

[5] Stephens v. Cady, 14 How. 528.

[6] Clayton v. Stone, 2 Paine, 392; Fed. Cas. 2872; Mott Iron Works v. Clow, 82 Fed. Rep. 316.

[7] Hime v. Dale, 2 Camp. 27.

[8] Martinette v. McGuire, 1 Abb. (U. S.) 356; Fed. Cas. 9173; Broder v. Zeno Mauvais Music Co., 88 Fed. Rep. 74.

[9] Southey v. Sherwood, 2 Mer. 435.

however, disassociated from the form of expression, cannot be the subject-matter of copyright.[1]

The ownership of the copyright is quite distinct from the ownership of the plates from which the matter is to be printed.[2] The former cannot be seized on execution, the latter may.

Sec. 581. *Patents on Inventions.*— Among the means of advancing the material prosperity of a people, none is more efficacious than to foster the art of manufacturing, or converting the raw material into new and different forms, or the production of old forms in greater quantities or at less expense.[3]

The art of devising processes and instruments for this end is called invention, and the law has, in order to stimulate the spirit of invention and compensate in a measure the individual for the good conferred upon the public, devised the means of protecting the inventor for a limited and reasonable time in a monopoly of the sale and use of his invention, and this is accomplished under what is known as the patent law, by which the owner is given an exclusive power to use, manufacture and sell his invention, and all others are prohibited from the same, and the owner is given a remedy against any person who may infringe his patent.

Inventions.— In order to constitute an invention the thing devised need not be intricate and involved.[4] The simplest device, if new, or producing new results, may constitute an important invention and entitle the inventor to a patent.

Inventions which produce articles are not always mechanical, but sometimes consist in *processes* of combination and manipulation of material involving the use of nothing which would be called a machine, other, perhaps, than the vessels or receptacles for mingling and manipulating the material. Such inventions are called processes.[5] For example, the Bessemer steel process,

[1] Baker v. Selden, 101 U. S. 99; Perris v. Hexamer, 99 U. S. 675. On the copyright of the plan of arrangement, see Bullinger v. Mackay, 15 Blatchf. 355.

[2] Stephens v. Cady, 14 How. 528; Stevens v. Gladding, 17 id. 447.

[3] Art. I, sec. 8, clause 8, of the national constitution is as follows: "To promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries."

[4] Gould Coupler Co. v. Pratt, 70 Fed. Rep. 622.

[5] A manufacturing formula falls within the term "art" in the statute. Tilghman v. Proctor, 102 U. S. 707.

and doubtless many processes of the greatest value, are held absolutely in secret instead of trusting to a patent or formula.[1]

So the modes of compounding medicines may be patented. This gives rise to the term "patent medicines."[2] Friction matches are invented by means of chemical combination.[3]

A process may, however, be patented notwithstanding it is necessary in order to produce the finished article that machinery be used.[4]

Mechanical devices may consist in new and original inventions, or improvements upon old devices, or a combination of old elements producing new and different results, or what amounts to a new result, producing the old article in finer quality or at a cheaper price.[5]

The patent of the United States protects the owner against the government, or use by the officers of the government. It cannot be said, however, to be strictly contractual, and a suit for infringement against the government officers is not a suit on contract.[6]

One may employ another, and by contract become entitled to his inventions,[7] but only the inventor is entitled to a patent.

One employed by another in a special line is not entitled to the benefit of inventions which he may make unless especially contracted for.[8]

Suits for the protection of patent-rights specifically must be brought in the federal courts, but a state court may, when the question arises collaterally, decide upon the validity of a contract, or enforce a contract in reference to a patent.[9] But a state has no right to prevent or restrict the sale of patent-rights.[10]

Sec. 582. *Trade-mark.*—By the established custom and usage of merchants, a practice early arose of designating the article by some particular sign, mark or brand which should of itself indicate the origin and ownership of the article so marked or

[1] See Risdon I. & L. Works v. Medart, 158 U. S. 68.

[2] Curtis on Patent, 22.

[3] Ryan v. Goodwin, 3 Sumn. 514.

[4] Id.

[5] Pennsylvania Ry. Co. v. Locomotive, 110 U. S. 490.

[6] United States v. Berdan Arms Co., 156 U. S. 552.

[7] Joliet & M. Co. v. Dice, 105 Ill. 409.

[8] McLeer v. United States, 150 U. S. 193.

[9] Pratt v. Paris Gas Co., 155 Ill. 531.

[10] Webber v. Virginia, 103 U. S. 344; Cranson v. Smith, 37 Mich. 409. See "Jurisdiction."

branded.[1] It was not, however, till the latter part of the eighteenth century that a right to the exclusive use of such a particular brand or mark, known as a trade-mark, was recognized and protected in the courts.[2] It has been said to be a merchant's commercial signature; it is the means by which a purchaser identifies the origin of a particular article.[3] And his rivals in trade were regarded as sailing under false colors if they imitated it.[4]

It arose among merchants engaged in trade, and has no reference whatever to invention, discovery or original thought, such as are involved in inventions and literary productions protected by a copyright and patents.[5]

It should be observed that congress is given the power to protect literary property and the result of inventions by copyright and patent,[6] but there is no reference in the constitution to a similar protection for trade-marks.

Property in a trade-mark is not strictly an accurate expression. It cannot exist as a naked symbol disconnected with the particular merchandise to which it is applied.[7] It does not arise by any legislation of congress, but immediately on adoption and user,[8] and is protected by the common law and the statutes of the various states,[9] or, in other words, it is within the control of the states.[10] A civil action for damages will lie in the state courts for the infringement of a trade-mark, irrespective of knowledge or intention.[11] Courts of equity have long exercised the jurisdiction to enjoin an infringement and enforce compensation for past injury.[12]

[1] Southern v. How, Popham, 144; Cro. Jac. 471; Larrabee v. Lewis, 67 Ga. 561; 44 Am. Rep. 735.

[2] In Blanchard v. Hill, 2 Atk. 284, the jurisdiction was declined. But it was thoroughly established in Hogg v. Kirby, 8 Ves. 215 (1803). A trade-mark is a mark by which the wares of the owner are known in trade. Shaw Stocking Co. v. Mack, 12 Fed. Rep. 707. It may be a symbol, a figure or a letter. Larrabee v. Lewis, *supra*.

[3] Larrabee v. Lewis, *supra*.

[4] Trade-mark Cases, 100 U. S. 82.

[5] Congress Spring Co. v. High Rock Co., 45 N. Y. 291; Delaware Canal Co. v. Clarke, 13 Wall. 322.

[6] *Ante*, sec. 581.

[7] Leather Cloth Co. v. Am. L. Cl. Co., 11 H. L. C. 532.

[8] Trade-mark Cases, *supra;* Rogers v. Rogers & S. Mfg. Co., 11 Fed. Rep. 495; McAndrew v. Bassett, 4 De G., J. & S. 380; Kathreiner v. Kneipp Co., 82 Fed. Rep. 321.

[9] See State v. Bishop, 28 Mo. 373; Vogt v. People, 59 Ill. App. 684; Cohn v. People, 149 Ill. 486.

[10] See Coats v. Holbrook, 2 Sandf. Ch. 586; 7 L. Ed. N. Y. Ch. 713. In this edition a valuable note is appended. Frazer v. Frazer Lubricating Co., 121 Ill. 147.

[11] Millington v. Fox, 3 Myl. & Cr. 338.

[12] Frazer v. Frazer Lubricating Co.,

In fact, the federal courts have no jurisdiction as such over trade-mark cases, and can take jurisdiction only on the ground of diversity of citizenship, or that such goods were intended for commerce with a foreign country or an Indian tribe.[1]

The United States congress may appropriately provide for the registration of trade-marks in reference to the subjects of interstate commerce, but any action beyond this scope and which interferes with the rights of the state over this particular species of property is unconstitutional.[2]

As a trade-mark arises by use, so it can only be preserved by use. It cannot be held and transferred to another unless he continues in its use in the same manner.[3]

Sec. 583. *Things Common.*— The sea, harbors and arms of the sea, for the purpose of navigation, are free and common to all, and so without doubt in this country is the right to fish therein.[4] The right of navigation in streams navigable in fact, in most of the states, is a right common to all persons, and in which individuals cannot obtain a several and exclusive privilege.[5] The soil of the beds of navigable streams and arms of the sea are owned by the state and may be granted or withheld, and the state may regulate the use of the stream for fishing or oyster culture.[6] Any special franchise, such as of fishing or to conduct a ferry, is property.[7]

121 Ill. 147. The courts act on the two-fold ground of injury to the first adopter and fraud on the public. Reddaway v. Banham (1896), App. Cas. 199; Coats v. Merrick Thread Co., 149 U. S. 562–566; Singer Co. v. June Co., 163 id. 169; Pillsbury-Washburn Flour Mills Co. v. Eagle, 86 Fed. Rep. 608; Garrett v. Garrett, 78 id. 472; Fairbank Co. v. Bell Mfg. Co., 77 id. 869; Thompson v. Montgomery, 41 Ch. Div. 35.

[1] Ryder v. Holt, 128 U. S. 525; Luyties v. Hollender, 21 Fed. Rep. 281.

[2] Trade-mark Cases, *supra.*

[3] Royal Baking Powder Co. v. Raymond, 70 Fed. Rep. 376; Manhattan Co. v. Wood, 108 U. S. 218.

[4] It is not intended to affirm that the state may not regulate, or, in the absence of constitutional limitation, grant franchises of fishing as well as of ferries. See Gentile v. State, 29 Ind. 409; Phipp v. State, 22 Md. 380; arguments in Charles River Bridge v. Warren Bridge, 11 Pet. 420.

[5] Gibbon v. Ogden, 9 Wheat. 1. The business of ferrying has been regarded of such a *quasi*-public nature as to justify the granting of a special exclusive franchise to conduct a ferry. Charles River Bridge Co. v. Warren Bridge, 11 Pet. 420; Mills v. St. Clair Co., 8 How. 569.

[6] Id.; McCready v. Virginia, 94 U. S. 391; Paul v. Hazelton, 37 N. J. L. 106; Martin v. Waddell, 16 Pet. 367. "There are some things, and they are the most essential of all to man, that are incapable of individual own-

[7] Convoy v. Taylor, 1 Black, 603.

The riparian owner on a navigable stream which is not properly an arm of the sea, even above the ebb and flow of the tide, has the paramount right to all use of the bed of the stream not inconsistent with its use for navigation,[1] unless his boundary is marked by the edge of the stream.[2]

As an example may be instanced the right as against all others to take mineral from the bed of the stream, or to use it for the purpose of fishing.[3]

On the sea and in the arms of the sea, the right of fishing is common; and although at common law, prior to Magna Charta, special privileges and franchises therein might be granted *by the sovereign*, nevertheless it may be doubted whether such a grant, disconnected with a grant of the soil or its use,[4] can be allowed under our system of law (with its limitations upon legislative power) in states not affected with ancient customs having their inception in colonial times.[5]

ership. Such are air and water. All may and do participate, without restraint, in their enjoyment. They are the common inheritance of mankind. There are other things to a large extent incapable of individual ownership, and of these are game and fish, and they belong to the entire community collectively; and belonging to all equally, for their protection from extinction, and to preserve the common ownership in all, they are, and of necessity have ever been, subject to legislative control. If they are not, the few would, by their destruction or appropriation, deprive the balance of the community of their rights in this common inheritance." Parker v. People, 111 Ill. 581.

[1] Braxon v. Bressler, 64 Ill. 338; Moore v. Sanborne, 2 Mich. 520; Parker v. People, 111 Ill. 581.

[2] See Angell on Tide Waters, ch. 7; 3 Kent, *410–17. On the subject of boundary the policy of the states differs. It is treated in this connection with real propery. The title to the beds of streams navigable in fact is in the state as proprietary. Morgan v. King, 35 N. Y. 453; 90 Am. Dec. 58. But the title to the seacoast and the shores of tidal rivers is not a proprietary but a sovereign right. Coxe v. State, 144 N. Y. 396. The extent of riparian or littoral ownership will depend on the terms of the grant under which the land is held.

[3] Holyoke Co. v. Lyman, 15 Wall. 500.

[4] The right to plant oysters (as it is called) is connected with a definite piece of the soil.

[5] See Chalke v. Dickinson, 1 Conn. 382. *Cf.* Arnold v. Munday, 1 Halst. 1; Gustafson v. State (Ct. Cr. App. Texas), 48 S. W. Rep. 518. In Martin v. Waddell, 16 Pet. 366, Chief Justice Taney said: "In no one of these colonies has the soil under its navigable waters and the rights of fishery for shell-fish or floating fish been severed by the letters-patent from the powers of government. In all of them, from the time of the settlement to the present day, the previous habits and usages of the colonists have been respected, and they have been accustomed to enjoy in common the benefits and advantages of the navigable waters, for the same purposes and to

While the right to hunt and take game is common, this common right cannot override the paramount right of proprietorship in the land (or bed of the stream); and if, according to the municipal law of the country or state, the riparian owner owns the bed of the stream, subject only to navigation, he has the exclusive right of fishery and has the right to exclude any other person from fishing within his boundaries. This right of the riparian owner is subject, of course, to the right of the state to regulate his use and enjoyment of the right of fishing in such manner as to protect the concomitant rights of other owners of the banks of the stream.[1]

The theory of the law is quite simple. If he owns the soil he may exclude others from it, precisely as the owner of land may prevent strangers from trespassing upon his close, even though they are in pursuit of game which they may lawfully take in places where they have a right to be. The custom exists quite universally to permit fishing in private ponds, but such custom amounts only to a license, which may be withdrawn. Such a license will, until revoked, defeat an action of trespass.[2]

Sec. 584. *Modes of Acquisition.*— There are various ways of acquiring title to personal property. Using the word "property" in the broad sense in which we have heretofore regarded it, personal property may be acquired by grant, by contract, by

the same extent that they have been used and enjoyed for centuries in England. Indeed, it could not well have been otherwise; for the men who first formed the English settlements could not have been expected to encounter the many hardships that unavoidably attended their emigration to the new world, and to people the banks of its bays and rivers, if the land under the water at their very doors was liable to immediate appropriation by another as private property; and the settler upon the fast land thereby excluded from its enjoyment, and unable to take a shell-fish from its bottom, or fasten there a stake, or even bathe in its waters, without becoming a trespasser upon the rights of another. The usage in New Jersey has, in this respect, from its original settlement, conformed to the practice of the other chartered colonies. And it would require very plain language in these letters-patent to persuade us that the public and common right of fishery in navigable waters which has been so long and so carefully guarded in England, and which was preserved in every other colony founded on the Atlantic borders, was intended, in this one instance, to be taken away."

[1] Id.; Holyoke Co. v. Lyman, 15 Wall. 500; Parker v. People, 111 Ill. 581.

[2] Marsh v. Colby, 39 Mich. 626.

descent, by testament or devise, and by forfeiture. These various modes are classed as acquisition by descent and by purchase. The only way to acquire by descent is through an intestate estate; all other modes are regarded as by purchase.

It is sometimes said that title may be gained in personal property by occupancy, but strictly speaking that cannot be.

Statutes of limitation may bar a right to bring an action, but such statutes may or may not exist in a particular state; and in the absence of some statute, no length of time will bar the recovery of one's goods by an action.

There are other modes of reclaiming property than by an action. The owner has a right to retake by his own hand, and a statute of limitation against bringing an action will not bar his right of recaption; so that as to personal property there can be no prescriptive title.

Marriage, as we have seen, merges the personality and thereby transfers the title to personal property.

It is sometimes said that title is acquired by judgment and by bankruptcy, but in a proper sense this is not true. No court of law or equity ever undertakes directly by its decrees to transfer title.

The court may decree that, according to the law and the evidence, the title *is in* one or more of the parties, or that *he shall convey* because he has agreed to, or that the property be sold; but in that case it is the conveyance or grant in the one instance, and the execution of the judicial sale in the other, which transfers the title. So that after all the two great modes of acquisition are descent and purchase; and the methods of transfer most frequently encountered by the lawyer in actual practice are by contract and by conveyance.[1]

Sec. 585. *The Function of Contracts.*— Contracts are never entered into for the mere purpose of agreeing: some other end is had in view; the contract being the mere preliminary instrument for the accomplishment of the desired end.

Primarily speaking, the only end directly accomplished by a mere contract is the imposition of an obligation or obligations upon one or both of the parties in favor of the other or

[1] Equity acts *in personam.* The law courts may restore that which belongs to a suitor, but never transfer title. See Langdell, Summary of Eq., § 40.

each;[1] but even in this sense a contract is one of the recognized methods of acquisition.[2] And it is well understood that by a mere contract an equitable interest may be acquired which a court will require to be specifically performed. In fact, it is by means of contracts, the meeting of minds in some form of proposal and acceptance, that by far the greater amount and interest in property is acquired, transferred and extinguished.

Commercial intercourse is carried on almost entirely by contract.

Persons are the actors, contracts the medium, things the subjects of traffic.

It is only by resorting to a legal fiction that a tort is allowed to be the means of transferring title, and this fiction takes the form of implying or creating a contract or promise from the acts of one party, but only at the election of the owner, as a means of facilitating a remedy.[3]

Either through the medium of a contract[4] of *purchase*, or by the law of *descent*, all property is transferred. From this the importance of the subject of contracts is apparent. In every

[1] See Anson on Contracts (2d ed.), p. 9.

[2] Mr. Justice Washington approves the statement of Powell in his work on Contracts, that "the regular effect of all contracts is on one side to acquire and on the other to part with some *property* or rights, or to abridge or to restrain natural liberty by binding the parties to do or restraining them from doing that which before they might have done or omitted." Dartmouth College Case, 4 Wheat. 656.

Mr. Smith, a lawyer distinguished for his scientific attainments in the field of jurisprudence, says: "Nearly all rights of property originate in contract, and the law of property is, therefore, in the main, but an application of the principle of contract." He adds: "This has been remarked by Mr. Bingham, the only author I know who seems to have appreciated the fact. 'Individual rights to land,' he says, 'depend upon the application of contracts, and can be sustained on no other foundation. It follows, therefore, that in all or most cases of dispute in regard to individual property in land, the questions that may arise are questions concerning contracts.' (Law of Real Property, 10.)" Law of Private Right, p. 12.

The idea is analogous to that expressed by Chief Justice Marshall, that a corporation is but a means to an end. "The power of creating a corporation, though appertaining to sovereignty, is not . . . a great substantive and independent power. . . . It is never the end for which other powers are exercised, but a means by which other objects are accomplished." McCulloch v. Maryland, 4 Wheat. 316.

[3] Andrews' Stephen's Pl., 52 *et seq.*

[4] Charters or franchises are called estates and property acquired by contract. Thompson v. People, 23 Wend. 579–84.

treatise upon personal property, real estate, sales, bailments, or bills and notes, the general features of the law of contracts are stated or assumed to be understood.[1]

These considerations render it indispensable that, at the beginning of the treatment of the law of things, the subject of contracts should be introduced and explained.

Method of Treatment.— Regarding contracts as an instrument in the accomplishment of their objects, the method pursued will be to present the general principles which apply to all contracts universally, leaving to a separate place, in logical sequence, the peculiar features of contracts of sale, insurance, bailments, common carriers, etc.

Sec. 586. *Definition.*— The term "contract" has been very frequently, and in a general way acceptably, defined.

Parsons says that a contract is an agreement between two or more parties for the doing or not doing of some specific thing.[2]

Story says a contract is a deliberate engagement between competent parties, upon a legal consideration, to do or abstain from doing some act.[3]

Agreement and *obligation* are the two important elements which appear in these definitions.[4]

[1] In confirmation of this it will be seen that the law of contracts falls under the denomination "Rights of Things" in Blackstone's Commentaries, and "Law of Personal Property" in Kent's Commentaries. Conversely, Smith's Mercantile Law treats of little else than contracts, and Parsons on Contracts is devoted almost entirely to the acquisition, enjoyment and possession of things as affected by contracts.

[2] 1 Parsons on Contracts, 5. Blackstone and Kent add the element of consideration. 2 Blk. Com. 446; 2 Kent, 449.

[3] Story on Contracts, 1. See Justus v. Lang, 42 N. Y. 493.

[4] Mr. Justice Washington in his opinion in the Dartmouth College case, says: "What is a contract? It may be defined to be a transaction between two or more persons, in which each party comes under an obligation to the other, and each reciprocally acquires a right to whatever is promised by the other. Powell on Cont. 6. Under this definition, says Mr. Powell, it is obvious that every feoffment, gift, grant, agreement, promise, etc., may be included, because in all there is a mutual consent of the minds of the parties concerned in them upon an agreement between them respecting some property or right that is the object of the stipulation. He adds that the ingredients requisite to form a contract are parties, consent, and an obligation to be created or dissolved. These must all concur, because the regular effect of all contracts is, on one side, to acquire, and on the other to part with, some property or rights;

We have seen that the Romans sometimes called laws "common agreements." From this it is easily understood how customs become a part of the contracts of individuals.

While the generic term "agreement" or "consent" is common to all conventions, the assent which makes an element of a contract must be some specific, voluntary act in relation to a specific, certain or ascertainable person, and this distinguishes the contractual agreement from any other.[1]

The essential elements of an enforceable contract are the *parties*, the *assent*, sufficient *consideration*, proper *subject-matter* and *due form*.

A contract, then, is an agreement between competent parties upon sufficient consideration, in accordance with the forms of law, by which some, or all, are bound to do or forbear to do a particular thing.[2]

That portion of the definition requiring the contract to be according to the forms of law is not generally found in definitions; but in many instances, although every other element appears, but the form is lacking, the law refuses to attach to the transaction the *vinculum juris*, the obligation or bond of the law, and such a contract is not enforceable in the courts.[3]

Contracts are primarily classified, on account of form, as *specialties* and *parol*, or *simple contracts;*[4] on account of a difference in nature, as *executed* and *executory*. These will be treated further on.

Contracts of Record, so-called.—There are other obligations that partake of the nature of contracts, such as *judgments*, *recognizances* and *statutes merchant*, as they were called in the English law, which were sometimes denominated contracts of record. These lack some of the elements of ordinary contracts, and the element of voluntary assent is present in them

or to abridge or to restrain natural liberty, by binding the parties to do, or restraining them from doing, something which before they might have done or omitted." Dartmouth College v. Woodward, 4 Wheat. 517.

[1] Anson on Contracts (2d ed.), 10; Clark v. Great N. Ry. Co., 81 Fed. Rep. 282.

[2] See the language used in the following cases: Dartmouth College v. Woodward, 4 Wheat. 656; Loaiza v. Supreme Court, 85 Cal. 11; 20 Am. St. Rep. 197; Clark v. Great N. Ry. Co., 81 Fed. Rep. 282.

[3] Anson on Contracts, 10.

[4] Rann v. Hughes, 7 T. R. 346, note.

only in a very forced and obscure way. Such obligations are not within our present treatment.[1]

The common law allows an action in form *ex contractu* upon a judgment of a court of record, because, as it is said, the law implies a contract to pay it, from the fact that there is a legal obligation to do so, irrespective of whether the transaction had its origin in tort or in agreement.[2]

Sec. 587. *Parties.*— There must be two parties, or two definite sets of parties, and this element distinguishes the political covenant which exists between the individual and the community in reference to his conduct, from those private agreements which pass under the name of contracts.[3]

There must be two independent minds. A man cannot contract with himself even in different capacities.[4]

It is essential that both parties understand who the parties

[1] Louisiana v. Mayor of New Orleans, 109 U. S. 285.

Statutes merchant and staple are frequently mentioned in English books as contracts of record. These were really acts fixing a local procedure for the enforcement of debts between merchant traders. In the time of Edward I., at Acton-Burnett a law was enacted that a creditor might bring his debtor before the mayor of York, London or Bristol, and require of him a recognizance, or writing obligatory, fixing the amount of the debt. These were enrolled or recorded, and on default, without further process, the mayor caused summary sale of the visible property of the debtor, or, in default of goods, the recognizance was sent to the chancellor, and, if nothing was found, the debtor might be imprisoned. This statute was re-enacted (13 Edw. III.), and was called the Statute of Merchants, and extended to all the large towns. The statutes staple had a different object and required the staple products, namely, leather, wool and lead, should be bought and sold only at certain places in England and Ireland and on the continent, and prohibited British merchants from exporting them. For the convenience and protection of those foreign merchants who were obliged to come into England to buy, they were not subject to the common law, but were authorized to resort to the law merchant. If both parties were aliens, a jury of foreigners was provided. An amendment of the 36 Edw. III., St. 1, 7, confined the jurisdiction of the mayor and constable under the statute to acts of debt and contract between merchants, and extended the recognizance similar to the statute of merchants. These recognizances became of record; hence, probably, the designation contracts of record.

[2] Taylor v. Root, 4 Keyes, 344, cited in dissenting opinion of Harlan, J., in Louisiana v. Mayor, *supra.*

[3] Anson on Contracts, p. 6; Canterberry v. Miller, 75 Ill. 355.

[4] Dexter v. Hall, 15 Wall. 9; Olney v. Howe, 89 Ill. 556; Eastman v. Wright, 6 Pick. 321; Michoud v. Girod, 4 How. 503.

are, and that they assent to entering into contractual relations with such parties.[1]

Persons Under Disability.— The capacity of parties to contract must generally be treated from the standpoint of *disabilities.*

All persons are presumed to be competent until the contrary is shown, and it rests upon the protesting party to allege and prove the incapacity.[2]

Incapacity may be general or particular, and may result from physical or natural causes. A disqualification is quite different from an incapacity. The former arises from a relation, the latter exists as a part of the personality.

The persons incapacitated are principally infants, married women, *non compos* persons, spendthrifts and seamen. Parties under disqualification are persons holding some special relation to a party or a subject, as agents, trustees, corporations, etc.

The limitations upon the powers of corporations to contract are sometimes treated in this connection, but not logically so, for the reason that the limitation is not, in the case of a corporation, a restriction of normal capacity, but a mere boundary of granted power.[3]

Sec. 588. *Infancy.*— The law of most countries fixes arbitrarily, but with reference to utility as shown by experience, the age of complete capacity to contract. At common law the legal age of responsibility was twenty-one years. In some states, by statute, a female is of age at eighteen.[4]

An infant may make a contract which is binding upon the adult, but in general is not bound by it, even in the case of contracts for necessaries. The obligation to pay arises not so much from stipulation as from the implied legal liability based upon the necessity of the situation and the benefit received.[5]

[1] Winchester v. Howard, 97 Mass. 304; Boston Ice Co. v. Potter, 123 Mass. 28; National Bank v. Hall, 101 U. S. 43; Taylor v. McClung, 2 Houst. (Del.) 24; Barnes v. Barrow, 61 N. Y. 39.

[2] C. & O. Ry. v. Mosby, 93 Va. 93.

[3] The subject has been treated under *Ultra Vires*, *ante*, secs. 469–70.

[4] Stevenson v. Westfall, 18 Ill. 209.

[5] It was formerly held that if an infant engaged to do a specific work by an entire contract he could not recover for part performance (McCoy v. Hoffman, 8 Cow. 84; Weeks v. Leighton, 5 N. H. 443), but these cases are overruled. The contract is not obligatory and does not bind in any particular. Medbury v. Watrous, 7 Hill, 110; Gibbney v. Hayden, 110 Mass. 137; Tenn. Mfg. Co. v. James, 91 Tenn. 154; 15 L. R. A. 211, and note.

The contracts of infants are not void because of infancy, but only voidable.[1] The distinction between *void* and *voidable* should always be borne in mind. A thing that is void is as though it never had been. A thing that is voidable may affect rights and interests.

The only contract binding on an infant is the implied contract for necessaries.[2] The only act which he is under absolute incapacity to perform is the appointment of an attorney. All other acts are voidable at his election.[3] A suit for a breach of promise to marry cannot be based on the promise of a minor.[4]

By combining the elements of a tort with the elements of a contract, the infant may become liable to an action of trover for converting another's goods to his own use after he has received them as bailee, or where he has obtained them fraudulently, with intention not to pay for them, although they are in such cases delivered to him on a contract.[5] His fraud taints the transaction and he is bound for his torts.[6]

The infant's defense on the ground of incapacity is a personal privilege, which only he or his legal representatives may take advantage of.[7] This is an exception to the rule that con-

[1] Henry v. Root, 33 N. Y. 526; Cole v. Pennoyer, 14 Ill. 158; Jackson v. King, 4 Cow. 207; 15 Am. Dec. 354, note.

[2] What are necessaries will depend on the condition and circumstances in life of the infant. An education of a character in keeping with his position is looked upon as a necessary. Price v. Sanders, 60 Ind. 310; Turner v. Gaither, 83 N. C. 357; 35 Am. Rep. 574.

[3] Cole v. Pennoyer, 14 Ill. 158. See opinion in Dexter v. Hall, 15 Wall., at p. 26. An infant may give an attorney parol authority to transact business, and such contract is voidable. Whitney v. Dutch, 4 Mass. 463.

[4] Hunt v. Peake, 5 Cow. 475.

[5] Vasse v. Smith, 6 Cranch, 226; Wallace v. Morse, 5 Hill, 391; Homer v. Thwing, 3 Pick. 493; Badger v. Phinney, 15 Mass. 359; 8 Am. Dec. 105; Mathews v. Cowan, 59 Ill. 341; Campbell v. Perkins, 8 N. Y. 440; Walker v. Gray, 1 Gray, 506. Where, however, the real injury is non-performance of contract, though this is stated as inducement to tort, there can be no recovery against the infant. Cooley's Elements of Torts, 30. The form of action does not determine the liability.

[6] Infancy is no defense to an action for seduction. Fry v. Leslie, 87 Va. 269. And an infant cannot escape liability for a tort on the ground that it was committed by the command of a parent. Scott v. Watson, 46 Me. 362; 74 Am. Dec. 457. Infants are liable for torts performed in their behalf and to which they assent. Sikes v. Johnson, 16 Mass. 389.

[7] Beardsley v. Hotchkiss, 96 N. Y. 211. The next friend of an infant, or his attorney, has the power and duty to claim rights, but not to waive them. C., R. I. & P. R. Co. v. Kennedy, 70 Ill. 364.

tracts must be mutually binding to bind either. The courts disagree as to whether a fraudulent representation as to his age is such a tort as will bind him to his contracts.[1]

Infants' Contracts, When and How Avoided.— Acts performed with judicial solemnity and of record must be avoided by procedure of equal solemnity and during his minority.[2]

Conveyances of real property by an infant cannot be affirmed or avoided until he attains his majority, although the infant may obtain the benefit of the use of the land in such cases.[3]

An infant avoiding a contract must return what he has obtained under it if he have it in hand, but if during minority he has wasted it, he may still avoid the contract and recover what he has paid on it, and the adult is without remedy.[4] It is only when he still has the consideration which he received in specie that he will be compelled to return it.[5]

This is a question of some nicety and one upon which the courts are not in harmony. Where the contract is entirely free from fraud and unfairness, it seems to be settled in England that he cannot recover back more than the difference between what he has paid and what he has received;[6] and quite a number of our decisions are in accord with the English doc-

[1] That it is not, see Nash v. Jewett, 61 Vt. 501; 4 L. R. A. 561; Carpenter v. Carpenter, 45 Ind. 142. *Contra*, cases in note to 4 L. R. A. 561. See Cooley, Elements of Torts, 30.

[2] Tucker v. Moreland, 10 Pet. 71; Breckenridge v. Ormsby, 1 J. J. Marsh. 236; 19 Am. Dec. 76.

[3] Root v. Stafford, 7 Cow. 179; Bool v. Mix, 17 Wend. 119. It may be regarded as well settled that all executory contracts and all contracts respecting property which are executed by delivery of some article may be avoided, both before and after majority, but conveyances of real property cannot be avoided before that time. Taylor on Infancy and Coverture, 69. The infant may avoid his conveyance at any time within the term of the statute of limitations after his majority. Mere inertness will not bar his right to avoid, unless accompanied by affirmative acts manifesting an intent to affirm. Sims v. Everhardt, 102 U. S. 300. And see Donovan v. Ward, 100 Mich. 601. Other cases, however, hold that a reasonable time, depending on the circumstances of each particular case, is all that is necessary for the infant's protection. See Goodnow v. Empire Lumber Co., 31 Minn. 468; 47 Am. Rep. 798. Any deliberate act by which the infant, after reaching majority, accepts a benefit or recognizes the validity of his deed, will be considered an affirmance.

[4] Riley v. Mallory, 33 Conn. 201; Todd v. Clapp, 118 Mass. 495; Engelbert v. Pritchett, 40 Neb. 195; 26 L. R. A. 177, and note; Chandler v. Simmons, 97 Mass. 508.

[5] Reynolds v. McCurry, 100 Ill. 356.

[6] Holmes v. Blogg, 8 Taunt. 508; Valentini v. Canali, 24 Q. B. D. 166.

trine,[1] but it is believed that the majority of the courts of America adopt the rule laid down above.

Ratification of Contracts Made During Infancy.— To constitute a ratification there must be a voluntary promise[2] to perform or acts unequivocally evincing an intention[3] to retain the advantages of the contract. A mere acknowledgment is not enough.[4] The distinction is made that, where the contract is executory, a new promise is necessary, but in the case of an executed contract ratification may be inferred from acts and circumstances.[5]

It has been held that the new promise must be made with knowledge that he is not already bound,[6] but the better opinion is that after he is of age there is no occasion for granting him such indulgence.[7] The rule regarding an infant's deeds of

[1] Riley v. Mallory, 33 Conn. 206; Adams v. Beall, 67 Md. 53; Johnson v. Northwestern Mut. Life Ins. Co., 56 Minn. 365.

[2] Henry v. Root, 33 N. Y. 526.

[3] Ratification is always a question of intention. Durfee v. Abbott, 61 Mich. 471.

[4] 1 Parsons on Contracts, *323. The supreme court of Minnesota has formulated the following rules as to affirmance and disaffirmance of infants' contracts, excluding contracts for necessaries: 1st. In so far as the contract is executory on the part of the infant, he may always disaffirm. 2d. If partly performed by him, but wholly executory on the part of the adult, and the minor having received no benefit, he may recover back what he has parted with. 3d. Where the contract has been wholly or partly performed on both sides, the infant may always rescind and recover back what he has paid upon restoring what he has received. 4th. On arriving at full age, he may avoid a conveyance of real estate without being required to place the grantee *in statu quo*. 5th. Where the contract has been wholly or partly performed on both sides, the infant must always restore what he has received in so far as he has it, if he sues to recover back what he has paid. 6th. The court will always grant an infant relief where the other party has been guilty of fraud and undue influence. The court points out that these rules are not in harmony with the rule in most of the states. Johnson v. Northwestern Mut. L. Ins. Co., *supra; ante*, sec. 588.

[5] Petty v. Rosseau, 94 N. C. 355.

[6] Smith v. Mayo, 9 Mass. 62; 6 Am. Dec. 28; Ford v. Phillips, 1 Pick. 202.

[7] Schouler's Dom. Rel. 590; Morse v. Wheeler, 4 Allen, 570; Anderson v. Soward, 40 Ohio St. 325. The ratification does not make the contract good from the beginning. Thornton v. Illinworth, 2 B. & C. 824; Ford v. Phillips, *supra*. And an action can be maintained on a ratification made only before the institution of proceedings. Freeman v. Nichols, 138 Mass. 313. The existence of a ratification is a question of fact to be determined as any other fact in issue. Irvine v. Irvine, 9 Wall. 617; Lynch v. Johnson, 109 Mich. 640. A few states, adopting the English act known as Lord Tenterden's act, provide that no action can be maintained unless the ratification is in writing.

realty is stated in the preceding section. Like his other contracts, except such as are for necessaries, his deeds are not void but voidable, and are of full force and effect unless disaffirmed.

Sec. 589. *Seamen.*— There is one class of citizens against whom there seems to be recognized a distinction not applicable to another class of persons, namely, seamen. Partly on account of the well-known improvidence of seafaring men, and partly on the ground of what is deemed an essential protection to the interests of maritime owners, the law holds the class known as seamen, notwithstanding they may be *sui juris* and adult, under a sort of disability in reference to contracts, and requires that persons dealing with them shall exercise a greater degree of fairness, and require of the seamen a less degree of diligence than is required of most adults.

On the other hand, the seaman's contract is more nearly allied to the old doctrine of master and servant or servitude than any other contract known to our law.[1]

Sec. 590. *Married Women.*— Sufficient has been heretofore said upon the subject of the effect of marriage on the ability of a woman to contract, and her disability in this regard may be left by reference to what has preceded.

Modern statutes in some states render both the husband and wife liable for contracts entered into by either for what are termed family expenses,[2] and in such cases it is now quite generally held that, although the original contract may have been oral, either has the right to change the form of the contract so as to take the case out of the statute of limitation,[3] and both are bound as though assenting, or even in the case of a refusal to assent; but in the latter case it has been held that the supplies must be necessaries.[4]

[1] Parsons on Contracts, ch. XIX, sec. 3. Quite an exhaustive discussion of seamen's contracts is found in Smith's Merc. Law, ch. IX. See Robertson v. Baldwin, 165 U. S. 275.

[2] Iowa, Illinois, Oregon and Missouri have such statutes. For construction, see Lawrence v. Simmons, 24 Iowa, 80; Smedley v. Felt, 41 Iowa, 588; Von Platen v. Krueger, 11 Ill. App. 627; Illingsworth v. Burley, 33 Ill. App. 394; Bedsworth v. Bowman, 104 Mo. 44; Dodd v. St. John, 22 Oreg. 250; 15 L. R. A. 717, and note.

[3] Smedley v. Felt, *supra.*

[4] Devendorf v. Emmons, 66 Iowa, 698; Haggard v. Holmes, 90 Iowa, 308.

Sec. 591. *Persons Non Compos Mentis.*— The term "*non compos mentis*" is frequently used by courts and writers as including only lunatics or madmen. It is properly used to include all persons of unsound mind whereby the understanding is lost or impaired,[1] including insane persons and persons reduced in understanding by temporary drunkenness, sickness or any decay of the mind.

Non compos mentis, in the eye of the law, is that state of the mental faculties which renders the subject incapable of acting rationally in the ordinary affairs of life, and to be effectual as incapacity to contract it must render the person incapable of understanding the effect and consequences of his act. It need not be such a total obliteration of the faculties as prevents the party from reasoning upon all subjects, nor yet the want of power at all times, upon correct premises, to arrive at accurate conclusions, but that want of power which prevents a person from reasoning or understanding the relation of cause and effect.[2]

It is well understood that in many forms of insanity the capacity to transact business is entirely unaffected. In such cases the insanity cannot be set up to avoid a contract.[3] It is also common for lunatics to have lucid intervals, and the law has always held that a contract entered into during such a period is valid.

Every one is presumed to be sane until the contrary is shown,[4] but derangement or imbecility once shown is presumed to continue until the contrary appears.[5]

Extent of Disability.— The old English doctrine promulgated by Lord Coke in the Beverly case, that a man could not be heard to stultify himself by pleading his own mental incapacity, is not followed in this country or in England.[6]

[1] The distinction between the incapacity on account of infancy and insanity is clearly pointed out in Dexter v. Hall, 15 Wall. 9.

[2] Searle v. Galbraith, 63 Ill. 272; Bliss v. Com. & P. R. Co., 24 Vt. 24; Emery v. Hoyt, 46 Ill. 260.

[3] Searle v. Galbraith, *supra*.

[4] See Pomeroy's Case, 117 Mass. 143; Guitig v. People, 66 Ind. 94.

[5] 1 Greenleaf, Ev., sec. 42; Emery v. Hoyt, 46 Ill. 258; Trish v. Newell, 62 Ill. 200.

[6] Gore v. Gibson, 13 M. & W. 623; Owings' Case, 1 Bland, 370; 17 Am. Dec. 311; Jackson v. King, 4 Cow. 207; 15 Am. Dec. 354; Dexter v. Hall, 15 Wall. 9.

Mere weakness of mind will not avoid a contract, unless it amounts to an absolute incapacity to understand;[1] but when coupled with inadequacy of consideration, or other evidence of fraud, imposition or over-reaching, feebleness may itself lessen the necessity for full and complete evidence of fraud.[2]

Contracts, whether Void or Voidable.— There is much contrariety of opinion as to whether contracts of persons *non compos mentis* are void or voidable merely. There is much authority in favor of the rule that the *deed* or *other contract* of an insane person is voidable rather than void.[3]

As to conveyances, *i. e.*, deeds, the weight of authority is in favor of the rule that they are absolutely void.[4] The confusion in the decisions is directly traceable to an error in Blackstone in this respect, he failing to distinguish between deeds and ordinary contracts. Mr. Justice Strong, in *Dexter v. Hall*, points out the error, the true rule, and the reasons for the distinction.[5]

The transfer of negotiable paper by an insane person is held void in Michigan.[6]

The distinction between deeds of conveyance and simple contracts, and between the latter when executed or executory, must be constantly regarded. Where the contract was made in the ordinary course of business, and is fair and reasonable, and has been fully executed, and the enfeebled mental condition of the one party was unknown to the other, and the parties cannot be put *in statu quo*, there can be no relief.[7] Those

[1] Graham v. Castor, 55 Ind. 559.

[2] C. & O. Ry. v. Mosby, 93 Va. 93.

[3] Ingraham v. Baldwin, 9 N. Y. 45; Chew v. Bank of B., 14 Md. 299; Currier v. Sears, 4 Allen, 336; Hovey v. Hobson, 53 Me. 453; Breckinridge v. Ormsby, 1 J. J. Marsh. 236; 19 Am. Dec. 71; Nichol v. Thomas, 53 Ind. 42; Fitzgerald v. Reed, 9 S. & M. 94; Elston v. Jasper, 45 Tex. 409; Eaton v. Eaton, 37 N. J. L. 108; Allen v. Berryhill, 27 Iowa, 540.

[4] Van Deusen v. Sweet, 51 N. Y. 578; Dexter v. Hall, 15 Wall. 9.

[5] His reasoning is, how can there be a contract without any assent, and how can there be an assent for any purpose without capacity? 15 Wall. 2. See note in 15 Am. Dec. 365. In some states it is provided by statute that after an inquisition in which insanity is found, contracts of the person shall be absolutely void. So a bank will be liable for paying the check of one so adjudged. Am. Trust, etc. Co. v. Boone, 29 S. E. Rep. 182; 40 L. R. A. 250. Before such finding the contracts of such a one are voidable only. Scanlon v. Cobb, 85 Ill. 296; Burnham v. Kidwell, 113 Ill. 429; Runnells v. Gerner, 80 Mo. 474.

[6] Hannah v. Sheldon, 20 Mich. 278.

[7] Wilder v. Weakley's Estate, 34 Ind. 181; Winback v. First Nat. Bank.

courts holding the party liable to respond base the liability not so much on the contract as upon the benefit that he cannot restore. It is the benefit received which entails the liability.[1]

Knowledge or information which would lead one to believe in the incapacity may constitute an important element in the case. As to contracts for necessaries, persons *non compos mentis* stand upon like grounds with infants,[2] and while they are not liable for crimes, they are liable for their torts.

Sec. 592. *Intoxicated Persons.*— The rule formerly was that intoxication would not relieve.[3] Knowingly dealing with a drunken person raises the presumption of fraud, and it devolves upon the other party to show good faith and a contract reasonably beneficial to the intoxicated person.[4]

To render a contract voidable, the party must be so completely intoxicated as to drown the reason, memory and judgment.[5]

Sec. 593. *Sickness.*— The extent to which illness must go, in order to destroy the capacity to consent, is a question upon which no definite rule can be given. It is clear that the temporary disability should be at least equal to the disability of persons *non compos mentis.*

It is well understood that extreme physical debility may leave unimpaired the faculties of the mind, but in most cases it would require clear proof of mental capacity, where the patient was too weak to be able to take any physical part in the execution of a contract, unless his sickness was in the nature of paralysis.[6]

97 Pa. St. 509; Burnham v. Kidwell, 113 Ill. 425; Eaton v. Eaton, 37 N. J. L. 108.

[1] Lincoln v. Buckmaster, 32 Vt. 652; Matthiessen v. McMahon, 38 N. J. L. 536.

[2] They may contract for necessaries suitable to their condition in life. And in interpreting the word "necessaries" courts will be more liberal with regard to contracts of individuals of this unfortunate class than with persons incapacitated merely by reason of lack of age. Sawyer v. Lufkin, 56 Me. 308.

[3] 2 Kent, 573.

[4] Joest v. Williams, 42 Ind. 565; 13 Am. Rep. 377; Gore v. Gibson, 13 M. & W. 623.

[5] Shackleton v. Sebree, 86 Ill. 616; Bates v. Ball, 72 Ill. 108; Johns v. Fretchey, 39 Md. 258; Longhead v. Coombs, etc. Com. Co., 2 Mo. App. 1017.

[6] See Wilson v. Bigger, 7 Watts & S. 111.

Illiteracy is by no means an incapacity to contract. Proof of illiteracy may affect the burden of proof somewhat, but only bears on the question of assent.[1]

Sec. 594. *Aliens.*— The question of alienage goes to the right to hold and transmit property under the rules of international law. It is not analogous to personal incapacity.

Sec. 595. *Assent of the Parties.*— Before there can be a contract there must be a voluntary meeting of minds on all the terms of the contract.[2]

Proposal and Acceptance.— It is said that the assent of parties is brought about by some form of proposal and acceptance, but this expression is rather more formal than natural, because in the case of implied contracts, whether they arise from meritorious or tortious acts, it is sufficient to understand that the assent arises from conduct to which the law attaches the obligations and consequences of a contract.[3]

It is never required that assent of the parties be in express words, but it is necessary that the assent be communicated by each to the other.[4] If services are performed by one man for another under circumstances showing that he requested and accepted the same, the transaction is treated as a contract. Thus, if he stand by and see another performing beneficial labor for him, the law will generally infer a promise to pay the reasonable value of the services.[5]

If, however, the labor is done at another's request, the mere fact that it benefits a third person who is cognizant of the labor and the benefit does not imply a promise.[6] Mere benefit will not raise an *assumpsit*, *i. e.*, a promise.[7]

If one makes a proposition to another which is acted upon and the matters proposed be accomplished, the acceptance by acts is sufficient.[8] But a proposal in form that, unless the person to whom the offer is made acts or declines to act, the offering party will consider a contract to exist, will not suffice.

There must be a real offer, however, before another party

[1] Selden v. Myers, 20 How. 506.

[2] Dexter v. Hall, 15 Wall. 9; Olney v. Howe, 89 Ill. 557; Hartford & N. H. Ry. Co. v. Jackson, 24 Conn. 517.

[3] Bradbury v. Helms, 92 Ill. 35; Andrews' Stephen's Pl., §§ 30, 31, 33.

[4] Frith v. Lawrence, 1 Paige Ch. 434.

[5] Huck v. Flentye, 80 Ill. 261; De Wolf v. City of Chicago, 26 Ill. 446.

[6] Walker v. Brown, 28 Ill. 378.

[7] Boston Ice Co. v. Potter, 123 Mass. 28. See "Consideration."

[8] Kinder v. Brink, McCormick & Co., 82 Ill. 376.

has the right to act. A mere advertisement soliciting business and stating the terms will not generally constitute a contract, but only an invitation to contract.[1]

Rewards.— If, however, the advertisement is clearly intended to be acted upon without further negotiations, the performance of a condition will constitute an acceptance.[2]

Acceptance.— The acceptance of a proposal must be upon the identical terms of the proposal.[3] The minds of the parties must meet on the same subject-matter in the same sense.[4]

A partial acceptance, or acceptance on condition, or which varies in any particular the terms, constitutes a rejection and a new proposal.[5]

Assent Where Parties Are Not in Direct Personal Communication.— In determining the assent to a contract conducted by correspondence, it is apparent from the general proposition that a proposal of an offer may be withdrawn at any time before acceptance, that there must be a time fixed by law as a point when the contract is consummated. This time may not always coincide with the state of the mind of either or both the parties.[6] Much of what is said in reference to this subject will apply to contracts in general.

Where an offer is made by mail, it may be accepted by posting an answer within a reasonable time, or in the manner indicated by the proposal, or by communicating in some customary mode.[7]

[1] Moulton v. Kershaw, 59 Wis. 315; 48 Am. Rep. 516; McConnell v. Brillhart, 17 Ill. 361; Howe v. O'Malley, 1 Humph. 287; 3 Am. Dec. 693; Anson on Contracts (2d ed.), Knowlton, p. 21.

[2] The offer of a reward may be withdrawn, like any other offer, before rights have accrued under it. Shuey v. United States, 92 U. S. 73. If the terms are complied with in ignorance of the reward, the courts are not in harmony as to the right to recover. That there may be a recovery, see Russell v. Stewart, 44 Vt. 170. *Contra*, Howland v. Lounds, 51 N. Y. 604.

[3] Estes v. Furlong, 59 Ill. 300; Virginia Hot Springs Co. v. Harrison, 93 Va. 569

[4] Hazzard v. New England Ins. Co., 1 Sumn. 282; Gill Mfg. Co. v. Hurd, 18 Fed. Rep. 673; Peabody v. Dewey, 153 Ill. 657. Unless accepted on the terms on which it is made an offer imposes no obligation. Tilley v. Chicago, 103 U. S. 155.

[5] First Nat. Bank v. Hale, 101 U. S. 43; Eliason v. Henshaw, 4 Wheat. 225.

[6] Adams v. Lindsell, 1 B. & A. 681.

[7] Maclay v. Harvey, 90 Ill. 525; 32 Am. Rep. 35, and note; Dana v. Short, 81 Ill. 468. Just what effect the postal regulations allowing the sender of a letter to recall it before delivery will have upon this proposition can only be surmised.

If the letter conveying the offer is delayed in the mails, without the fault of the person to whom the offer is made, he may nevertheless accept the offer.[1]

If the acceptance is duly posted, but is delayed or lost, and consequently never reaches the person making the offer, the contract is complete, if the usual mode of conveyance has been resorted to, and the loss is without fault of the person accepting.[2]

The acceptance completes the contract.[3]

Fiction as to Time of Assent.— The necessity for adopting some point where the contract is complete, irrespective of the actual state of mind, constitutes the essential point of distinction between the rule governing contracts by letter or telegram and contracts of parties while in direct communication. The distinction may be stated thus: Where the parties are in immediate communication a proposal may be revoked without notice;[4] but where the proposal is by letter or telegram, the notice of a recall or revocation must reach the person to whom the offer is made before acceptance.[5]

The whole doctrine of meeting of minds by an acceptance of a proposal after a lapse of time rests upon the fiction that the offer is renewed during every moment of time.[6] No matter how much or how little time has intervened between the offer and acceptance, the offer speaks as of the moment of acceptance.[7] Where the parties reside in different states the contract is made where it is accepted, and the law of the place of ac-

[1] Maclay v. Harvey, *supra*, note in 32 Am. Rep. 51; Macktier v. Frith, 6 Wend. 103; Averill v. Hodge, 12 Conn. 438.

[2] Maclay v. Harvey, *supra*, note in 32 Am. Rep. 40; Vassar v. Camp, 11 N. Y. 441.

[3] Anson on Contracts, 11. The rules which obtain in the English courts are very tersely stated by Holland's Jur., p. 230.

[4] Cooke v. Oxley, 3 Term Rep. 653; Dickerson v. Dodd, 2 Ch. Div. 463.

[5] The leading English case is Cooke v. Oxley, 3 Term Rep. 653. Story criticises the case. Benjamin, in his work on Sales, upholds it, and the rule established by the case is generally upheld. Dickinson v. Dodds, 2 Ch. Div. 463.

[6] Anson on Contracts; Adams v. Linsdell, 1 B. & Ald. 681.

[7] Brauer v. Shaw, 168 Mass. 198, disregarding McCullough v. Insurance Co., 1 Pick. 278; Taylor v. Insurance Co., 9 How. 390; Patrick v. Bowman, 149 U. S. 411; Wheat v. Cross, 31 Md. 99; Sanford v. Howard, 29 Ala. 684; Holtzman v. Millaudin, 18 La. Ann. 25. Telegrams are, of course, within the rule. Brauer v. Shaw, *supra;* Cowan v. O'Connor, 2 Q. B. D. 640.

ceptance governs.[1] Where goods are ordered by mail, shipping the goods will be counted an acceptance.[2]

Sec. 596. *Assent Must be Real and Voluntary.*— To affirm that assent must result from the intelligent volition of the mind is but another way of asserting that there must be an assent.

Whatever misleads the mind or destroys the volition prevents the reality of the apparent assent.

The law recognizes several distinct modes by which this assent is prevented, and their constant recurrence with similar typical incidents has occasioned their treatment under specific designations or heads, such as fraud, duress, mistake, etc.

A contract entered into through mistake or induced by misrepresentation or fraud or compelled by duress or undue influence is considered as lacking the quality of assent.

Mutual mistake[3] as to the subject-matter,[4] the consideration or any of the terms of a contract[5] prevents the meeting of minds.

In cases of mutual mistake neither party is guilty of any wrong towards the other. There is simply a lack of a meeting of the minds upon the same subject and in the same sense.

A mistake in order to be effectual must relate to a material fact involved, and go to the essence of the contract.[6] Mere ignorance of collateral facts which affect value or utility do not constitute such a mistake of fact as will avoid the contract.[7]

Mistake of Law.— It is a maxim that "*ignorance* of the law excuses no one."[8] But this maxim in its terms and in its effect

[1] State Mut. Ins. Co. v. Brinker Stove Co., 61 Ark. 1; 29 L. R. A. 712.

[2] Crook v. Cowan, 64 N. C. 743.

[3] Park Bros. Co. v. Blodgett & Co., 64 Conn. 32; Nevius v. Dunlap, 33 N. Y. 676. The mistake must be mutual. Belt v. Mehen, 2 Cal. 159; Page v. Higgins, 150 Mass. 27; Hearne v. Insurance Co., 20 Wall. 488. That is, each must suppose that the other intended a thing or condition different from what he, the latter, actually had in mind. As where the contract was for wool to arrive on the ship Peerless, and there were two ships by that name, one party meaning one, the other the other, there was no contract. Raffles v. Wichelhaus, 2 H. & C. 906, stated in Anson on Contracts, *130.

[4] Anson on Contracts, 166–67; Gibson v. Pelkie, 37 Mich. 380; Wood v. Boynton, 64 Wis. 265.

[5] Rupley v. Daggett, 74 Ill. 351; Peabody v. Dewey, 153 Ill. 657.

[6] Hunt v. Rousmaniere, 1 Pet. 1.

[7] In Wood v. Boynton, *supra*, a jeweler bought a stone of a woman, paying one dollar for it. It proved to be a valuable diamond. Neither knew its character or value, but there could be no question as to identity, and it was held that the sale was binding. *Cf.* Sherwood v. Walker, 66 Mich. 568.

[8] Broom, Max. (8th ed.) 253, and

is distinguishable from a *mistake* of law, that is, where one or both parties are honestly mistaken as to the legal consequences and effect of their act.[1] Perhaps no case can be found where it is squarely held that a mere mistake of law unmixed with misrepresentation, fraud or other circumstances is a good ground for relief;[2] but relief is frequently granted on this ground where there is some unfairness of treatment or a fiduciary relationship exists between the parties.[3]

Misrepresentation as to Law.— A pure mistake of law is distinguishable from an intentional misstatement as to the law or an innocent misrepresentation as to what it is. One amounts to fraud, the other is misrepresentation; but in either case relief may be had on the ground of mistake of law.[4] All courts hold that the proof of fraud, mistake or misrepresentation to annul or change a written contract must be clear.[5]

Misrepresentation Differs from Mistake and Fraud.— In misrepresentation there is not necessarily that mutuality of mis-

note. See Hunt v. Rousmaniere, 1 Pet. 1. This is a leading case to which most subsequent cases refer, and it should be carefully read.

[1] Underwood v. Brockman, 4 Dana, 309; 29 Am. Dec. 407. In Berry v. Am. Cent. Ins. Co., 132 N. Y. 49, Justice Brown says there can be no relief solely on a mistake of law, but a misrepresentation as to law is ground for relief.

[2] Griswold v. Hazard, 141 U. S. 26.

[3] Haveland v. Willets, 141 N. Y. 35.

[4] Landsdown v. Landsdown, Mosley, 364; Champlin v. Layton, 18 Wend. 407; Berry v. Am. Cent. Ins. Co., *supra*. Mr. Lemuel A. Welles, in an able article on "Mistake of Law" in The Counsellor, says: "A case which has gone farther by way of dicta than any other in this country is Park Bros. & Co. (Limited) v. The Blodgett & Clapp Co., 64 Conn. 32. Judge Torrance in that case said: 'The distinction between mistakes of law and mistakes of fact is certainly recognized in the text-books and decisions, and, to a certain extent, is a valid distinction; but it is not practically so important as it is often represented to be,' quoting Markby, Elements of Law, secs. 268, 269. 'The distinction between errors of law and errors of fact, though very emphatically announced, has had very little practical effect upon the decisions of the courts. The distinction is not ignored, and it may have had some influence, but it is always mixed up with other considerations which not infrequently outweigh it. The distinction between error of law and error of fact is therefore probably of much less importance than is commonly supposed. There is some satisfaction in this because the grounds upon which the distinction is made have never been clearly stated.' . . . 'It is no longer true, if it ever was, that a mistake of law is no ground for relief in any case.'"

[5] Palmer v. Insurance Co., 54 Conn. 501; Park Bros. Co. v. Blodgett Co., 64 id. 31; Adams v. Robertson, 37 Ill. 45.

apprehension, because one relies upon what the other states. Strictly speaking, misrepresentation is innocent, and this disguishes it from fraud, because, the moment the element of intentional deceit enters, the character of the act changes from mere mistake to misrepresentation or fraud.[1]

A misrepresentation is a statement as to the existence of a past or a present fact, and to be effectual should relate to a material fact.[2]

In cases where one party has much the better means of knowing, and where the other party has the right to rely upon the information, the party assuming to represent must be held to warrant the truth of his assertions, even though innocently made.[3]

Fraud.— Assent induced by fraud renders the contract voidable. To constitute fraud between the parties to a contract there must be some active deception by statements known to be false,[4] or by *suppressio veri*,[5] or affirming as true what is not known to be true, even though believed to be so.[6] Mere inaction, in the absence of a duty to act, cannot constitute fraud, and to be effectual as a means of relieving the acts or advices relied upon must actually deceive and cause him to act.[7]

Fraud must be also a false representation as to a past or existing thing.[8] A matter of opinion as to present value or the expression of future intention is not such a fact as may be relied upon as a fraud.[9]

[1] Moore v. Copp, 119 Cal. 429. See Champlin v. Layton, 18 Wend. 407.

[2] Orr et al. v. Goodloe, 93 Va. 263.

[3] Anson on Contracts, 143; Grymm v. Byrd, 32 Gratt. 300. See Smith v. Richards, 13 Pet. 26 (a leading case); Martin v. Jordan, 60 Me. 531; Witherwax v. Riddle, 121 Ill. 140.

[4] Cochran v. Cummings, 4 Dall. 250; Cooley, Elements of Torts, 202.

[5] Kidney v. Stoddard, 7 Met. 252; Allen v. Addington, 7 Wend. 9; Croyle v. Moses, 90 Pa. St. 250.

[6] Braley v. Powers (Me.), 42 Atl. Rep. 362.

[7] The law imposes on a party the duty of imparting the facts regarding the subject-matter which are peculiarly within his knowledge. Thus, if one sells unwholesome provisions, knowing them to be so, but without disclosing their condition, this is a fraud. Emerson v. Brigham, 10 Mass. 197; 6 Am. Dec. 109. In French v. Vining, 102 Mass. 132; 3 Am. Rep. 440, the doctrine was applied to a case where poisoned food had been sold to be fed to domestic animals. And if the seller knows the purpose for which an article is bought and that it is wholly unfit for the purpose by reason of a hidden defect, this also is a fraud. Maynard v. Maynard, 49 Vt. 297.

[8] Fish v. Cleland, 33 Ill. 240; Gage v. Lewis, 68 Ill. 617. See Orr v. Goodloe, *supra;* and see next note.

[9] Pasley v. Freeman, 3 Term R. 51;

Fraud in Consideration Distinguished from Fraud in Obtaining Assent.— The law distinguishes between fraud in the transaction out of which a contract grows, or, as it is called, fraud in the consideration, and fraud in reference to the assent or execution of a contract. The former relates to the amount, existence or quality of the subject of the contract; the latter relates to the contract itself, and is commonly called fraud and circumvention in the execution which leads one to enter into a contract different from what he supposed he was doing.

The statutes of some states render void contracts procured by circumvention — even a negotiable note held by an innocent person; but when so held it is too late to claim that fraud was used in procuring the agreement.[1]

Negligence in assent is an important consideration where it arises between third parties, and generally relief cannot be obtained unless the complaining party has been ordinarily prudent.[2]

Ellis v. Andrews, 56 N. Y. 83; 15 Am. Rep. 79. Thus where, for the purpose of obtaining a subscription, a promise was made that a branch road would be built, this was held but the expression of an existing intention. See Watkins v. West Wytheville L. & I. Co., 92 Va. 1; also New Brunswick R. Co. v. Conybeare, 9 H. L. Cas. 711. But the line of demarcation is very shadowy. In Rorer Iron Co. v. Trout, 83 Va. 397, the lessees represented to the lessors that they were about entering upon extensive operations in mining and marketing ores; that they had the means at hand for successfully working a force capable of mining and transporting such a quantity of ore daily that the royalty thereon would, at ten cents per ton, yield the owners of the property not less than $10 per day, collectible every night, if desired, and promising to commence operations in sixty days. Upon these representations they secured a lease for twenty years, but utterly failed to comply with their promises. The learned judge writing the opinion says: "The false representations thus made by the lessees, and by means of which an unconscionable advantage was taken of the lessors, were of matters peculiarly within the knowledge of the lessees and on which the lessors relied and acted as they had a right to do, and they were deceived and injured by them, because they were false. These false representations were not held out as opinions merely, but were positive affirmations, especially adapted to the end in view, which was to obtain the lease of the mining privileges aforesaid." And the court held that relief could be granted. Doubt has been thrown on the correctness of this decision by a writer in 2 Va. Law Register, who asks: "Were these representations of existing facts, or were they such expressions of opinion as would come under an exception to the rule?"

[1] Day v. Union India Rubber Co., 20 How. 216; Douglass v. Matting, 29 Iowa, 498; 4 Am. Rep. 238, and valuable note; Chapman v. Rose, 56 N. Y. 137; 15 Am. Rep. 401; Sims v. Bice, 67 Ill. 88; Swannell v. Watson, 71 Ill. 456.

[2] See 4 Am. Rep. 238, and note; In-

As affecting the validity of a contract between the immediate parties: "Every contracting party has an absolute right to rely on the express statements of an existing fact, the truth of which is known to the opposite party and unknown to him, as the basis of a mutual engagement; and he is under no obligation to investigate and verify statements to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith."[1]

But where the rights of third persons are affected, or where, as in the case of negotiable paper, it is apparent that they may be affected, by a contract, a greater degree of care is required, and a party trusting to the statements or representations or

surance Co. v. Norwood, 69 Fed. Rep. 81. The tendency of some courts to give this rule a wide application *between the parties* has been the subject of severe animadversion. The views of the English courts may be gathered from Directors, etc. of Cent. etc. R. Co. v. Kisch, L. R. 2 H. L. 99, where Lord Chelmsford used the following language: "When once it is established that there has been any fraudulent misrepresentation or wilful concealment by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper inquiry. He has a right to retort upon the objector: 'You at least, who have stated what is untrue, or have concealed the truth for the purpose of drawing me into a contract, cannot accuse me of want of caution because I relied implicitly on your fairness and honesty.'" And see Aaron's Reefs v. Twiss (1896), App. Cas. 273; Cottrill v. Krum, 100 Mo. 397; 18 Am. St. Rep. 549.

[1] Cooley's Elements of Torts, 198, quoting from Mead v. Bunn, 32 N. Y. 275, 280. "If one can read his contract, his failure to do so is such gross negligence that it will estop him from denying it, unless he has been dissuaded from reading it by some trick or artifice practiced by the opposite party. If he cannot read it, it is as much his duty to procure some reliable person to read and explain it to him before he signs it as it would be to read it before he signed it if he were able to do so; and his failure to obtain a reading and explanation of it is such gross negligence as will estop him from avoiding it on the ground that he was ignorant of its contents. This is a just and salutary rule, because the other contracting party universally acts and changes his position on the faith of the contract; and it would be a gross fraud upon him to permit one, who has received the benefits of the agreement in silence, to escape from its burdens by proof that he did not know and did not inquire what these burdens were when he assumed them. Upton v. Tribilcock, 91 U. S. 45, 50; Fuller v. Insurance Co., 36 Wis. 599, 603; Sanger v. Dun, 47 Wis. 615, 620; 3 N. W. Rep. 388; Albrecht v. Railroad Co., 87 Wis. 105, 109; 58 N. W. Rep. 72; Wheaton v. Fay, 62 N. Y. 275, 283; Germania Fire Ins. Co. v. Memphis & C. R. Co., 72 N. Y. 90, 93; Hill v. Railroad Co., 73 N. Y. 351–353; authorities cited in Insurance Co. v. Norwood, 32 U. S. App. 490, 507; 16 C. C. A. 136, 145; and 69 Fed. Rep. 71, 80." Chicago, St. P., M. & O. Ry. Co. v. Belliwith, 83 Fed. Rep. 437.

promises of another party as to any matter connected with the consideration or execution of the contract must take the risk of the trust he reposes or suffer for his negligence;[1] for it is a maxim of the law that, of two innocent persons, the one whose act contributed to the loss must suffer,[2] and in such cases any degree of negligence gives the stranger the advantage.[3]

Intelligent judgment must be exercised in applying the law in such cases. Concealment and artifice are the weapons of fraud, and what may appear quite plain after discovery may deceive the unwary and unsuspecting.[4]

Effect of Fraud.— The effect of fraud upon a transaction differs according to (*a*) the nature of the contract, (*b*) the tribunal, (*c*) the nature of the fraud. As to simple (*i. e.*, unsealed or oral) contracts, fraud in either the consideration or the execution will defeat it, and if followed by damage will give rise to an action for deceit. Specific performance will be refused in equity. As to sealed contracts, in courts of law only fraud in the execution will defeat them, while in courts of equity fraud in any material particular will be ground for cancellation or will defeat specific performance.[5]

One who hears and acts upon statements made to another cannot claim to have been defrauded if the statements prove false. There is lacking in such a case the essential element of privity. So it is held that an agent who acts on false representations made to him with the design of affecting the acts of his principal is without remedy.[6] But in the case of representations made in a public manner and to induce individuals to act upon them, whoever receives, relies and acts upon these in the

[1] 4 Am. Rep. 238, note. A plea or claim of fraud in the execution of a contract or note necessarily involves the fact of due care on the person claiming the defense. Ross v. Doland, 29 Ohio St. 473; Butler v. Carns, 37 Wis. 61; Homes v. Hale, 71 Ill. 552.

[2] Broom, Max. (8th ed.) 715; East Ind. Co. v. Tritton, 3 B. & C. 289; Leach v. Nichols, 55 Ill. 273; De Camp v. Hamma, 29 Ohio St. 467; Sim v. Pyle, 84 Ill. 271.

[3] Daniels, Neg. Inst., sec. 850; Benj. Ch. Dig., Bills and Notes, art. 52.

[4] See Buckner v. Calcoke, 28 Miss. 467. "Every case involving the question of negligence in not discovering a fraud must be considered on all its facts, and very great apparent negligence may be excused where prudence has been overcome by new, peculiar or very gross frauds." Cooley's Elements of Torts, 199; Brady v. Finn, 162 Mass. 260.

[5] Todd v. Mitchell, 67 Ill. App. 84; Windell v. Hurlbut, 115 Ill. 403; George v. Tate, 102 U. S. 564.

[6] Wells v. Cook, 16 Ohio St. 67; 88 Am. Dec. 436.

manner intended, and is deceived to his damage, has a right to treat them as frauds upon him.[1]

Fraud in fiduciary relations as a ground for rescinding a contract is cognizable only in courts having equity powers, and it being one of the great heads of equity jurisdiction, the subject will be retained for treatment under fraud as a ground for jurisdiction in equity.

Fraud affecting third persons always relates to the transfer or incumbrance of property, and in that phase naturally appears with sales, bailments, mortgages, deeds, wills, etc.

Duress is the term of the law meant to express the unwilling extortion from one of his apparent assent to a transaction.[2]

If this is accomplished by threatened or by actual violence to the person, or those standing in close domestic relations, as wife, parent, or child, or by wilful and unlawful imprisonment of the person,[3] and perhaps the wilful and unlawful detaining of personal property,[4] the contract will be void. A lawful imprisonment does not constitute duress.[5] But an arrest constitutes duress if it be without lawful authority, though for a just cause.[6]

Threats constitute duress where they cause reasonable apprehension of loss of life or of some great bodily harm,[7] or of imprisonment.[8]

Undue Influence.— One party may occupy such a position or

[1] Courts of law and equity have frequently given relief where parties have been defrauded by misrepresentations contained in prospectuses of corporations. Taylor v. Ashton, 11 M. & W. 401; Booth v. Wonderly, 36 N. J. 250; Paddock v. Fletcher, 42 Vt. 389. And see Fisher v. Budlong, 10 R. I. 525, where a party was induced to insure by a false representation contained in a prospectus issued by an officer of an insurance company.

[2] Duress is a species of fraud in which compulsion in some form takes the place of deception in accomplishing the injury. Cooley's Elements of Torts, 205.

[3] Anson on Contracts, p. 156. A threat to cause the arrest of one for an offense of which he is innocent is duress, though the one making the threat believed in the other's guilt. Giddings v. Iowa Bank, 104 Iowa, 676.

[4] Spaids v. Barrett, 57 Ill. 289; 11 Am. Rep. 10. Some states do not recognize duress of goods.

[5] McCormick H. Mach. Co. v. Miller, — Neb. —, 74 N. W. Rep. 1061; Wilcox v. Howland, 23 Pick. 167. When goods are unlawfully detained under a pretended lien or a fraudulent attachment, money paid to release them may be recovered back. Spaids v. Barrett, 57 Ill. 289; 11 Am. Rep. 10.

[6] Thompson v. Lockwood, 15 Johns. 256.

[7] Baker v. Morton, 12 Wall. 150. They must be such as deprived the party seeking relief of free will in entering into the contract. Kennedy v. Roberts, 105 Iowa, 521.

[8] Harmon v. Harmon, 61 Me. 227;

sustain such a relation to the other as to be able without any actual physical force to so far control the will of the other as to really constitute an overmastery of the mind and render him unable to resist his importunities.[1]

The law recognizes that to a certain extent in the relations of husband and wife, parent and child, attorney and client, nurse with the sick, or one in charge of an imbecile, the former, in each instance, has a measurable power over the mind of the latter, and it requires that no undue or excessive importunity shall be made the means of securing a beneficial contract or conveyance; and the excessive exercise of this natural control is called undue influence.[2] Contracts entered into because of it do not bind. The usury laws recognize that the debtor is measurably within the power of the creditor.[3]

Not every pleading, urging or cajoling will amount to undue influence. The act is so nearly akin to duress that it differs only in the quality of the force. The importunity must amount to coercion destroying the freedom of mind, so that the act is performed rather from motive of fear or helplessness.[4]

To avoid a will or deed it must be shown that the free agency of the party executing the instrument was destroyed.[5]

Mere appeals to the affections or the impulse of gratitude, however importunate, are not sufficient.[6]

Sec. 597. *Form of Assent.—As to simple parol contracts*, that is, all contracts, whether written or oral,[7] but which are

City Nat. Bank v. Kusworm, 26 L. R. A. 48, note.

[1] By undue influence is meant that control which one obtains over another, whereby the other is made to do, in important affairs, what of his own free will he would not do. Martin v. Teague, 2 Speers, 260; Mitchell v. Mitchell, 43 Minn. 73; Hester v. Hester, 122 Pa. St. 239.

[2] Allore v. Jewell, 94 U. S. 511; Anderson, Law Dict.

[3] Wheaton v. Hibbard, 20 Johns. 290; Hewett v. Dement, 57 Ill. 500.

[4] Orr v. Pennington, 93 Va. 268; Anson on Contracts, 166.

[5] Delaplain v. Grubb, 44 W. Va. 612; 30 S. E. Rep. 201; Layman v. Conroy, 60 Md. 286.

[6] Wise v. Foot, 81 Ky. 10; Schofield v. Walker, 58 Mich. 96; Delaplain v. Grubb, *supra*. "The line between due and undue influence," said Graves, C. J., in Wallace v. Harris, 32 Mich. 397, "when drawn, must be with full recognition of the liberty due every true owner to obey the voice of justice, the dictates of friendship, of gratitude and of benevolence, as well as the claims of kindred, and, when not hindered by personal incapacity or particular regulations, to dispose of his own property according to his own free choice."

[7] Where parol evidence is necessary to fix some of the terms of a contract, it is treated as oral. Railway Pass. Ass'n v. Loomis, 142 Ill. 560.

not under seal, no especial form is required[1] excepting in certain contracts falling within the statute of frauds and certain mercantile contracts, such as a bill of exchange or promissory note. These latter by the law merchant must always be in writing. Excepting in these special instances the parties may choose their own form of expressing their intention to be bound; or in some instances they may be bound *ex contractu* where no actual intent to be bound exists.

It is frequently laid down as a rule that the law will not allow an agreement to rest partly in writing and partly in parol; and it is sometimes added, so it is equally inadmissible to add to, take from, or specifically change the terms of a written agreement by parol.[2]

Neither branch of this supposed rule states a proposition of law, and both are equally misleading.

It is not admissible to add to or take away from or vary the written stipulations of a contract;[3] but if the parties choose and will so arrange the terms of their stipulations that the oral stipulations are independent of and do not affect the written stipulations, and it is evident that they desire and intend part to be in writing and part oral, no rule of law or evidence, except in special instances, prevents the existence and proof of a contract so entered into.[4]

The rules of law to be regarded in such cases are, first, that the best evidence must always be given of any fact, and second, the rules prescribed by statutes.

Where parties have deliberately put their engagements in writing in terms importing certainty as to object and terms, it is presumed that the whole engagement of the parties and the extent and manner of their undertaking is expressed in such writing.[5]

The rule arose when sealed contracts were the only ones upon

[1] See Mobile & M. R. Co. v. Jurey, 111 U. S. 584.

[2] Lane v. Sharp, 3 Scam. 573; Messmore v. New York Shot Co., 40 N. Y. 422; Merriam v. Field, 24 Wis. 643.

[3] Huit v. Brown, 21 Minn. 163.

[4] Potter v. Hopkins, 25 Wend. 417; Fowler v. Redican, 52 Ill. 411; Black River L. Co. v. Warren, 93 Mo. 274. "The rule itself is not quite so broad as the terms in which it is commonly stated. It excludes the language covering the negotiation as to a point covered by a stipulation, but it does not reject another different but not inconsistent stipulation." Blossom v. Griffin, 13 N. Y. 569–73. See cases in brief in St. Clair Co. Ben. Ass'n v. Fietsam, 97 Ill. 474.

[5] Stackpole v. Arnold, 11 Mass. 30.

which an action would lie,[1] but it has outlived the old tradition.

The modern foundation or reason for the rule is the presumption attending the reducing of the contract to writing.[2] In the case just cited it is said if it appears in the written agreement itself that everything which has been agreed upon was not inserted, and that instead of inserting it a reference is made to it, the reason of the rule does not exist.[3]

It is not necessary in order to admit evidence that the written parts should expressly refer to parol conditions or terms. It is sufficient if it clearly appears, either from the writing or circumstances, that it was not the intention of the parties to include within the written part their whole agreement.[4]

If the agreement is within the statute of frauds, parol evidence cannot be admitted, even to connect the two writings.[5]

Two writings executed at the same time in reference to the same subject-matter may be regarded as constituting one contract,[6] and, unless the contract is within the statute of frauds, parol evidence may be given to connect them.[7]

A written instrument executed in part performance of a contract does not supersede a contract or prevent its proof as a parol contract.[8]

It is quite plain that the rule sometimes stated is put too broadly, and that in the absence of the statute of frauds simple contracts may arise wholly by acts or wholly by written stipulations, or wholly by words; or they may rest partly in writing and partly in oral stipulations, or partly written and partly by acts, or partly oral and partly by acts, the true rule being the one of evidence that parol evidence cannot be heard to contradict a written stipulation.[9]

[1] Stackpole v. Arnold, 11 Mass. 30.

[2] Com. v. McCalmont, 3 Pa. 122.

[3] Anson on Contracts, 50, 51; Couch v. Meeker, 2 Conn. 305; Fowler v. Redican, 52 Ill. 411.

[4] Stoops v. Smith, 100 Mass. 63; 1 Am. Rep. 85; 4 Phillips' Ev., 598.

[5] Fowler v. Redican, 52 Ill. 405. See Emerson v. Slater, 22 How. 28.

[6] Anson on Contracts, 150.

[7] Heywood v. Perrin, 10 Pick. 228; Fowler v. Redican, *supra;* Bailey v. Railroad Co., 17 Wall. 105.

[8] Barker v. Bradley, 42 N. Y. 316; 1 Am. Rep. 521; Bernard v. Sampson, 12 N. Y. 561; Ludeke v. Sutherland, 87 Ill. 483; Juilliard v. Chaffee, 92 N. Y. 531.

[9] A contract may rest partly in writing and partly in parol. Batterman v. Pierce, 3 Hill, 171; Potter v. Hopkins, 25 Wend. 417. See 10 L. R. A. 689. In a recent New York case it was said the defendant is *prima facie* bound by the writing; but whether the plaintiffs promised some-

Recitals of Consideration.— The true consideration may always be shown whether it is set out in the writing or not,[1] excepting that, as to contracts under seal, it is not admissible by this indirect means to show that there was no contract.[2]

A parol collateral agreement to do something not mentioned in the contract, but which constitutes a material part of the consideration, may be shown by parol.[3]

As to oral contracts, it is always allowable to show what the true consideration of the contract was, whether it was set out in the writing or not,[4] or to show that there was no consideration, or in fact anything that would show that there was really never in the eye of the law a contract.[5]

Sec. 598. *Scope of the Assent.*— The assent of the parties in the case of written contracts is not alone to be measured by the four corners of the instrument. As we have seen, it may be supplemented by other stipulations not contained in the written stipulations. But aside from this, the covenants may be amplified by reference to other sources of information, and all writings to which reference is made in a written contract are a part thereof, and binding upon those signing with notice, even though the terms of the document may not be fully understood by the parties executing it.[6] It is the duty of the parties to acquaint themselves with everything referred to, or of which they should take notice.[7]

thing more than can be inferred from that writing, and which may constitute a separate undertaking leading to the defendant's order, and what they did at the interview when the bargain was arranged, may be shown by a resort to the conversation. Routledge v. Worthington Co., 119 N. Y. 592.

[1] Wolf v. Fletemeyer, 83 Ill. 418; Mann v. Smyzer, 76 Ill. 365; Baker v. Bradley, 42 N. Y. 316; 1 Am. Rep. 521.

[2] Juilliard v. Chaffee, 92 N. Y. 529. It is not admissible, except by statute, to disprove consideration in a deed so as to destroy it as a conveyance. M'Crea v. Purmort, 16 Wend. 460; Wilbur v. Warren, 104 N. Y. 192.

[3] Bross v. C. & V. R. R. Co., 9 Brad. 363; Oliver v. Oliver, 4 Rawle, 141; 26 Am. Dec. 123; Witbeck v. Waine, 16 N. Y. 538; M'Crea v. Purmort, 16 Wend. 460; 30 Am. Dec. 103; Randidge v. Lyman, 124 Mass. 362; Carr v. Dooley, 119 Mass. 294.

[4] Wolf v. Fletemeyer, 83 Ill. 418; Mann v. Smyzer, 76 Ill. 365.

[5] Culver v. Hide & Leather Bank, 78 Ill. 625; Peabody v. Dewey, 153 Ill. 657; Juilliard v. Chaffee, *supra*.

[6] Sec. 599.

[7] Kennedy v. Ross, 25 Pa. St. 256; Clinton v. Hope Ins. Co., 45 N. Y. 454; Home Ins. Co. v. Favorite, 46 Ill. 263; G. & S. W. Ry. Co. v. Barrett, 95 Ill. 480; Black v. W., St. L. & P. Ry. Co., 111 Ill. 351. In Hart v. Hart, L. R. 18 Ch. Div. 670, a reference was made to "usual covenants," and proof was resorted to to show what these were. In Harris v. G. W. Ry. Co., 1 Q. B

Covenants implied from those expressed, upon the identical principle invoked in construing the constitution, are as much a part of the contract as those which are expressed.[1]

The law of the place where the contract is made is a part of it, and all other states ought to carry it out precisely as it would be according to the *lex loci contractus*,[2] even though invalid by the law of the forum.[3]

Usages of trade and customs[4] of business among banking, mercantile, insurance companies, common carriers, or others known to have customs are a part of the contract to such an extent that they may modify or amplify express words of a contract, and it is the duty of persons to acquaint themselves with the usual mode in which such businesses are conducted.[5]

These latter are not the general usages which amount to public law, but they are special customs relating to a particular business or a business in a particular place.[6] But it is not the office or province of a usage or custom to override the plain terms of a contract,[7] and it has no effect if it be inconsistent therewith.[8] The custom must not be absurd or unreasonable.[9]

Div. 515, a railway ticket had printed on face: "Subject to condition on back." *Held*, this was notice of the condition; but where no such notice appeared, it must appear that attention was directed to it. Henderson v. Stevenson, L. R. 2 H. L. Sc. App. 470. "See back," on face of ticket, is not conclusive on question of notice. Parker v. S. E. Ry. Co., 2 C. P. D. 416. For the American law on the subject, see Railroad Co. v. Manufacturing Co., 16 Wall. 318; Potter v. The Majestic, 60 Fed. Rep. 624. But a contract to transport, made orally, is not controlled by conditions and stipulations for exemption printed on the back of a receipt for the goods. Merchants' Dis. & T. Co. v. Furthmann, 149 Ill. 66.

[1] Dunlap v. C., M. & St. P. Ry. Co., 151 Ill. 409.

[2] Ogden v. Saunders, 12 Wheat., at p. 298; Morley v. Lake Shore Ry., 146 U. S. 162; Merchants' Dis. & T. Co. v. Furthmann, 149 Ill. 66.

[3] Greenwood v. Curtis, 6 Mass. 358; 4 Am. Dec. 145.

[4] These general usages are like the law of the state. Hostetter v. Park, 137 U. S. 30.

[5] Mills v. United States Bank, 11 Wheat. 431; Fowler v. Brantley, 14 Pet. 318; Bank of W. v. Triplett, 1 Pet. 25; Renner v. Bank of Col., 9 Wheat. 582. *Cf.* Bliven v. N. E. Screw Co., 23 How. 420; Rindskoff v. Barrett, 14 Iowa, 101; Doan v. Dunham, 79 Ill. 131.

[6] There is a distinction between usage and custom. The former refers to particular matters and places, while custom is more general. See Wells v. Barley, 49 N. Y. 464.

[7] Moran v. Prather, 23 Wall. 492.

[8] Robinson v. United States, 13 Wall. 363.

[9] United States v. Buchanan, 8 How. 83; Walker v. W. T. Co., 3 Wall. 150; 18 Lawyers' Ed. U. S. Rep. 172, note.

A course of dealing is sometimes confused with usage and custom, but differs from both in that it consists of a habit by which two persons have conducted numerous transactions; and the transactions must have been so numerous as to warrant the court and jury in saying that in the absence of any stipulation this course of dealing was tacitly assumed as a part of their contract.[1] A uniform course of doing business by a company will not bind one not connected with it.[2]

It seems that the invariable usage of a business house, consistent with custom, controls even in the absence of personal knowledge of it, and that the law requires persons dealing with men engaged in commercial businesses like banking, where usages are necessary and common, to inquire into their established usages.[3] But this rule cannot extend to a mere course of dealing. They must be known in order to bind,[4] and to be availed of must be pleaded.[5]

Sec. 599. *Agreement, Not Intention, Constitutes the Contract.*— It follows from what has been said that the only thing that the courts can regard is the intention or agreement as expressed by words or acts or conduct of the parties, and that the secret intention of one of the parties cannot defeat the actual contract or control its construction; hence it is said the court will not inquire whether the parties did not intend to effect a different object from that which the legal effect of their conduct or agreement indicates.[6] The actual intention of the parties may be one thing and the agreement another.[7]

[1] Bishop on Contracts, p. 444.

[2] Riley v. Penn Mut. L. Ins. Co. (Pa.), 42 Atl. Rep. 191.

[3] Mills v. United States Bank, 11 Wheat. 431; Fowler v. Brantley, 14 Pet. 318.

[4] Gamble v. Stauber Mfg. Co., 50 Neb. 463.

[5] First Nat. Bank v. Farmers' Bank (Neb.), 76 N. W. Rep. 430.

[6] "In other words," as said by Prof. Holland, "the legal meaning of such acts on the part of one man as induce another to enter into a contract with him, is not what the former really intended, nor what the latter really supposed the former to intend, but what a 'reasonable man,' *i. e.*, a judge or jury, would put upon such acts. This luminous principle at once sweeps away the ingenious speculations of several generations of moralists, while it renders needless long lists of subtle distinctions which have been drawn from decided cases." Holland's Jur., p. 225; Pickard v. Sears, 6 A. & E. 475; Smith v. Hughes, L. R. 6 Q. B. 607; Cornish v. Abington, 4 H. & N. 549.

[7] Broadwell v. Broadwell, 1 Gilm. 599. The first rule is that men must be taken to mean what they say.

The Agreement Must be Actual.— If one who is unable to read signs a contract which he is led by the affirmation or conduct of the other party to believe is the contract he desires to sign, whereas it expresses a different agreement, there is no such meeting of minds as constitutes a contract.

The leading case upon this subject is *Thorogood's Case*,[1] where an illiterate man was told that the document was a release of an arrears of rent due, but in fact it released all claims. He did not require the contract to be read, but the other party misrepresented to him the contents of the contract, he replying: "If it is not otherwise, I am content." The deed was held void.

In such a case the deed is absolutely void, and, if there is no negligence whatever, the same rule applies to a promissory note.[2] Such fraud, deceit and circumvention is akin to forgery, and may even constitute that offense.[3]

Diligence in Such Cases.— It is not under all circumstances that even illiterate persons may rely upon the other contracting party. Of course as between the parties[4] to the agreement such deception avoids it, but where the rights of third persons are involved the element of diligence must also exist.[5]

If one who is capable of understanding executes a contract, he may not avoid it on the ground that he did not read it over and was not informed as to its contents.[6]

The law requires of all parties that they shall exercise reasonable prudence in the business affairs of life, and that innocent persons shall not suffer because of their apparent acts, which are unreal only because of negligence.[7]

It is the duty of one about to execute a contract of any kind to inform himself as to its contents, and mere negligence will not excuse him. As between himself and the other party, he

Pollock, Cont. *456; Upton v. Tribilcock, 91 U. S. 45; Sanger v. Dun, 47 Wis. 615; State Bank v. Butler, 149 Ill. 575.

[1] 2 Co. Rep. 9*b*; Anson on Contracts (Knowlton's 2d ed.), 161.

[2] Foster v. McKennan, L. R. 4 C. P. 705; Champion v. Ulmer, 70 Ill. 322; Douglass v. Matting, 29 Iowa, 498.

[3] McGinn v. Tobey, 62 Mich. 259; 4 Am. St. Rep. 848; Griffiths v. Kellogg, 39 Wis. 294; 20 Am. Rep. 48.

[4] Linington v. Strong, 107 Ill. 295; 111 Ill. 152.

[5] Hunter v. Walters, L. R. 7 Ch. 84; Anson on Contracts, *124.

[6] Leach v. Nichols, 55 Ill. 273.

[7] Anson on Contracts, 16–18.

ought to be able to prove: First, his own mistake; second, some degree of fraud.[1]

As affecting the rights of an innocent third person, he ought to be able to show diligence on his part and fraud affecting the character, import and execution of the instrument.[2]

Sec. 600. *Importance of Form.*— The presence of certain formalities accompanying the manner in which the assent was required to be expressed, or, as it is otherwise termed, the execution of contracts or conveyances, was never in any system more strenuously insisted upon as a condition upon which the courts moved to enforce them than in the law of England.[3]

The Roman law has been justly termed a highly artificial system, but it was no more so than is the common law.

According to the Digest, a contract is a species of *agreement* (or convention), the accord of two wills, *conventio pactum;* and in an agreement there is first of all the *pollicitatio*, the offer made by one party, followed by acceptance by the other.

When this accord of wills was such in its *form* and *elements* that the law added a third element, the *vinculum juris*, or obligation, it was called a contract. Such is precisely the case in our law.[4]

It is to be observed that not all agreements reach the dignity of a contract which result in a legal obligation.

To the agreement of the minds there must also be added the obligation,[5] which arises in one of two ways: By the presence of certain formalities, or by a consideration.[6] Let it be remem-

[1] Whart. on Ev., secs. 1028, 1243.

[2] Pindar v. Resolute F. Ins. Co., 47 N. Y. 114; Black v. W., St. L. & P. Ry., 111 Ill. 351; Upton v. Tribilcock, 91 U. S. 45; Sanger v. Dun, 47 Wis. 615. See fraud in execution of negotiable paper under the subject "Negotiable Instruments."

[3] See 1 Spence, Eq. Jur., pp. *119–243. This becomes apparent when we consider that originally only deeds under seal were enforceable— that a conveyance of an interest in land not accompanied with or susceptible of delivery (seizin) could only be by deed. Then came the law that negotiable promises must be in writing, and lastly the statute of frauds, applying to most of the affairs of life. See the reason given for these solemnities in Sharington v. Strotton, Plowd. 298–302 *et seq.* (A. D. 1565).

[4] *Ante*, sec. 586. See also 1 Pollock, Cont., pp. 6–8.

[5] Sanders' Justinian, 399.

[6] Mitchell, Judge, replying to an argument that a note was an executory contract, says: "This is a misnomer. It is not a contract at all, but a mere naked promise, a *nudum pactum*, for want of a consideration, which is an essential part of the definition of a contract." Kerns' Estate, 171 Pa. St. 55.

bered that obligations are by the common law divided into obligations *ex contractu* and *ex delicto*.

Sanders, in his notes to Justinian, says "that in order that this third element [the obligation] should be added, it was, according to the strict theory of Roman law, necessary that the accord of the wills should have been expressed in a particular manner."[1]

He adds: "In the Roman law, the *nexum*, the form of conveyance by the scales and the copper, was the only form of contract recognized, and the use of this form continued to be necessary to pass *res mancipi*.[2] Afterwards other and more varied forms were substituted."[3]

In the early days the king's courts in England entertained jurisdiction only where the contract was made by deed under seal, or if the transfer of the thing was completed by delivery.

Of mere agreements, *privatæ conventiones*, not so perfected, and claims resting upon verbal promises, the king's court took no cognizance, and the common law afforded no remedy.[4] Indeed, when the common-law courts first took cognizance of the breach of verbal executory contracts, it was upon the theory of a *delict* or tort.[5]

From this may be seen the origin of the technical name of the action of *assumpsit*, viz., trespass on the case on the promise.[6] These theories dominated the English law so completely as to direct the classification of actions into actions *ex delicto* and actions *ex contractu*.

[1] Sanders' Justinian, 399. There were thus introduced the following forms to which names were given: 1. *Verbis*, by the stipulation. 2. *Literis*, by entry in a ledger. 3. Then, without any special form being gone through, contracts were recognized when made *re*, i. e., by simple delivery of a thing, in one of four ways: *mutuum, commodatum, depositum, pignus*. And lastly, 4. In four cases contracts were recognized as arising immediately out of the consent of the parties, sale, letting or hire, partnership, *mandatum*. There were thus ten recognized heads of contracts depending on form. Sanders' Justinian, 399.

[2] See Introduction, sec. 59.

[3] Sanders' Justinian, 399.

[4] Spence's Eq. Jur. 243. In such cases, where the non-performance implied a breach of faith, in Glanville's time the ecclesiastical courts might lay hold of the conscience of the party and force him to perform, and the king through his chancery court might interfere in special cases.

[5] 1 Spence's Eq. Jur. *119, 242. See "The History of Assumpsit," J. B. Ames, 2 Harv. Law Rev. 14–16.

[6] The plea was then not guilty; now

So likewise the formalities accompanying the execution of agreements after the time when the common-law courts would enforce an unsealed contract because of the presence of the consideration, controlled the classification of contracts into specialties and simple or parol contracts.[1]

Sealed or Unsealed.— All contracts by the law of England were, after simple contracts became enforceable, distinguished into agreements by *specialty* and agreements by *parol*. A mere writing of itself carried no obligation different from an oral engagement. The specialty was a writing under seal; all others were deemed parol or simple contracts.[2]

Executed and Executory Contracts.— The distinction in substance and effect between an executory contract and one executed is very marked and clear. The former is an agreement to do or forbear, and the promisor has as yet done nothing. An executed contract has generally been executory, but by performance has fulfilled its office, and the promisor has conferred the benefit by way of something given, granted or forborne.

Only in the case of gifts and grants do executed contracts arise independently of a prior executory agreement, and not always in such cases.[3]

Sealing — Effect of.— While the distinction between sealed and unsealed instruments may be technical, it is part of the bedrock on which the whole law of contracts is built.[4] The ex-

it is *non assumpsit*. See 1 Spence's Eq. Jur. 242.

[1] Before that time the law knew only two forms of agreement: the contract, deed or *pactum*, and *nudum pactum*.

[2] Rann v. Hughes, 7 T. R. 346. This is the case which overruled Pillans v. Van Mierop, 3 Burr. 1663, which held that a simple written agreement implied a consideration. Reported as a note to Mitchinson v. Hewson.

[3] See Fletcher v. Peck, 6 Cranch, 87. In this case it was held that an executed contract, *i. e.*, a grant, was attended by an obligation which survived performance by delivery.

[4] Per Mitchell, J., In re Kerns' Estate, 171 Pa. St. 55. Many strictures have been indulged in against the requirement of a seal and the apparent unreasonableness of it. To us at the present time it seems strange, but the requirement is precisely of the same character as the provisions of the statute of frauds, and was simply saying, in effect: No action can be brought on any contract not evidenced by the seal of the party charged. As commerce increased, modern statesmen and lawyers found it useful to provide that no action could be brought (in a multitude of special instances) unless upon a writing signed by the party charged.

tent and character of the remedy was controlled mainly by the presence or absence of a seal.

In fact, the elements which must be present in the agreement in order to make it enforceable were different, according as it was sealed or unsealed, *i. e.*, the specialty rested on the solemnities of its execution, as incontrovertibly evidenced by the seal.[1] The simple contract rested on consideration, as it might be established by the evidence; while no matter how solemn and perfect the promise, whether in writing or orally made, unless based on a consideration it was a mere naked pact, and not enforceable.[2]

At common law, in the case of sealed instruments, the consideration was conclusively presumed.[3]

Except in the case of bills and notes it is necessary for the

[1] 1 Spence's Eq. Jur. 161. Prior to the statute of frauds a deed was not necessary to convey lands, but only things lying in grant,— incorporeal things of which the grantee could not be given manual possession. Lands passed commonly by the ceremony of investiture. 3 Washb. 234. See *infra*, Real Property. At this day it is required in most of the states that a deed shall be sealed. The origin of this custom may be thus explained: In the early days of the common law, learning was confined almost exclusively within the limits of the church. Very few of the landed gentry could write. But every man of position had a distinctive seal — the badge of his family. Therefore when a written document was required, not being able to sign his name, he affixed his seal, generally in wax. A writing was then a solemn affair, and was taken as conclusive of the consideration for the deed. (See *infra*, Consideration.) It can be readily seen how natural it was that the custom of affixing the seal should remain after the reason for its use had passed away. For a long time after the ability to write had become quite common no written instrument was called a *writing* unless it had a seal. This is well and fully explained in Williams on Real Property, *137; 2 Blk. Com. 305, 306. In Hacker's Appeal, 121 Pa. St. 192, the court said that what in the early times "from necessity attested the execution and the genuineness of it, is now but a *mere arbitrary form*, through which, however, special obligations still attach, in support of the well-recognized distinction between writings which are valid and those which are not." As noted above the seal was formerly an impression upon wax. But now no particular form is necessary, and it may be an impression upon wax or upon the paper itself. This impression may be made by a stamp, or by affixing a piece of paper. It may be a mere scroll. The letters L. S., or the word "seal" inclosed in brackets, are frequently used. Bradford v. Randall, 5 Pick. 495; Hacker's Appeal, 121 Pa. St. 192; Van Bokkelen v. Taylor, 62 N. Y. 105.

[2] United States v. Linn, 15 Pet. 290. See "Consideration," *infra*, sec. 601.

[3] Anstell v. Humphries, 99 Ga. 408; Carey v. Dyer, 97 Wis. 554; Re Kerns' Estate, 171 Pa. St. 55; Sumner

person relying upon a simple contract to allege and prove the consideration.

In the case of sealed instruments no such proof need in the first place be offered, but in many of the states, by force of the statutes, the consideration of all classes of contracts is open to inquiry.[1]

Other important consequences follow affixing a seal, whether the contract be such an one as is required to be under seal or not; *e. g.*, it is not allowable to show that one signing a sealed instrument is the agent of an undisclosed principal and so to bind the principal, which may generally be done if the contract is not sealed;[2] nor can such a contract be modified by a subsequent parol contract;[3] nor can it be shown in any other way that parties not named in it are entitled to its benefits.[4] There is a tendency to remove the distinction between sealed and unsealed instruments, and not being based on any rational ground it is hard to understand how the distinction survived so long.[5]

The Statute of Frauds.— The English law as to the formalities essential to enforceable contracts is, except in a few particulars, controlled by what is known as the Statute of Frauds and Perjuries, an enactment of the 29th Car. II., ch. 3, and amendments thereto or modifications thereof.[6] By adoption

v. Williams, 8 Mass. 162; 5 Am. Dec. 83; Gray v. Barton, 55 N. Y. 68; 14 Am. Rep. 118; 6 Am. Dec. 656.

[1] In other states statutes have been passed by which the distinction between sealed and unsealed instruments is abolished, and are designed to make sealed as well as unsealed instruments open to defense for want of consideration. Tracy v. Alvord, 118 Cal. 654. See Leonard v. Bates, 1 Blackf. 172; Withers v. Green, 9 How. 213; Barton v. Gray, 57 Mich. 622.

[2] Briggs v. Partridge, 64 N. Y. 357.

[3] B., O. & C. Ry. Co. v. I. C. Ry. Co., 137 Ill. 30. But an executed parol agreement may have the same effect by estoppel. Watson v. White, 52 Ill. 364; Worrell v. Forsyth, 141 Ill. 30.

[4] Gibson v. Warden, 14 Wall. 244. See the subject of "Privity."

[5] McMillan v. Ames, 33 Minn. 257.

[6] The agitation for the passage of this statute became active in 1673, but it was not passed till 1677. The matters which its provisions regulate are those of every-day occurrence, and the great importance of the enactment was fully recognized at the time. The language of Lord Nottingham that "every line was worth a subsidy" is often quoted. From the fact that lands were conveyed and so many of the transactions of daily life carried out without the aid of writings, when any question arose as to these matters it was necessary to resort to the testimony of witnesses. The object of passing the statute "was to prevent the facility to frauds and the temptation to perjury held out by the enforcement of obligations depending for their evi-

the substance of the provisions of this statute is the law of most of the states in the Union.

The statute of frauds relates to all manner of leases, deeds, conveyances, assignments and wills affecting real estate, all of which, excepting devises, fall within the broad meaning of the word "contract," but two only of the sections, namely, the fourth and seventeenth, specifically affect personal executory agreements, raising a mere obligation *in personam.*

The fourth section provides:

1. That no action shall be brought[1] whereby to charge any executor or administrator to answer damages out of his own estate for any debt of the deceased;[2]

2. Or to charge any one upon any special promise to answer for the debt, default, or miscarriage of another person;[3]

dence upon the unassisted memory of witnesses." Smith, Contracts, 79. The master spirit in the framing of this statute is said to have been Sir Matthew Hale. Associated with him in its preparation were Lord Keeper Guilford and Sir Lionel Jenkins. It was brought into the House of Lords by Lord Nottingham.

[1] A contract within the statute cannot be used as *defense* any more than as the basis of an action. Wheeler v. Frankenthal, 78 Ill. 124; Browne on Fraud, § 131; Hand v. Osgood, 10 Mich. 55.

[2] The design of this clause is to prevent executors or administrators from being held fraudulently for the debts of the estate. The undertaking is in the nature of a guaranty. A promise implied by law is not within the statute. Bellows v. Sowles, 57 Vt. 164.

[3] This closely resembles the first clause, and, like it, is held to be in the nature of a guaranty. Harrington v. Rich, 6 Vt. 666.

If the promise to indemnify is a promise to pay the debt of another out of the property of the promisor, it is within the statute. Nugent v. Wolfe, 111 Pa. St. 88, 471; Clement's Appeal, 52 Conn. 464. But if it is but a promise to pay over funds belonging to that other, it is not. Rymer v. Sim, 3 H. & McH. 451; 1 Am. Dec. 379. It is, however, to be distinguished from a promise to save the promisee harmless, or a mere indemnity. There must be three parties in contemplation. Lerch v. Gallup, 67 Cal. 595; cases cited in note to Tighe v. Morrison, 25 L. R. A. 617. A promise by one to another to pay the latter's debt to a third person is not within the statute. Eastwood v. Kenyon, 11 Ad. & El. 438; Townsend v. Long, 77 Pa. St. 143; 18 Am. Rep. 438, and cases cited in 25 L. R. A. 264, note.

If, by an original agreement, the promisor becomes primarily liable, this is not within the statute; as where goods are delivered to another on the credit of the promisor. The statute contemplates an agreement collateral to a primary liability. See Larsen v. Jenson, 53 Mich. 427; Bugbee v. Kendricken, 130 Mass. 437; Eden v. Chappee, 160 Mass. 225; Hartley v. Varner, 88 Ill. 561.

If the promise operates to extinguish the primary liability it is a novation or payment, and is not

3. Or to charge any one upon any agreement made in consideration of marriage;[1]

4. Or any contract for the sale of lands, tenements, or hereditaments, or any interest in[2] or concerning them;[3]

5. Or any agreement that is not to be performed within one year from the making thereof.[4]

within the statute. Carlisle v. Campbell, 76 Ala. 247; Teeters v. Lamborn, 43 Ohio St. 144; Hill v. Frost, 59 Tex. 25.

The term "miscarriage" embraces liabilities arising *ex delicto* as well as out of contract. Kirkham v. Mather, 2 B. & Ald. 613. And so in some states the word "misdoings" has been substituted. See Bellows v. Sowles, 57 Vt. 164.

If the main purpose of the promisor is not to answer for another, but to subserve some pecuniary interest of his own, the promise is not within the statute. Emerson v. Slater, 22 How. 28–43.

[1] This has no reference to the promise to marry, the consideration for which is the promise of the other party, unless such promise is part of, and dependent upon, an ante-nuptial agreement. Chase v. Fitz, 132 Mass. 359.

[2] 3 Washb. Real Prop. 553.

[3] This must be a substantial interest in land. *Fructus industriales* (crops planted and cultivated) do not constitute such interest. *Fructus naturales* (timber, etc.) do, if it is contemplated that property in them shall pass before they are severed from the soil. Anson on Cont. 61. See *infra*, Real Property. A contract is within the section if it covers both realty and personalty. Meyers v. Schemp, 67 Ill. 469.

[4] A contract does not fall within this clause of the statute unless it cannot by any possibility be performed within the year without violating the contract. See Durgin v. Smith (Mich.), 73 N. W. Rep. 361; Curtis v. Sage, 35 Ill. 22.

Several states hold, following Donellan v. Reed, 3 B. & Ad. 199, that if one party may perform within a year the contract is without the statute. Grace v. Lynch, 80 Wis. 166; Wolke v. Fleming, 103 Ind. 110; Mackey v. Thisler (Kan.), 53 Pac. Rep. 767; Smalley v. Green, 52 Iowa, 241.

Contrary: Broadwell v. Getman, 2 Den. 87; Pierce v. Paine's Estate, 28 Vt. 24; Jackson Iron Co. v. Negaunee, etc. Co., 65 Fed. Rep. 298; Whipple v. Parker, 29 Mich. 375; Frary v. Sterling, 99 Mass. 461.

A promise to marry which cannot be performed within a year is within the statute. MacElree v. Wolfensberger (Kan.), 52 Pac. Rep. 69. But not so a promise (though contingent) which may be performed within a year, even though the contingency (*e. g.*, regaining health) be improbable. McConahey v. Griffey, 82 Iowa, 564. See also Walker v. Johnson, 96 U. S. 524; Seddon v. Rosenbaum, 85 Va. 928; 3 L. R. A. 339, and note. This section embraces leases for land. Alt v. Lohnas, 19 Ill. 576. And such a lease, to begin at a future date and continue one year, is within the statute. Wheeler v. Frankenthal, 78 Ill. 124. The contrary is true under the New York statute (Young v. Dake, 5 N. Y. 463); also in Michigan (Whiting v. Ohlert, 52 Mich. 462). And this suggests the remark that the particulars of the statute differ quite materially in the several states. See Brown v. Kayser, 60 Wis. 1.

Unless the agreement in all such cases upon which the action was based, or some memorandum or note thereof, be in writing, signed by the party to be charged, or some other person thereunto by him lawfully authorized.[1]

The memorandum in writing provided for in the statute must mention or refer to all essential elements of a contract, and must be signed by the party to be charged or his agent.[2] The signature may be by a mark or initials.[3]

No formality is required.[4] Nor is it essential that the writing be contemporaneous with the transaction, or even that it precede the suit. A definite admission in an answer in chancery would constitute a sufficient memorandum in writing to take the case out of the operation of the statute.

The elements of the written memorandum may be collected from several documents, either physically attached, or one referring to the other, or so connected as plainly to refer to the transaction, and be sufficiently clear and certain without reference to parol testimony.[5]

It need not be delivered.[6] An entry on the books of the party charged is sufficient.[7]

The memorandum must make manifest a complete contract against the party charged, and render reasonably certain the parties, subject-matter, the terms and conditions of sale, and in some states the consideration.[8]

[1] See as to the requirements of the clause, 3 Par. Cont. 3.

[2] See Morton v. Murray, 176 Ill. 54.

[3] 2 Kent, 669; Salmon Falls Mfg. Co. v. Goddard, 14 How. 447.

[4] Clason v. Bailey, 14 Johns. 484. See note in 2 L. R. A. 212.

[5] Louisville Asphalt, etc. Co. v. Lorick, 29 S. C. 533; 2 L. R. A. 212, and note; Ross v. Allen, 45 Kan. 231; 10 L. R. A. 838; Frank v. Miller, 38 Md. 461; Peck v. Vandemark, 99 N. Y. 29.

[6] If, however, it be in the form of a deed, it must be delivered. Callanan v. Chapin, 158 Mass. 113; Campbell v. Thomas, 42 Wis. 437; 24 Am. Rep. 427, a case where a deed placed in escrow did not recite the terms of the contract. See also Kopp v. Reiter, 146 Ill. 437; 22 L. R. A. 272, and note.

[7] Tufts v. Plymouth, etc. Co., 14 Allen, 407. But an unsigned entry is insufficient. Barry v. Law, 89 Fed. Rep. 582.

[8] Anson on Contracts, 72; McConnell v. Brillhart, 17 Ill. 353. Names of parties, Mentz v. Newwitter, 122 N. Y. 491. The rule of Wain v. Warlters, 5 East, 10, that the consideration must appear, is repudiated in other states. Packard v. Richardson, 17 Mass. 122; Britton v. Ainger, 40 N. H. 422; Patchin v. Swift, 21 Vt. 297.

Void or Voidable.— It is important to distinguish whether the particular contract involved in a litigation is one rendered absolutely void by the terms of the statute or by the construction of the courts, or whether it is regarded as being merely voidable.[1]

The general rule applies here that a contract in violation of a statute is not void unless expressly so declared, and the courts do not regard these contracts as *malum in se*, or wrong in themselves, and on that ground illegal, and if they are held void they do not put the parties in a position where no recovery may be had for a benefit received under the contract.[2]

Part Performance.— Part performance of a contract falling within the inhibition of the statute will not in the courts of law be ground for the maintenance of any action or relief based on it.[3] But in equity the part performance is held to be a ground for a specific performance of the contract.[4] Equity acts independently of the agreement, on the ground that, the aim of the statute being to prevent fraud, it will not permit a substantial fraud to be imposed under the cover of its provisions.[5]

The acts performed to give this doctrine force must have been done by the plaintiff in pursuance of the agreement and in reliance upon it, and must be of such a nature that the parties cannot be put *in statu quo*.[6]

[1] Browne on Fraud, § 115.

[2] Abbott v. Draper, 4 Den. 51–57; 12 Johns. 451. See Illegality. In some states the statutes declare that these contracts shall be void unless the prescribed formalities are observed.

Lex loci.— A contract, valid by the laws of the place where it is made, although not in writing, will not be enforced in the courts of a country where the statute of frauds prevails, unless it is put in writing. Leroux v. Brown, 12 C. B. 801; Pritchard v. Norton, 106 U. S. 134. Generally the converse of this is not true, but it has been held otherwise. Danner v. Cheeseborough, 36 Conn. 39.

[3] In the absence of statute. Browne on Fraud, § 451; Allaire v. Whitney, 2 Hill, 485; Comstock v. Ward, 22 Ill. 248; Warner v. Hale, 65 Ill. 395; Thompson v. Gould, 20 Pick. 134.

[4] Dunn v. Berkshire, 175 Ill. 243.

[5] Malins v. Munroe, 4 N. Y. 403. When a father promises his son that if the latter will clear up and improve a certain tract of land he will deed the same to him, and the son enters on the land and clears it up, the case is taken out of the statute. Lobdell v. Lobdell, 36 N. Y. 327. And see Neale v. Neale, 9 Wall. 1.

[6] Williams v. Morris, 95 U. S. 444; Crabill v. Marsh, 38 Ohio St. 331; Fraser v. Gates, 118 Ill. 99; Irwin v. Dyke, 114 Ill. 302; Peckham v. Winter, 49 Mich. 179.

When the promise is to deed land, part performance by payment of money or by services is not sufficient.[1]

Sec. 601. *Consideration.*— A consideration is an essential element of an enforceable simple contract.[2]

In an early period of English law, when the necessity for the presence of what we now call the consideration was recognized, it was designated by an expression which, according to the idiom, conveyed the precise idea. It was then called *quid pro quo* — a something for a something. Later it was termed a *cause*, and finally obtained the technical designation *consideration*.[3]

It is said in *Sherington v. Strotton* that "the common law requires that there should be a new cause whereof the country may have intelligence or knowledge, . . . for livery of seizin was first invented as an act of notoriety. . . . For like reason, when a use shall pass, there had to be by the common law a contract, *or* a public and notorious consideration."[4]

This cause was a different thing from the motive.[5]

Valuable and Good.— It was necessary that it be either something of value, or be what was termed a good consideration.[6]

Good consideration as distinguished from a valuable consideration is the interest and natural love and affection which exists between near relatives.[7] A good consideration will support an executed promise,[8] but will not support an executory one.[9]

Marriage is a valuable consideration, and there is no other consideration as much respected in the law. It is a valuable consideration to support an ante-nuptial settlement, and on

[1] Blanchard v. McDougal, 6 Wis. 167; 70 Am. Dec. 458; Ellis v. Carey, 74 Wis. 176; 4 L. R. A. 55; Alderson v. Maddison, L. R. 7 Q. B. D. 174; 8 App. Cas. 467.

[2] In re Kerns' Estate. 171 Pa. St. 155. See remarks of Mitchell, J., *ante*, p. 734.

[3] Holmes' Hist. Com. Law, 253. See also Sherington v. Strotton, Plowd. 298, at p. 302 (1565).

[4] Wilmot, J., in 3 Burr. 1670, *infra*, states that consideration was like *deliberation*, reflection, solemnity; and Mansfield said that the reason for seizin, sealing, etc., was upon the same principle as the statute of frauds. Id. 1669.

[5] Philpot v. Gruninger, 14 Wall. 570. See Ellis v. Clark, 110 Mass. 389.

[6] *Infra*, p. 746.

[7] Sherington v. Strotton, Plowd. 298; King v. Thompson, 9 Pet. 204; In re Kerns' Estate, 171 Pa. St. 55.

[8] Priester v. Priester, Rich. Eq. Cas.; 23 Am. Dec. 191; Fink v. Cox, 18 Johns. 145; 9 Am. Dec. 191.

[9] Kirkpatrick v. Taylor, 43 Ill. 207; In re Kerns' Estate, *supra*.

grounds of sound public policy is upheld with steady resolution.[1] To make such a settlement void as a fraud upon creditors it is necessary that both parties participate in the fraud.[2]

In Simple Contracts.— The court of king's bench, Wilmot and Mansfield sitting, decided that a written contract as to a mercantile transaction[3] was enforceable without pleading and proving a consideration, but this decision was emphatically declared never to have been the law of England.[4]

It may now be considered undisputed that our law will not enforce a simple contract between the original parties unless based on a good or valuable consideration received or incurred for the promise.[5]

Formal deeds in the English law were enforceable without reference to a consideration, while on the other hand the obligation of the party to perform a simple agreement could only be compelled in the courts, because his obligation rested upon a duty growing out of a benefit received by him, or a harm incurred to the other party because of his refusal to comply with his promise.[6]

[1] Champion v. Cotton, 17 Ves. Jr. 264; Hedring v. Wickham, 29 Gratt. 628; Bradish v. Gibbs, 3 Johns. Ch. 523.

[2] Maguire v. Thompson, 7 Pet. 348; Prewit v. Wilson, 103 U. S. 22.

[3] The restrictions pointed out by both the judges are generally overlooked. They confined their views to mercantile cases. The case was a letter of credit promising to honor drafts in the future. Wilmot, J., said he did not say it was *always* good if in writing. Page 1671. Cooper says that Justice Wilmot seems to have had in his mind the obligatory effect given by the Roman law, where the prescribed forms of verbal stipulations were observed. See Inst. 3, 16, 1.

De Verbis Stipulationem.— But among the Romans the practice was to put all nominate contracts and stipulations in writing, which when carried to a magistrate were inserted *inter acta*, registered or recorded, and the parties had a copy delivered to them under seal. This was not the case with mere pacts or promises, which might intervene by means of any informal words, and between absent parties. Cooper's Justinian, p. 587. See also 1 Pollock, Contracts, pp. 6–8.

[4] Rann v. Hughes, 7 T. R. 346.

[5] Cottage St. M. Ch. v. Kendall, 121 Mass. 528.

[6] Sherington v. Strotton, Plowd. 298; Anson on Contracts, 62; Bristow v. Lane, 21 Ill. 194. "A consideration of some sort or other is so necessary to the forming of a contract that a *nudum pactum* or agreement to do or pay something on one side, without any compensation on the other, will not at law support an action, and a man cannot be compelled to perform it." 3 Broom & Hadley's Com. 159. Thus, a mere voluntary service will not uphold *assumpsit*, unless moved by a previous request. Lampleigh v. Brathwait, Hob. 105; 1 Smith's L. C.

Cooper says the doctrine of *nudum pactum* has been long recognized in the English law,[1] Bracton introducing it from the Roman law; and he adds that Wilmot, Justice,[2] seems to have had in mind the obligatory effect of the Roman law, where the prescribed forms and verbal stipulations were observed.

"A bargain without a consideration," says the Lord Chancellor in *Middleton v. Kenyon*,[3] "is a contradiction in terms and cannot exist." Exceptions to this, of course, are sealed instruments and negotiable paper.

With respect to other parol contracts, whether verbal or written, we have adopted in substance the civil-law doctrine on this subject, and the want of consideration will defeat a recovery on such a contract.[4]

How Consideration Arises.— Any act performed at the express or implied request of the promisor, whether it be in the nature of an affirmative service or conveyance or any suspension of a right or forbearance of action, is a consideration, although no actual benefit accrues to the person promising;[5] but a mere voluntary courtesy or expression of intention is not sufficient.[6] The value is entirely immaterial.[7] Where one obtains what he bargains for, the law does not weigh values.[8]

267. And while a gratuitous promise may form the subject of a moral obligation, it creates no legal responsibility. Broom's Legal Maxims, 745. See Cumber v. Wane, 1 Str. 436; 1 Smith's L. C. 633.

[1] See the matter fully explained. Sherington v. Strotton, Plowd. 298–302 (about A. D. 1565); Joselyn v. Laciere, 12 Mod. 295.

[2] In Pillans v. Van Mierop, 3 Burr. 1663.

[3] 2 Ves. Jr. 408.

[4] Cooper's Justinian, 587, 588.

[5] Moore v. Davis, 49 N. H. 45; 6 Am. Rep. 460. Abandoning the use of tobacco is a sufficient consideration to sustain an action on a promise to pay a sum of money if the plaintiff would stop. Talbot v. Stemmons, 89 Ky. 222; 5 L. R. A. 856. Attendance at a university as a student is a good and sufficient consideration to support a promise to pay annually a sum of money. Hoshor v. Kautz (Wash.), 53 Pac. Rep. 51.

[6] Hind v. Holdship, 2 Watts, 104; 26 Am. Dec. 107; Kramer v. Old, 119 N. C. 1; 34 L. R. A. 389; Lawrence v. McCalmont, 2 How. 426.

[7] Lampleigh v. Brathwait, Hob. 105; 1 Smith's L. Cas. (9th ed.) 281. Where the vendor has received back the subject of sale, and delivered up the securities given for balance of the purchase price, a statement that he intended to give the vendee all he got above a certain sum is a mere *nudum pactum*. Johnson v. Ackless, Breese, 92.

[8] Condrey v. West, 11 Ill. 146; Anson on Contracts, 64. An agreement to pay $100 for the ice which may form on a certain pond is en-

Where property constitutes the consideration, there can be no failure unless there is a warranty or false representations.[1]

In equity the value of the consideration may constitute important evidence on the question of fraud;[2] but there is no case of mere inadequacy, independent of other circumstances of fraud or fiduciary relationship, or an overreaching of some sort, where the contract is held void.[3]

As to creditors, however, the amount of the consideration must be such as to bear a reasonable proportion to the amount of the contract.[4] The amount paid may be the extent of the recovery allowed on notes held as collateral where a defense exists between original parties.[5]

Species of Consideration — Mutual Promises.— As is commonly said, a promise by one person is a good consideration for the promise or undertaking on the part of the person to whom the promise is made. To render such a contract binding the promises must have been concurrent as well as mutual; that is, they must actually exist at the same time and bind both at the same time.[6]

For example, if A. agrees to rent a farm to B., and B. agrees to pay a certain price, the mutual promises are sufficient consideration for the agreement, and either or both may enforce it if it is in other respects valid.[7]

An interchange of notes is an example, and the failure of one person to pay would not constitute a failure of consideration, but a mere breach of the contract.[8]

forceable although no ice of any value forms. Townsend v. Water Co., 63 Ill. 126. See Smith v. Williams, 1 Murph. 426; 4 Am. Dec. 564. A void patent right is not a valuable consideration for a promise though both parties believe it is valid. But if the right is valid the consideration is valid without regard to the value or utility of the machine. Even if it be void, and the fact that it is in litigation is known to the vendee, the fact that it is void is no defense to an action on notes given for it. Jones v. Burnham, 67 Me. 93; 24 Am. Rep. 10; Dickinson v. Hall, 14 Pick. 217; Lester v. Palmer, 4 Allen, 146; Nash v. Lull, 102 Mass. 63.

[1] Leggett v. Sands, 60 Ill. 163.

[2] Anson on Contracts, 66; McArtee v. Engart, 13 Ill. 242.

[3] Hind v. Holdship, 2 Watts, 104; 26 Am. Dec. 107.

[4] Patrick v. Patrick, 77 Ill. 555; Bay v. Cook, 31 Ill. 337.

[5] St. P. Bank v. Cannon, 46 Minn. 95. See "Negotiable Paper."

[6] McArtee v. Engart, 13 Ill. 242; Olney v. Howe, 89 Ill. 560; U. & S. R. R. Co. v. Brinckerhoff, 21 Wend. 139.

[7] Dorsey v. Packwood, 12 How. 126; Morrow v. Southern Exp. Co., 101 Ga. 810.

[8] Gage v. Lewis, 68 Ill. 604.

Where several agree to combine for a common object, the promise of each is good consideration for the promise of the others. Subscriptions to stock or for an object of charity are instances.[1]

The relinquishment, forbearance, or waiver of any legal right at the request of another is a valuable consideration for a promise.[2]

The compromise of a doubtful right of action, provided the claimant honestly believes in his cause, constitutes a consideration, but a claim known to be unfounded and used as a pretext to extort money is not.[3]

If the claim as made could under no circumstances constitute a cause of action it is different.[4]

[1] Whitsett v. Pre-emption Church, 110 Ill. 25; Johnson v. Allerwein Univ., 41 Ohio St. 527; Conrad v. La Rue, 52 Mich. 86. A recent decision by the Maine court discussed the distinction between subscriptions to business enterprises and for charitable objects (Bryant Pond, etc. Co. v. Felt, 87 Me. 234): "1. A subscriber to the capital stock of an unorganized business corporation has a right to withdraw from the enterprise, provided he exercises the right before the corporation is organized and his subscription is accepted. Such a subscription is not a completed contract. See Cook, Stock and Stockholders, § 169. 2. Such rule, however, does not apply to voluntary and gratuitous subscriptions to public or charitable objects, which, when accepted and acted upon, become binding, nor to subscription papers so worded as to become binding contracts between the subscribers themselves." The second point is *obiter* in that case and cannot be said to be a rule uniformly held. Rogers v. Galloway College, 64 Ark. 627; 39 L. R. A. 636; Hamilton College v. Stewart, 1 N. Y. 581; Presbyterian Church v. Cooper, 112 N. Y. 511. *Cf.* Roberts v. Cole, 103 N. Y. 600. See learned note, *sub.*, Lampleigh v. Brathwait, 1 Smith's L. Cas. (9th ed.) 281–306.

[2] Anson on Contracts, 66; Miller v. Hawker, 66 Ill. 185; Union Bank v. Geary, 5 Pet. 99; Houck v. Frisbee, 66 Mo. App. 16; Stearns v. L. S. & M. S. R. Co. (Mich.), 71 N. W. Rep. 148. Thus, forbearance to prosecute a legal claim, whether such claim be reasonable or unreasonable, is a good consideration. Callisher v. Bischoffsheim, L. R. 5 Q. B. 449; Prout v. Pittsfield, 154 Mass. 450. Otherwise if the claim is in fact invalid. Gunning v. Royal, 59 Miss. 45.

[3] McKinley v. Watson, 13 Ill. 140; Heaps v. Dunham, 95 Ill. 584; Sweitzer v. Heasley, 13 Ind. App. 567. The innocence of one of a charge of bastardy is no defense in an action on a note given by him in compromise of the proceedings. Billingsley v. Clelland (W. Va.), 23 S. E. Rep. 812. The consideration for a compromise cannot be the settlement of a suit which amounts to an agreement to compound a felony. Sloan v. Davies (Iowa.), 74 N. W. Rep. 922; Smith v. Pinney, 32 Vt. 282. *Cf.* Fink v. Smith, 170 Pa. St. 124. There are some authorities, however, which hold a view contrary to the first proposition of this sentence. Gunning v. Royal, 59 Miss. 45.

[4] Mulholland v. Bartlett, 74 Ill. 58; Heaps v. Dunlap, 95 Ill. 583.

Past, Executed or Moral.—There is a class of considerations called past or executed, where the thing which caused the alleged promise was wholly done before the promise, but these fall under the same principle as a moral consideration. Unless there was a request for that which constitutes the consideration previous to its performance, a past benefit is no consideration. This previous request may, however, be implied, where, for example, one accepts and retains the benefit of work voluntarily done by another for him, and an acceptance will be implied by standing by and approving.[1] If one is *compelled* to do for another what the other in law should do,[2] or if one does voluntarily what he is not bound to do for another who is bound to do the thing, in all these cases a subsequent promise is binding.[3]

A mere moral obligation will not support an action in the courts,[4] but if there be a legal obligation resting on the person promising to do what another does for him, a subsequent promise to repay binds, although the service was performed without request;[5] as, if one pay another's taxes, or bury his wife or child.[6] In pleading (theory) it is necessary to aver a consideration, and both prior request and a subsequent promise; but in fact, where one party derives a benefit from an act or service, it is equivalent to a previous request and may be so alleged. Saunders asserts that where a man pays a sum of money or buys goods for me without my knowledge or request, and afterwards I agree to the payment or receive the goods, this is equivalent to a previous request.[7] But this is stated too broadly. By merely paying a debt one does not become a creditor, nor is the payment without request sufficient consideration for a promise to repay.[8]

There is no authority for the assertion that if one pays the

[1] De Wolf v. Chicago, 26 Ill. 443; Walker v. Brown, 28 Ill. 386; Moore v. Mason, 103 Mass. 560; Silverthorn v. Wylie, 96 Wis. 69.

[2] Greenleaf on Ev., secs. 107–8.

[3] McMorris v. Herndon, *infra.*

[4] See *ante*, p. 744; Thorne v. Deas, 4 Johns. 84; Eastwood v. Kenyon, 11 Ad. & El. 348. A son being able is morally bound to assist his indigent parent, but a promise to pay for past support is not binding. Edwards v. Davis, 16 Johns. 281; Cook v. Bradley, 7 Conn. 57.

[5] McMorris v. Herndon, 2 Bailey L. 56; 21 Am. Dec. 515.

[6] Jenkins v. Tucker, 1 H. Blk. 90.

[7] Per Saunders, *sub.*, Osborn v. Weston, 1 Saund. 264. *Cf.* Hicks v. Burhans, 10 Johns. 243.

[8] Eastwood v. Kenyon, 11 Ad. & El. 348; 39 E. C. L. 142; Frear v. Hardenbergh, 5 Johns. 272; 4 Am. Dec. 356.

debt of another, or performs an act beneficial to him, he becomes a creditor thereby without any previous request or subsequent promise,[1] and it is only under certain circumstances that a subsequent promise will bind.

The extent to which the rule may be pushed is that, where one man does an act for another which that other is bound in law to do, and which, in case he neglects it, it is still the duty of some one to perform, like burying the kin, the law may imply both the previous request and the subsequent promise, and even though the person bound expressly refuses to perform, or forbids the act.[2]

But the mere conferring of a benefit, as voluntarily paying a debt, building a fence, tilling the soil, furnishing supplies, and the like, will not raise an *assumpsit;*[3] and it is only where that which is alleged to be the consideration has at one time been an obligation, though it may no longer be so, that it constitutes sufficient consideration for a new promise; for example, a debt barred by the statute of limitations, the previous debt of a bankrupt, or the unenforceable contract of an infant.[4]

It is safe to say that a moral obligation will not support an unexecuted promise, except in cases where a valid consideration once existed.[5]

Sec. 602. *The Character and Relation of Stipulations.*— There is nothing more difficult to understand than the rules relating to the character, relation and dependence of stipulations in contracts containing various mutual covenants.[6]

The question in such cases is whether the performance of the respective covenants on the one side depends (*i. e.*, is con-

[1] Huck v. Flentye, 80 Ill. 256. See 2 Greenleaf, Ev., secs. 107–8, and notes.

[2] Fairchild v. Bell, 2 Brev. 129; 3 Am. Dec. 702.

[3] Boston Ice Co. v. Potter, 123 Mass. 28; 25 Am. Rep. 9.

[4] Eastwood v. Kenyon, 11 Ad. & El. 348; Sturges v. Crowninshield, 4 Wheat. 122; Harwood v. Kiersted, 20 Ill. 367; Edward v. Davis, 16 Johns. 282.

[5] Cook v. Bradley, 7 Conn. 57; 18 Am. Dec. 79; Mitchell v. Lyman, 77 Ill. 530. If I see my neighbor's property in flames, and without his knowledge or request I exert my efforts to extinguish the fire and save the property, I cannot maintain an action for the value of the labor. Bartholomew v. Jackson, 20 Johns. 28.

[6] New Orleans v. Tex. Pac. Ry. Co., 171 U. S. 312–336. This case explains and applies the rules provided for in the Louisiana code, which follows the French civil law, but are based upon the same principles which permeate the common law.

ditional) upon the performance of the covenants on the other side, or whether the stipulations are independent of each other, and must be performed irrespective of performance by the other side.[1]

If the performance of one depends upon the performance of the other, then it is said that they are mutual dependent covenants or conditions.

If not, they are independent covenants.

Covenants and Conditions Distinguished.— It is of the utmost importance that the technical distinction between a covenant and a condition be understood.

A covenant is an executory, promissory agreement to do or perform, and for a breach of this promise an action will lie for the damages caused by the breach.

A condition is an act required to be performed, or required not to be performed, or an event the happening of which shall dispense with further performance; and the effect of a condition is to put an end to and forfeit all rights under the mutual stipulation to which it relates. But a condition does not sustain an action for damages.[2]

One can readily understand that a party might be willing to enter into a contract agreeing to do, or to sell, upon condition that if he did not do what he promised he should forfeit the consideration, where he would not be willing to make the same contract coupled with the responsibility to answer for uncertain damages which might be caused by his breach; and in order that the practitioner may not bring an action upon a contract which is in fact a mere condition, it is essential that the distinction be thoroughly understood.[3]

[1] These rules apply to covenants in all classes of contracts and also to deeds and grants in wills; and while the citation is purposely restricted to as few cases as will illustrate the rule, the cases have been selected with a view to illustrate many phases of the subject.

[2] Hale v. Finch, 104 U. S. 266; Blanchard v. D., L. & L. M. Ry. Co., 31 Mich. 46; Palmer v. Plank-road Co., 11 N. Y. 389; Close v. Burlington, C. R. & N. Ry. Co., 64 Iowa, 149. These conditions are called in the Louisiana code *suspensive conditions*, an appellation which expresses with peculiar felicity the effect of the stipulation. New Orleans v. Tex. Pac. Ry. Co., 171 U. S. 333.

[3] For example, in Hale v. Finch, 104 U. S. 266, the action was brought for the damages occasioned by the breach of the stipulation, but it was held a mere condition; consequently no action could lie. So, in Palmer v. Plank-road Co., 11 N. Y. 389, it was

Dependent and Independent Covenants.— What is meant by dependent and independent covenants is that, where a covenant is dependent, its performance is a condition to requiring performance on the other side,[1] while if the covenants are independent it is obligatory upon each party to perform his agreement irrespective of performance on the other side.

So it is said in one case that performance is a condition precedent, while in the latter it is not.

The law permits men to have as many contracts between each other, existing at the same time, as they desire. These may all be embraced within one document containing as many covenants on different subject-matter as the parties desire, or they may be evidenced by different documents; and although they may be in different documents and executed on different days, they may relate to one and the same transaction and constitute in reality one contract with covenants or conditions, the one dependent upon the other.[2]

When a plurality of subjects is embraced or a multiplicity of agreements is found in one contract, whether made up of several documents or contained in one instrument, the question presents itself to the court as to the relation and dependence of these stipulations, and it is for the court to determine whether they amount to mutual independent covenants or whether some of them are conditions, and if so whether they are conditions precedent or subsequent.[3]

said that "there may be a condition without a covenant, and that where the language imports a condition merely, and there are no words importing an agreement, it cannot be enforced as a covenant, but the only remedy is through a forfeiture of the estate." And further: "It by no means follows, because a grantee consents to take an estate subject to a condition, that he also consents to obligate himself personally for the performance of the condition. Many cases might be imagined in which one would be willing to risk the forfeiture of the estate, while he would be altogether unwilling to incur the hazard of a personal responsibility in addition." The same doctrine is held in Blanchard v. Railroad Co., 31 Mich. 43; Close v. Burlington, C. R. & N. Ry. Co., 64 Iowa, 149.

[1] In such case the contract may expressly recite that "in consideration of the performance of the promises and agreements," etc. Dermott v. Jones, 23 How. 220; Sheerer v. Moses, 84 Ill. 448.

[2] Hunt v. Livermore, 5 Pick. 395; Bradley v. Marshall, 54 Ill. 173.

[3] The leading American case on the subject of dependent and independent contracts is Mill Dam Foundry v. Hovey, 21 Pick. 417.

Several Kinds of Covenants.—It is sometimes said that covenants are conditions in certain instances, but more accurately it may be said that a covenant may provide that its performance be a condition.

Lord Mansfield said: "There are three kinds of covenants. Such as are called *mutual and independent*, where either party may recover damages from the other for the injury he may have received by a breach of the covenants in his favor, and where it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff.

"2. There are covenants which are *conditions and dependent*, in which the performance of one depends upon the prior performance of another, and therefore, until this prior condition is performed, the other party is not liable to an action on his covenant.

"3. There is also a third sort of covenants, which are *mutual concurrent conditions*,[1] to be performed at the same time; and in these, if one party was ready and offered to perform his part, and the other neglected or refused to perform his, he who was ready and offered has fulfilled his engagement, and may maintain an action for the default of the other; though it is not certain that either is obliged to do the first act."[2]

There is also an additional class of covenants not mentioned by Lord Mansfield in this connection, known as conditions subsequent.

Entire Contracts Distinguished from Mutual Covenants and Conditions.— Entire contracts do not require that there be any mutual, dependent stipulations, but merely that it appear from the contract to do or perform, though it be entirely on one side, that the contract be completely and entirely performed before a recovery is allowed upon the contract.[3]

Rules for Determining the Character of Covenants and Stipulations.— The controlling rule of construction for settling these questions is to seek for the evident intent and meaning of the parties as expressed in the instrument, construed in the light

Its doctrines, based on the English cases, are universally approved. Boston Blower Co. v. Brown, 149 Mass. 421; New Orleans v. Tex. Pac. Ry. Co., 171 U. S. 334.

[1] Jones v. Barkley, Doug. 690. See note *sub.*, Gardiner v. Carson, 15 Mass. 500 (Little-Brown's ed.).

[2] 2 Pars. Cont. *527.

[3] *Post*, sec. 603.

of circumstances, rather than to place complete reliance upon arrangement and phraseology.[1]

It is plain that in these cases, where the contract expressly provides that performance on the one side shall be a concurrent act or shall precede performance on the other side, that such precedent performance is a condition; and if, although not so expressly stated, it appears that such was the intention, the effect is the same; and this is the true inquiry in all cases.[2]

In a note to *Pordage v. Cole*, Mr. Williams formulated the following rules, which have been generally approved and frequently applied:[3]

"1. If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or *may* happen, *before* the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money, or for not doing such other act *before* performance, for it appears that the party relied upon his *remedy*, and did not intend to make the *performance* a condition precedent; and so it is where *no time* is fixed for performance of that which is the consideration of the money or other act.[4]

"2. When a day is appointed for the payment of money, etc., and the day is to happen after the thing which is the consideration of the money, etc., is to be performed, no action can be maintained for the money, etc., before performance.

[1] Gardiner v. Carson, 15 Mass. 500. The name by which the parties designate a stipulation is not conclusive. Blanchard v. D., L. & L. M. Ry. Co., 31 Mich. 43.

[2] Mill Dam Foundry v. Hovey, 21 Pick. 417; Tompkins v. Elliot, 5 Wend. 496; Bank of Columbia v. Hagner, 1 Pet. 455, and note; Stoolfire v. Royse, 71 Ill. 223.

[3] See 2 Pars. Cont. *528–33.

[4] 1 Saund. 310; Goldsborough v. Orr, 8 Wheat. 217; Dermott v. Jones, 28 How. 220; Gage v. Lewis, 68 Ill. 604; Willets v. Burgess, 34 Ill. 494. Lord Holt further said, in Thorp v. Thorp, 12 Mod. 455: "What is the reason that mutual promises shall bear an action without performance? One's bargain is to be performed according as he makes it. If he makes a bargain, and relies on the other's covenant or promise to have what he would have done to him, it is his own fault. If the agreement be that A. shall have the horse of B., and A. agree that B. shall have his money, they may make it so, and there needs no averment of performance to maintain an action on either side; *but if it appear by the agreement that the plain intent of either party was to have the thing done to him performed, before his doing what he undertakes of his side, it must then be averred.*" And see Cunningham v. Morrell, 10 Johns. 202; Loud v. Pomona Land, etc. Co., 153 U. S. 564.

"3. Where a covenant goes only to *part* of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant without averring performance in the declaration.[1]

"4. But where the mutual covenants go to the *whole consideration* on both sides, they are mutual conditions, and performance must be averred.[2]

"5. Where two acts are to be done *at the same time*, as where A. covenants to convey an estate to B. on such a day, and in consideration thereof B. covenants to pay A. a sum of money *on the same day*, neither can maintain an action without showing performance of, or an offer to perform, his part, though it is not certain which of them is obliged to do the first act, and this particularly applies to all cases of sale.[3]

"6. It may also be laid down as a rule that stipulations or promises may be dependent from the nature of the acts to be performed, and the order in which they must necessarily precede and follow each other. 'When the act of one party must necessarily precede any act of the other, as where one stipulates to manufacture an article from materials to be furnished by the other, and the other stipulates to furnish the materials, the act of furnishing the materials necessarily precedes the act of manufacturing and will constitute a condition precedent without express words.'"[4]

Condition Precedent.— This act may be so related to the contract or performance in point of time as to require the performance before the party obtains any rights in or to the subject-matter of the contract, and such a stipulation is called a condition precedent.

A condition subsequent is an act to be performed subsequent to the entering into the contract and after the party may have

[1] This latter rule is a repetition of an expression of Lord Mansfield in Boone v. Eyre, 1 H. Bl. 273. "The distinction is very clear. Where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent." Pars. on Cont. 531, note.

[2] Mill Dam Foundry v. Hovey, 21 Pick. 417; Boston Blower Co. v. Brown, 149 Mass. 421.

[3] Stoolfire v. Royse, 71 Ill. 223.

[4] Mill Dam Foundry Co. v. Hovey, *supra*.

obtained rights in and to the subject-matter, the non-performance of which condition subsequent may give rise to a forfeiture of all rights under the contract and the subject-matter, and in this manner cause the discharge of all obligations under it.[1]

The usual implied condition subsequent is the happening of some event by what is called the act of God, and such a condition is held to arise by operation of law.[2]

It is customary for parties to stipulate that certain subsequent conditions may avoid the contract. For example, ship-owners and charterers usually contract to carry safely except as against the act of God, public enemies, etc., and, they might add, other dangers and accidents incident to navigation. If any of these excepted things occurred it would be a condition subsequent.[3]

The numerous grants of land by the public to railway corporations for constructing railways usually contain express conditions subsequent; *i. e.*, the grant is conditioned upon the completion of the road, and then the completion would constitute a condition precedent to obtaining the grant.

The same contract may contain an express condition upon the perpetual maintenance of the road, and this perpetual maintenance is a condition subsequent, for a violation of which the grant would be forfeited.[4]

[1] Hale v. Finch, 104 U. S. 266; Blanchard v. D., L. & L. M. Ry. Co., 31 Mich. 42, and note.

[2] In the very important case of Mill Dam Foundry v. Hovey, 21 Pick. 441, Chief Justice Shaw said: "The distinction is now well settled between an obligation or duty imposed by law and that created by covenant or act of the party. When the law creates a duty, and the party is disabled from performing it without any default of his own, the law will excuse him; as, in waste to a tenement, if the same be destroyed by tempest or enemies, the lessee is excused. But when the party by his own contract creates a duty or charge upon himself, he is bound to make it good notwithstanding any accident, by inevitable necessity, because he might have provided against it by his own contract."

[3] Anson on Contracts, 266. In Del. & L. W. Ry. Co. v. Bowers, 58 N. Y. 573, a contract to deliver a specified quantity of coal provided that if the business was interrupted by "strikes, floods" and other events specified, no damages should be recovered for breach. A part only was delivered; payment refused; the excuse was a strike; a recovery was allowed. The court in its opinion says: "But parties may agree in advance under what circumstances and upon what contingency the contract shall terminate, or either party be absolved from its obligations; and if the circumstances occur or the contingency happen, even by the voluntary act of the party claiming the benefit of the stipulation, it will be available to him in the absence of any fraud or *mala fides*."

[4] Blanchard v. D., L. & L. M. Ry. Co., *supra*.

Sec. 603. *Entire Contracts*[1] are such as expressly or impliedly provide for complete performance upon the one part according to the terms of the contract, and anything less is a breach.[2] They are therefore a species of conditional contracts.[3] Of course it is to be understood that a portion of the stipulations may be entire and conditional and others mutual and independent,[4] or those on one side apportionable while the other is not.

It is obviously within the right of the parties to expressly stipulate that they shall furnish certain material, labor, machinery or property, or perform a certain service for a certain and definite period of time, and be entitled to nothing unless exact and literal performance is made.[5] It is their right to make that agreement absolute and independent of any condition whatever — the act of God, inevitable accident, or any matter within their own control. The question in all cases is one of intention unless expressly mentioned. A disability arising from the act of God is impliedly excepted, while a casualty or mere accident not so termed is not. In such cases complete performance is a condition to a recovery on the contract; but by a departure from the strict rule of the common law, that a contract cannot be implied where an express one exists, it is held in most states that a recovery may be had for a part performance where the benefit received under the contract is abandoned by mutual consent, or, in case of breach, the benefit exceeds the damage for the breach.[6]

But it is more common for the parties to make the agreement to furnish the property or labor without any such specific stipulation governing the contingency of abandonment or failure to perform.

[1] It might be more accurate to say entire stipulations or an entire agreement.

[2] Cutter v. Powell, 6 T. R. 320; 2 S. L. C. 1212; Fenton v. Clark, 11 Vt. 557; Leopold v. Salkey, 89 Ill. 412; 31 Am. Rep. 100, note; Pope v. Porter, 102 N. Y. 366.

[3] Mill Dam Foundry v. Hovey, 21 Pick. 417; Wooten v. Walters, 110 N. C. 251.

[4] White v. Atkins, 8 Cush. 367; Jones v. Dutton, 7 Brad. 580. Although a decision of an inferior court it is a very instructive case.

[5] Cutter v. Powell, *supra;* Fenton v. Clark, 11 Vt. 557; Britton v. Turner, 6 N. H. 481; 26 Am. Dec. 713.

[6] This is the doctrine of which Britton v. Turner, *supra*, is the leading case, and opposed to it, Olmstead v. Beal, 19 Pick. 529, may be called the ruling case. The states are pretty evenly divided on the question.

Such contract is regarded as an entire contract, and complete performance, under ordinary circumstances, is a condition precedent to a recovery *on the contract.*[1]

There seems to be no conflict on this point.[2] But the harmony in the decisions is maintained only to the point of denying a recovery based specifically on contract.

Performance Prevented by Act of God.[3] — There is a seeming conflict of decisions upon the question as to whether, in cases where complete performance of entire contracts is prevented by unavoidable casualty or death of the party, which would be reckoned as an act of God.

The case of *Cutter v. Powell* is generally cited as the great leading case on the doctrine of entire contracts relating to personal service. Under the peculiar circumstances of that case it was held that, notwithstanding the plaintiff's testator performed a part of his contract, and was prevented from full performance by death, no recovery could be allowed for the value of the part performance.

The facts and circumstances involved in the decision of *Cutter v. Powell* take the case out of the general rule. In that case a seaman contracted for a larger rate of wages than was customary on the express provision that he proceeds, continues, and does his duty on board for the voyage, and he died before the ship reached the port.[4]

[1] The student must observe the distinction between a recovery on the contract and a recovery of the value of a part performance, or, as it is termed, a recovery on the *quantum meruit.* See Andrews' Steph. Pl. 86; McMillan v. Malloy, 10 Neb. 228.

[2] Olmstead v. Beal, *supra.*

[3] Cutter v. Powell, 6 T. R. 320. What constitutes an "act of God" is not susceptible of close definition. It has been said to be equivalent to inevitable accident. But this is not strictly correct. It excludes all idea of human agency, and has been said to mean such a direct and violent and sudden and irresistible act of nature as could not have been foreseen, or, if foreseen, prevented. Nugent v. Smith, 1 C. P. D. 423; and see McArthur v. Sears, 21 Wend. 190; Mill Dam Foundry v. Hovey, *supra;* School Dist. v. Dauchy, 25 Conn. 530; Schwartz v. Sanders, 46 Ill. 18. The phrase occurs most frequently in connection with the limitation of liability of carriers and will be referred to again under that head.

[4] The instrument was as follows: "Ten days after the ship Governor Parry, myself master, arrive at Liverpool, I promise to pay to Mr. T. Cutter the sum of thirty guineas, *provided* he proceeds, continues, and does his duty as second mate, in the said ship, from hence to the port of Liverpool. Kingston, July 31st, 1793."

Complete performance was, according to the particular circumstances, held to be a condition precedent to recovery.

Chief Justice Kenyon stated that the contract was to receive a larger sum than was customary wages if the whole duty were performed, and nothing unless the whole of that duty were performed; it was a kind of insurance.

Lawrence, J., distinguished the case from the common case of a hired servant.

The general rule with regard to the common case of contracts of service is that the servant shall be entitled to his wages for the time he serves, though he does not continue in service during the whole year, except only in the case of voluntary abandonment and rightful discharge; and even in these cases most states allow a recovery.[1]

If his complete performance is prevented by the act of God, such as sickness, casualty or death, there seems to be no conflict of authority upon this proposition, and the *obiter* of *Cutter v. Powell* supports the general rule, and its facts are clearly distinguishable from the ordinary cases supporting the rule.[2]

In *Cook v. McCabe*,[3] Cassoday, J., points out the distinction as follows: "In *Cutter v. Powell* the sailor was to be paid the sum named, 'provided he proceed, continue, and do his duty on board for the voyage;' and that case, in the language of Allen, J., in *Wolfe v. Howes*,[4] 'is distinguishable in this: that by the peculiar wording of the contract it was converted into *a wagering agreement*, by which the party, in consideration of an unusually high rate of wages, undertook to insure his own life, and to render, at all hazards, his personal services during the voyage, before the completion of which he died.'"

Where complete performance is prevented without the fault of the promisor, but by a cause not amounting to the act of God, the case is not so clear and is distinguishable in principle; but in the absence of any special stipulation the weight of authority largely favors a recovery upon the *quantum meruit* for the value of the service.[5]

[1] Cutter v. Powell, 6 T. R. 320.

[2] Leaver v. Morse, 20 Vt. 620, and Ryan v. Dayton, 25 Conn. 188, are cases distinguishing Cutter v. Powell.

[3] 53 Wis. 250.

[4] 20 N. Y. 200.

[5] Schwartz v. Sanders, 46 Ill. 18; School Dist. v. Dauchy, *supra;* Ryan v. Dayton, 25 Conn. 188; Mill Dam

It will be observed that all these cases involve, in order to allow recovery, an implied contract, where there has been an express one.[1]

Discharge, Rightful.— Where the servant is discharged for cause there is a conflict of authorities, some courts holding he may recover the full value of his services over and above the damage to his employer, because of the act which constitutes the ground for the discharge.[2]

Foundry v. Hovey, 25 Pick. 417; Britton v. Turner, *supra*. If, on the whole, what has been received is beneficial, a recovery may be had on a *quantum meruit*. Eakin v. Hansom, 4 McCord (S. C.), 249. The case of Clay v. Hodge, 18 Iowa, 66, presents an able exposition of this question by Judge Dillon. In the course of the opinion that learned judge said: "This cause does not involve much in amount, but yet presents a legal question of the highest importance, and one in relation to which the best jurists and the ablest thinkers almost radically differ. It is found by the referee that the plaintiff has not performed in full his contract. It is not found that the defendant waived, prevented or dispensed with its performance. Not having performed the special contract, he cannot recover (so all of the authorities agree) on the contract. Eyser v. Weissgerber, 2 Iowa, 463, 468, and cases cited; Corwin v. Wallace, 17 id. 374, referring to previous adjudication of same case. The controversy is whether in such case he may recover as upon a *quantum meruit*. This question was settled in this state by the case of Pixler v. Nichols, 8 Iowa, 106, which distinctly recognized and expressly followed the case of Britton v. Turner, 6 N. H. 481. That celebrated case has been criticised, doubted and denied to be sound. It is frequently said to be good equity, but bad law. Yet its principles have been gradually winning their way into professional and judicial favor. It is bottomed on justice, and is right upon principle, however it may be upon the technical and more illiberal rules of the common law, as found in the older cases. With the known and natural disposition of courts and juries to disfavor the cause of him who has broken his contract, and yet seeks a recovery, and with the limitations stated in Pixler v. Nichols, the application of this rule will not be found practically to work injustice to the employer or contracting party who is without fault. This rule will apply to such cases as the one under consideration. A formal acceptance of the work, or an acquiescence in the breach, is not necessarily essential to recovery."

[1] This seems no objection, even in Massachusetts, in any case except case of hiring of personal service. Bowker v. Hoyt, 18 Pick. 555; McMillan v. Malloy, 10 Neb. 228.

[2] In such a case there can be no recovery for the breach. Bass Furnace Co. v. Glasscock, 82 Ala. 452; 60 Am. Rep. 748; Leopold v. Salkey, 89 Ill. 412; 31 Am. Rep. 93; Odeneal v. Henry, 70 Miss. 172. And wages can be recovered only to the time of discharge. Hale v. Sheehan, 36 Neb. 439; Newman v. Reagan, 63 Ga. 755. In other cases it is held that the discharged employee is entitled to no wages since the last preceding periodical payment. Beach v. Mullin, 34 N. J. L. 343; Hartman v. Rogers, 69 Cal. 643.

The strict rule requiring a complete performance of entire contracts as a condition precedent to a recovery either on the contract or on a *quantum meruit* for the value of the benefit over and above the damage occasioned by the non-performance seems now confined only to the contract of service,[1] while on all other contracts which of necessity must be for the furnishing of property and material, a recovery may be had although there is a *breach* of a contract and no complete discharge.[2]

Wrongful discharge of a servant in cases of contracts of hiring entitles the servant to recover by all the authorities, the only difference of opinion being as to the measure of damages and the procedure to be adopted; *i. e.*, whether he may wait until the expiration of the term and sue upon the contract, or may bring suit immediately upon breach of the contract for the value of his services and damages; or whether he may have several successive suits for instalments as they fall due.[3]

Voluntary Abandonment.—In case of voluntary abandonment of the service by the servant, it was formerly held with strictness that there could be no recovery, even though the contract was almost completely performed and the value of the services vastly exceeded the damages occasioned by the breach.[4]

[1] See note in 31 Am. Rep. 103, where the rule in many states is pointed out. Ryan v. Dayton, 25 Conn. 188; Ind., B. & W. R. Co. v. Koons, 105 Ind. 507, 511.

[2] McMillan v. Malloy, 10 Neb. 228.

[3] The full treatment of this question falls under the head of "Election of Remedies," and the reader is referred to that title. If, by the contract of hiring, the service is to continue for a definite time, the wages to be paid at stipulated periods, as weekly or monthly, the servant has, of course, an action on the contract for wages due at the time of the wrongful discharge. He cannot, however, after discharge, and during the time for which the contract was to run, bring successive suits for wages at the end of the periods stipulated. Jones v. Dunton, 7 Ill. App. 580. As growing out of the wrongful discharge after the term has commenced, he has two remedies: 1. He may treat the contract as continuing and recover damages for the breach, in which case the measure of damages would be the amount of wages due, less what he might have earned. Larkins v. Hecksher, 51 N. J. L. 133; 3 L. R. A. 137; Stubbe v. Waldeck, 87 Wis. 437; Richardson v. Eagle Mach. Works, 78 Ind. 422; 41 Am. Rep. 584. 2. Or, if he does not sue on the contract for wages due, as above, he may rescind the contract and sue on a *quantum meruit* for services actually rendered. Howard v. Daly, 61 N. Y. 362; Chamberlin v. McAllister, 6 Dana, 352; Clark v. Manchester, 51 N. H. 594; Wilkinson v. Black, 80 Ala. 329; Dover v. Plemmons, 33 N. C. 23. See "Master and Servant," "Constructive Service."

[4] A very hard application of this

In 1834 the supreme court of New Hampshire introduced the first innovation of this strict rule as applied to contracts of service, and held that even though there was a voluntary abandonment of the service, unjustifiable and against the wish of the employer, there might nevertheless be a recovery upon the *quantum meruit* for so much as the value of the services exceeded the damages to the employer.[1]

The decision is based upon the ground that there is no real distinction between allowing a *quantum meruit* in such cases and in a case where the contract is to furnish property and material; that there was no distinction resting upon the reasoning that the party receiving material and labor was held to accept and receive, unless he returned, and the idea that during every day of the personal service the defendant was accepting and receiving beneficial service.

This rule has been adopted in many of the states,[2] but others still adhere firmly to the old rule.[3]

Sec. 604. *Apportionability of Contracts.*— It is frequently stated that a contract is divisible or apportionable when by its terms, either express or implied, it is contemplated that, on a performance of less than the whole, a portion of the consideration on the other side shall be due and demandable;[4] but it seems well settled by the highest authority that an entire contract to furnish a gross amount delivered in instalments is entire, even though payment is to be made as the instalments are delivered,[5] and it is not essential to entirety that every act of performance should be simultaneous or continu-

rule is shown where the plaintiff worked ten and one-half months out of a yearly contract, and on Saturday, in anger, refused to continue longer and left, returning Monday, offering to resume, but his employer refused to receive him back. He was allowed to recover nothing. Lautry v. Park, 8 Cow. 63.

[1] Britton v. Turner, *supra.*

[2] See Clough v. Clough, 26 N. H. 24; McMillan v. Malloy, 10 Neb. 328; 3 L. R. A. 471; Duncan v. Baker, 21 Kan. 99.

[3] Kohn v. Faudel, 29 Minn. 470; Kettle v. Harvey, 21 Vt. 301; Byrd v. Boyd, 4 McCord, 240; 17 Am. Dec. 740; Timberlake v. Turner (Miss.), 24 L. R. A. 231, and cases cited in note.

[4] White v. Atkin, 8 Cush. 370; Keeler v. Clifford, 165 Ill. 545; Wooten v. Walters, 110 N. C. 251; Jackson v. Cleveland, 15 Wis. 107; Partridge v. Forsythe, 29 Ala. 200.

[5] Such is the doctrine of Mersey Co. v. Naylor, approved in Norrington v. Wright, *infra.*

ous. An illustration of this is found in a contract of sale to be delivered in instalments.[1]

An entire contract is never apportionable, but the consideration of it may be. The recovery which is allowed upon abandonment or breach or rescission is distinguishable from a recovery in accordance with the terms of an apportionable contract.

A contract to do an entire thing, furnish a specific quantity of a commodity, or perform services for a definite period, is entire;[2] but even where a portion of the consideration is to be paid as the work progresses, the remedy only is apportionable, though the contract may be entire,[3] and the party performing has the right to demand and recover the instalments as they accrue; and a recovery of one is not, like a recovery of a breach of contract, a bar to a subsequent suit for another instalment of the balance. But even in such cases the *performance* of the act less than the whole may be a condition precedent, while on the other hand payment for an instalment will not generally constitute a condition justifying a rescission,[4] unless so expressly provided.[5]

The stipulations of a contract may be entire on one side and apportionable on the other; *e. g.*, a contract to sell and deliver a specific quantity of a commodity to be delivered in instalments, to be paid for on delivery, is without doubt an entire contract to sell and deliver the gross amount; but the contract to pay, while not a condition precedent, is apportionable, at least so far as to allow a recovery of the instalments as delivered;[6]

[1] Norrington v. Wright, 115 U. S. 203.

[2] Id.

[3] Id.

[4] Mersey Co. v. Naylor, 9 App. Cas. 434, stated in 115 U. S. 210. *Cf.* Keeler v. Clifford, 165 Ill. 544. The reasoning in this case is not very plain, but the decision is correct.

[5] "Whether a contract is entire or not is to be determined by considering whether the obligation which it imposes is to be discharged at different times or to different persons. If parties have stipulated in the same contract that a debt shall fall due in instalments, or that several distinct obligations which it imposes shall be performed at different times at stipulated periods, or to different persons, the consideration for each separate act being either expressly or impliedly apportioned, they have thereby made the contract divisible *in such a sense* that an action may be maintained on the contract to recover upon each separate independent stipulation as it matures or is broken." Indiana, B. & W. R. R. Co. v. Koons, 105 Ind. 507, 511.

[6] Pope v. Porter, 102 N. Y. 366. "They contemplate and require a

and on the other hand, the delivery of the instalments as contracted for may be a condition precedent, which, if not performed, will permit the purchaser to rescind.

Sec. 605. *The Subject-matter.*— The treatment of the subject-matter, whatever form it takes, consists in pointing out the general rules in relation to objects for the accomplishment of which no valid enforcible contract can be made.[1]

In these cases it will be seen that all of the essentials of assent and consideration on one side may be present, but the subject-matter is such that to it the law will not attach the obligation.

The subject-matter is not always, although sometimes, distinguishable from *consideration*, and subject-matter is but another mode of expressing the *object* intended to be accomplished.[2] Thus, in the case of mutual promises to pay money, the *subject* of the contract is the payment of money, and in mutual promises to do and perform different things in consideration of the performance by the other party of something else, the subject-matter and the consideration are the same. In a given case, however, the thing to be performed by one side may be legal, while that agreed upon to be performed by the other side may be illegal, and in such a case, the mutual agreements being the consideration for each other, the consideration for one promise is illegal because the object to be accomplished by the other party is illegal.

The fundamental rule is that all contracts which have for their object anything repugnant to the general policy of the law, or contrary to the provisions of a statute, are void; for it

performance in separable parts or divisions; and where the vendor delivers an agreed proportion, which the vendee accepts, and payment therefor becomes immediately due, the right to recover is at once complete and is not forfeited by a later default. The contract in such cases is called divisible or distributive, and the language is not objectionable if correctly understood and applied." Pope v. Porter, 102 N. Y. 362–71.

[1] Broom's Max. (8th ed.) 732. It is a fundamental rule of public policy that the freedom of contracting shall not be lightly interfered with. Printing Co. v. Sampson, 19 Eq. 462. See *ante*, sec. 398.

[2] In the draft of the civil code prepared for New York by David Dudley Field and others, what is called the *subject-matter* is treated as the *object*. So the same thing is spoken of in different connections and by different persons indiscriminately, as consideration, subject-matter, and object. Parsons treats the subject of illegality under the title "Consideration."

is a rule as well in law as equity, *ex turpi contractu actio non oritur.*[1]

It is also a rule that although the object of the contract be legal, if it is based on an immoral or illegal consideration the contract is void.[2]

On first view the above rules seem exceedingly simple. Giving to the words in which they are expressed a plain and literal interpretation would have the effect of declaring every unlawful contract void *ab initio*, *i. e.*, as though it never had been. But such is the changing, uncertain sense in which the words *void* and *illegal* are used that it cannot be affirmed as a rule of law that every contract prohibited by the statutes, or repugnant to the policy of the law, is void.[3]

There is a wide distinction in legal contemplation between contracts which are illegal and those which are void, and, paradoxical as it may seem, contracts which are regarded in the English law *merely* as void are not void, whereas contracts which are regarded in the light of that law as illegal are void.[4]

[1] Thalimer v. Brinkerhoff, 20 Johns. 397.

[2] Broom's Max. (8th ed.) 732; Bank of U. S. v. Owens, 2 Pet. 539; Byrd v. Hughes, 84 Ill. 174.

[3] *E. g.*, usurious and wagering contracts.

[4] For example, by the 8th and 9th Vict., ch. 109, sec. 18, it is provided: "All contracts and agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made." Counsel in argument, in Lilley v. Rankin, Q. B. Div. 1886, 19 Chi. Leg. News, 202, a case on a contract said to be in violation of this statute, said: "This contract is void only, and not illegal; and though I admit that a bill or note given for an illegal consideration and indorsed over to one who has given valuable consideration, with notice of its illegality, could not be sued on, yet, when the consideration is only void, *i. e.*, not tainted with illegality, an indorsee for value, *even with notice*, may recover it." And Huddleston, B., states in the opinion: "The statute of 9 Anne, ch. 14, avoided bills and notes given for certain purposes, and by 5 and 6 Will. 4, ch. 41, sec. 15, such notes were deemed to be not merely void, but as given for an illegal consideration. Now, if these notes had come within the effect of the 9 Anne, ch. 14, the statute of 5 and 6 Will. 4, ch. 41, would have made them illegal; but they do not, and 8 and 9 Vict., ch. 109, sec. 18, need only be looked at, which enacts that contracts by way of gaming or wagering shall be void, and not recoverable by legal process. I will do no more than mention the cases of Fitch v. Jones, 24 L. J. Q. B. 293, and Beeston v. Beeston, 33 L. T. Rep. (N. S.) 700; 1 Ex. Div. 13, which go to show that notice of the voidness of the

Almost any case involving the invalidity of contracts because of illegality presents an instance of the confusion resulting from this inapt use of these terms *illegal* and *void*.

Illegality should be used as a term indicating the quality or character of the contract.

Void should be used as indicating the effect of the presence of the taint of illegality and given its common, natural sense.

Voidable should be used to designate another effect of a different degree of illegality.

Penalized contracts accurately designate a class of contracts prohibited under penalty, but which, if performed, are attended with no consequence except the penalty, though not enforceable while executory.[1]

These three classes are recognized by our courts, but the words by which they are designated are seldom used with discrimination. *Void* is generally used to indicate one species of transgression, instead of the effect of transgression; *illegality*, another, and no fixed designation is used for the third.

In this connection it is important to distinguish between fraud and illegality. An illegal contract is one which, while it is complete in essentials, the courts will refuse to enforce because it has for its object something which is impolitic or prohibited. Fraud, on the other hand, goes to the inception of the contract, and precludes the idea of assent.[2]

Divisibility of Illegal Contracts.— It is the rule of the modern authorities that where, on a lawful consideration, a party has contracted to perform anything, and an illegal act is included therein, he must perform so far as the effect is legal if it can be separated from the illegal part.

Where, however, no separation can be made between the legal and illegal stipulations, the whole will be held void.[3]

This supposes legality of consideration. If one of two considerations is void, the other will support the promise; if illegal, the whole contract is void.[4]

consideration is no defense to an action on a bill or note, if it be proved that the holder gave valuable consideration for the instrument, which is the present case."

[1] See Aiken v. Blaisdell, 41 Vt. 655.

[2] Anson on Contracts, *182.

[3] 2 Kent, Com. 467; Hynds v. Hays, 25 Ind. 31; Warren v. Chapman, 105 Mass. 87; Saratoga Co. Bank v. King, 44 N. Y. 87; Whitbeck v. Estate of Ramsey, 74 Ill. App. 524.

[4] Metc., Cont. 246; Henderson v. Palmer, 71 Ill. 583; Root v. Merriam,

A partial want or failure of a consideration avoids a note *pro tanto*, but illegality in respect to a part of the consideration avoids it *in toto*.[1]

The principle does not, however, apply to subsequent contracts growing out of, but not bottomed on, the illegal transaction, in which the plaintiff does not require the aid of the illegal transaction to establish his case.[2]

Illegal contracts are those which are prohibited either (1) by statute or (2) by the rules of the common law.

Illegal by Statute.—The statute may declare expressly that a contract having for its object certain things shall be void or illegal, or both. And a contract which is void as being in contravention of a statute does not become valid by the repeal of the statute.[3]

Again, the statute may simply impose a penalty upon the accomplishment of certain objects. The question then arises, Does this amount to a prohibition? And this depends upon the interpretation and construction of the particular statute, and can be answered satisfactorily by ascertaining as nearly as possible the intention of the legislature.[4]

Where the penalty is incurred by every breach of the provisions of the statute, there can be no doubt of the intention to make the contract void. If, however, the prohibition of the statute is against carrying on a business except on certain specified conditions, and a penalty is imposed once for all, a contract violating such provisions will not be void.[5]

Where the penalty is imposed, not for the protection of the whole public, but for the security of the revenue, probably it will be held, in most cases, that it was intended not to prohibit the contract, but only to *penalize* it.[6]

The courts are reluctant to sustain a contract where the effect would be to encourage the violation of the revenue laws.[7]

27 Fed. Rep. 909; Barnard v. Backhaus, 52 Wis. 593; Armstrong v. Toler, 11 Wheat. 258; Embry v. Jennison, 131 U. S. 348.

[1] Widoe v. Webb, 20 Ohio St. 431.

[2] Armstrong v. Toler, 11 Wheat. 258; Brooks v. Martin, 2 Wall. 70.

[3] Webber v. Howe, 36 Mich. 150.

[4] Larned v. Andrews, 106 Mass. 435; Aiken v. Blaisdell, 41 Vt. 668.

[5] Smith v. Mawhood, 14 M. & W. 463.

[6] Brown v. Duncan, 10 B. & C. 93; Anson on Contracts, *173; Larned v. Andrews, 106 Mass. 435; Aiken v. Blaisdell, 41 Vt. 655, 668.

[7] Greenhood, Pub. Pol. 582.

Statutes prohibiting or penalizing contracts have been classified into those relating (1) to the security of the revenue; (2) to the protection of the public in dealing with certain articles of commerce, (3) or in dealing with certain classes of trade; (4) to the regulation of the conduct of certain kinds of business.[1]

The statute of frauds has been considered at length. By it certain contracts are declared to be void and unenforceable.[2] Where there is an entire express contract, void under this statute, no implied promise can be raised.[3]

Contracts Prohibited by the Rules of the Common Law.— A contract made with an alien enemy is void, not on any ground of public policy, but because by the common law trading with an enemy without a license from the king was illegal.[4]

An agreement to commit an indictable offense falls within the prohibition of the common law. And so with regard to agreements to commit civil wrongs. An example will be found in an agreement involving the publication of a libel.[5]

Contracts Against Public Policy.— It is sometimes attempted to distinguish agreements made in violation of the policy of the law from those treated under the previous heading. But such a distinction is without value, because rules have grown up on this subject which are in reality rules of the common law as much as those considered in the last paragraph.

The phrase "public policy," or the policy of the law, is one of uncertain meaning. Public policy is changeable, and varies with the habits, education and condition of the people.

It has been different at different stages in the development of the law, and must change with the circumstances and environments of the people, and with the growth of a public sentiment in conformity with high ideals.[6]

[1] Anson on Contracts, 226; Pollock on Contracts, p. 682.

[2] See *ante*, p. 738.

[3] Galvin v. Prentice, 45 N. Y. 162; 6 Am. Rep. 58; White v. Buss, 3 Cush. 448.

[4] Potts v. Bell, 8 T. R. 548; Hanger v. Abbott, 6 Wall. 532.

[5] Clay v. Yates, 1 H. & N. 73.

[6] See Davies v. Davies, 1 L. R. 36 Ch. Div. 364. "Public policy in the administration of the law by the courts is essentially different from what may be public policy in the view of the legislature. With the legislature it may be, and often is, nothing more than expediency. The public policy which dictates the enactment of the law is determined by the wisdom or unwisdom of the leg-

A contract contrary to the policy of the state where it is made or to be enforced is not generally enforceable anywhere.[1] But a contract valid where made will not be enforced in a state where it is deemed contrary to good morals.[2]

The contract is not void, however, as against public policy unless it contravenes some established interest of society.[3]

Bargains Abrogating Parental Duty.— The contract of a parent by which he bargains away for a consideration the custody of his child to a stranger, attempting to shift from himself to another the paternal obligation, amounts to a mere sale of the child and is void as against public policy. But a contract which amounts to a family compact, by which a relative undertakes, in return for the custody of the child and the charge of his education, to pay a specified sum to the parent, and a specified sum to the child on his coming of age, and where parental affection is not to be extinguished and the welfare of the child is to be promoted, is not against public morals or the policy of the law.[4]

Maintenance is an officious intermeddling in a suit in which one has no interest by maintaining or assisting either party with money or otherwise to prosecute or defend it.

Champerty is a species of maintenance, being a bargain with a plaintiff or defendant to divide the land or other matter sued for between them if they prevail at law.[5]

These were offenses at common law punishable by fine and imprisonment,[6] and are still regarded in England as contrary to public policy as tending to stir up strife and to increase litigation. It was said in a recent case that maintenance would exist if the conduct of the party tended to promote litigation.[7]

The rules relating to champerty and maintenance have not

islature. If the legislature declared by statute that it was injurious to public interests, under any circumstances, for a parent to surrender the custody of a child during minority to a grandfather, that would be the end of discussion on that question." Enders v. Enders, 164 Pa. St. 266.

[1] Teal v. Walker, 111 U. S. 242; Tolman v. Reed, 72 N. W. Rep. 1104.

[2] Oscanyan v. Arms Co., 103 U. S. 261, 277.

[3] Story on Contracts, sec. 546; Peterson v. Christensen, 26 Minn. 377.

[4] Enders v. Enders, 164 Pa. St. 266, 27 L. R. A. 56, and note citing many cases.

[5] 4 Blk. Com. 134.

[6] Thalimer v. Brinkerhoff, 20 Johns. 386.

[7] Bradlaugh v. Newdegate, 11 Q. B. 10.

been adopted in some states, it being held in such that here the condition of society which furnished a good reason for these rules does not exist. Many of the states, however, have statutory provisions on the subject, and in some jurisdictions it is held that a purely champertous agreement is void as against public policy whether prohibited by statute or not.[1] In most of the states the English doctrine is recognized, but with more or less modification.[2]

But a stranger to a contract cannot object that it is champertous. The defense can be set up only when the agreement is sought to be enforced or title is to be made through it.[3]

A person may assign an interest in a chose in action even though it happens to be the subject of litigation.[4]

A marriage brokage contract, or agreement to pay for the bringing about of a marriage, is void as interfering with the freedom of consent, which it is the policy of the law to encourage.[5]

So an agreement in restraint of marriage is against public policy, as tending to prevent the increase of population, and as being injurious to the moral welfare of the citizen.[6]

Agreements providing for immediate separation of husband and wife are valid. But an agreement looking to a separation in the future is void, as it is supposed to discourage the performance of "duties in the fulfillment of which society has an interest."[7] An agreement not to defend a divorce suit, in consideration of a sum to be paid in lieu of alimony, is void.[8]

Contracts of Public Officers.— It is a maxim of the law that no one shall act where his interest and integrity are in conflict, and the principle involved in this maxim pervades every department of private intercourse and public service.[9] It follows that wherever one is placed in an official position it is contrary to

[1] Johnson v. Van Wyck, 4 App. (D. C.) 294. See Stanley v. Jones, 7 Bing. 369; Peck v. Henrich, 167 U. S. 639; Johnson v. Hilton, 96 Ga. 577.

[2] Ross v. Ft. Wayne, 64 Fed. Rep. 1006.

[3] Davis v. Settle (W. Va.), 26 S. E. Rep. 557; Barnes v. Scott, 117 U. S. 582.

[4] Rucker v. Bolles, 80 Fed. Rep. 504.

[5] Morrison v. Rodgers, 115 Cal. 252; Johnson v. Hunt, 81 Ky. 321.

[6] Lowe v. Peers, 4 Burr. 2225; Mandelbaum v. McDonald, 29 Mich. 78.

[7] Cartwright v. Cartwright, 3 D. M. & G. 982; Randall v. Randall, 37 Mich. 571.

[8] Smutzer v. Stimson, 9 Colo. App. 326; Hamilton v. Hamilton, 89 Ill. 348.

[9] Woodstock Co. v. Richmond Co., 129 U. S. 643.

the policy of the law for him to be interested in a contract with the principal to make a profit to himself, and so the common law forbids contracts between public corporations and officers of the same; and although there are many statutory provisions covering this subject, generally speaking such statutes are merely declaratory of the common law.[1]

The rule is uniform, and its operation subject to no exception that the public is entitled to the best judgment of every officer, and it is the policy of the law that no private pecuniary interest shall mould or modify his views. The validity of the contract does not depend upon good faith or right intentions.[2] Such contracts are, to say the least, voidable under all circumstances.[3]

[1] Borough of Milford v. Milford Water Co., 124 Pa. St. 610; Smith v. Albany, 61 N. Y. 144; Bellaire Goblet Co. v. City of Finley, 5 Ohio Cir. Ct. Rep. 418; Pickett v. School District, 25 Wis. 552. In People v. Town Board, 11 Mich. 222, it is said: "Public officers are agents and their official powers are fiduciary. They are trusted with public functions for the good of the public, to protect, advance and promote its interests and not their own."

[2] Greenhood, Pub. Pol. 5. In Piatt v. Longworth, 27 Ohio St. 195, which involved a sale made by an administrator to a relative, the administrator having some secret interest, Johnson, J., says: "In such cases the court will not suffer itself to be drawn aside from the application of this equitable rule by any attempt on the part of the purchaser to establish the fairness of the purchase, because of the danger of an imposition and the presumption of fraud, inaccessible to the eye of the court. The policy of the rule is to shut the door against temptation in cases where this relationship exists; it is of itself deemed sufficient to create the disqualification. The sale will be set aside, not because there is fraud, but because there may be fraud." This principle is well stated by Elliott, J., in Elkhart Co. Lodge v. Curry, 98 Ind. 208: "A wholesome rule of law is that parties should not be permitted to make contracts which are likely to set private interests in opposition to public duty or to the public welfare. . . . It is not necessary that actual fraud should be shown, for a contract which tends to the injury of the public service is void, although the parties enter into it honestly."

[3] Stewart v. Railroad Co., 38 N. J. L. 505.

Mayor of City.— The fact that the mayor of a city is also the president and a stockholder of a gas company is held in Capital Gas Co. v. Young (Cal.), 29 L. R. A. 463, not to defeat the right of the gas company to collect for gas furnished, not under any contract, but by requirement of law, although the statutes make it unlawful for any city officer to be interested in any contract or business for which payment is to be made from the city treasury. *A member of a city council* claimed to have contracted with a railway company to enter its employ and devote substantially all his time in the general management of said company's business within his city in the procurement of rights of way through such city, a necessary and substantial part of which comprised cession of rights

A contract by a public officer to perform future services for a third person for less than the official fees or salary is void *in toto* and cannot be enforced; neither will the existence of such a contract defeat an action for the legal fees for or services performed for a private person.[1] Nor is it competent for a public officer to assign his unearned salary.[2] The public service cannot be endangered by allowing its officers to become embarrassed or incapacitated from performing their duty and upholding the dignity of the office by such improvident bargains.[3]

Agreements Having a Tendency to Injure the Public Service.— The law proceeds on the theory that servants are chosen for their fitness, and the public has a right to their personal services. So a sale of a public office is recognized both in England and in this country as being contrary to the rules of the common law.[4]

Agreements which, in their necessary operation upon the action of parties, tend to restrain natural rivalry and competition, to the disadvantage of the public, are void.[5] And an understanding between contractors engaged in work for the public, by which the government is to be charged excessively for work done, is contrary to public policy.[6]

Lobbying Contracts.— Public policy emphatically condemns every effort to influence legislative action by underhanded methods for private profit. It is not necessary to show that actual corruption was resorted to, or that it was contemplated.

over its streets and avenues, and thereafter during the term of office assisted, as such councilman, in granting and ceding valuable rights and interests from such city to such railway company. Such rights were held so connected with the subject-matter of said employment as to have a tendency to influence the action of such member of council; that such contract contravenes public policy and will not be enforced. C., H. & D. Ry. Co. v. Morris, 10 Ohio C. C. 502; McCortle v. Balls, 29 Ohio St. 419; Fuller v. Duane, 18 Pick. 472.

[1] A notary public is such an officer and within the rule. John's Am. Notaries, sec. 19; Ohio Nat. Bank v. Hopkins, 8 Ct. App. (D. C.) 146.

[2] Bangs v. Dunn, 66 Cal. 72; Schloss v. Hewlet, 81 Ala. 266; Bliss v. Lawrence, 58 N. Y. 442.

[3] Ohio Nat. Bank v. Hopkins, *supra*, citing Liverpool v. Wright, 28 L. J. (N. S.) Ch. 811; Palmer v. Vaughn, 3 Swanst. 173; Parsons v. Thompson, 1 H. Blk. 322; Foster v. Wells, 8 M. & W. 147; Anson on Contracts, *184.

[4] Hall v. Gavitt, 18 Ind. 390; Morse v. Ryan, 28 Wis. 356.

[5] Hoffman v. McMullen, 83 Fed. Rep. 372.

[6] Fisher Elec. Co. v. Botte Iron Works (Mich.), 74 N. W. Rep. 493.

Contracts by which one agrees to act for another in such a matter and manner may be valid.[1] Persons whose interest may in any way be affected by an act of the legislature are entitled to be heard either in person or by counsel; but persons acting in a representative capacity must appear in their true character. "A hired advocate or agent assuming to act in a different character is practicing deceit."[2] All indirect methods of influencing public officials in respect to public business intrusted to them are immoral. The same considerations apply with full force to all agreements looking to the procurement of contracts from heads of departments, national, state or municipal. If the agency is open and understood by all parties, it is lawful; but if the solicitation is meant to be understood as disinterested, or if the contract contemplates that action shall be secured by any other than honest, open and public means, the courts will not enforce the contract.[3]

Perversion or Obstruction of the Course of Justice.— There can be no valid agreement to stifle a prosecution for a crime. The knowledge that a crime has been committed cannot be converted into a source of profit.[4] In *Keir v. Leeman*,[5] Chief Justice Tindal said: "We have no doubt that in all offenses which involve damages to an injured party, for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle his private damage in any way he may think fit." Some old English cases made a distinction between compounding felonies and compounding misdemeanors. But this distinction does not seem to be continued in the English law, and it is discountenanced with us. In this country any act which is made punishable by law is an offense against the public, and cannot be made the subject of private compromise unless expressly authorized by statute.[6]

[1] Marshall v. Railroad Co., 16 How. 314, 334; Trist v. Child, 21 Wall. 441; Hayward v. Nordberg Mfg. Co., 85 Fed. Rep. 4, 11.

[2] Hayward v. Nordberg Mfg. Co., *supra*.

[3] Id.

[4] Williams v. Bayley, L. R. 1 H. L. 220; Schultz v. Culbertson, 46 Wis. 313; Ricketts v. Harvey, 106 Ind. 564.

[5] 9 Q. B. 371.

[6] Jones v. Rice, 18 Pick. 440; Partridge v. Hood, 120 Mass. 403; Shaw v. Spooner, 9 N. H. 197; Malli v. Willett, 57 Iowa, 705.

Any agreement tending to hamper or control the administration of justice is void.[1] The validity of such a contract depends on its tendency. Though a particular contract be free from any taint, yet, if in its nature it is such as might have been injurious to the public, it is void. And this is so whether lawful or unlawful means are contemplated to execute it.[2]

A contract ousting the jurisdiction of the courts over matters arising under it is void. A covenant or stipulation contained in or concurrent with an executory contract and collateral thereto, providing that all matters of dispute which may subsequently arise in reference to it shall be referred to an arbitrator or umpire, whose decision shall be binding, is void.[3]

Such umpirage may be made a condition precedent to bringing suit, and the agreement may provide for the ascertainment of the damages claimed to have accrued.[4]

An original agreement to perform work of a certain grade or in a specified manner, or furnish materials of a certain quality, may provide that the decision of a superintendent, architect or umpire shall be final and conclusive. In the absence of fraud or mistake his decision is binding.[5]

Arbitration.— A contract to arbitrate matters already actually in dispute is legal.[6]

Agreements Against Good Morals.— It is the policy of the law to encourage morality. Courts will not lend their aid to enforce contracts *contra bonos mores.*[7]

A promise made in consideration of future illicit cohabitation is void.

A promise made in consideration of past illicit cohabitation

[1] Crowder v. Reed, 80 Ind. 1.

[2] Greenhood, Pub. Pol. 5; Woodstock Iron Co. v. Richmond, etc. Co., 129 U. S. 643; Ridenbaugh v. Young (Mo.), 46 S. W. Rep. 959.

[3] Miles v. Schmidt, 168 Mass. 339. In Stephenson v. Insurance Co., 54 Me. 55, the court said: "The law, and not the contract, prescribes the remedy; and parties have no more right to enter into stipulations against a resort to the court, for a remedy in a given case, than they have to provide a remedy prohibited by law. Such stipulations are repugnant to the rest of the contract, and assume to divest courts of their established jurisdictions."

[4] Mitchell v. Dougherty, 90 Fed. Rep. 639; Avery v. Scott, 8 Exch. 497; Insurance Co. v. Morse, 20 Wall. 451; D. & H. Canal Co. v. Pa. Coal Co., 50 N. Y. 250.

[5] Faunce v. Burke, 16 Pa. St. 469; 55 Am. Dec. 519; Guthat v. Gow, 95 Mich. 527; Wendt v. Vogel, 87 Wis. 462.

[6] Davis v. Havard, 15 S. & R. 165; 16 Am. Dec. 557. See ARBITRATION AND AWARD.

[7] Drennan v. Douglas, 102 Ill. 341.

is a mere gratuitous promise, binding if made under seal, otherwise not.

A parol promise to compensate for the injury sustained by seduction is valid. In such a case it is in accordance with the policy of the law that the wrong-doer should compensate for the wrong.[1]

Where a house is rented for purposes of prostitution and the owner knows at the time the purpose to which it is to be put, he can maintain no action for the rent.[2] But the price of clothes, food, and furniture, necessaries of life, sold for the use of the keeper of a bawdy-house may be recovered.[3]

Sec. 606. *Contracts in Restraint of Trade.*[4]— It is the right of every citizen to engage upon an equality in every lawful vocation, and it is a settled view that the public has the right to require that no one shall incapacitate himself; also that the course of trade should be kept free from unreasonable obstruction. Hence an individual may have a right to question the action of the general public through its officers which tend to inequality in this respect, and it is the duty of public officers to preserve manufactures, trade and commerce from unreasonable obstruction and restriction.[5] Notwithstanding the freedom of individuals to contract, or the power of the general public to regulate trade and commerce, private contracts or public measures which have the tendency and effect of unreasonably restraining competition and trade are against the policy of the law.[6]

[1] Anson, Contracts (2d Am. ed.), 246.

[2] Pearce v. Brooks, L. R. 1 Exch. 213.

[3] Sprague v. Rooney, 82 Mo. 493; 52 Am. Rep. 383; Armfield v. Tate, 29 N. C. 258.

[4] See Cook's Trade and Labor Combinations, Part II.

[5] In Chappel v. Brockway, 21 Wend. 157, Judge Brockway said: "The common law will not permit individuals to oblige themselves by contract where the thing to be done or omitted is injurious to the public. Contracts in restraint of trade are, for the most part, contrary to sound policy, and are consequently held void. This is the general rule. The presumption is against all contracts in restraint of trade, and consequently it lies upon him who seeks to enforce such an obligation to show that it is free from objection. Contracts . . . that a man will not pursue his occupation or carry on business anywhere in the state are void, upon whatever consideration they may be made. They must be injurious to the public, and no good reason can be shown why one individual should thus fetter himself, or another individual should contract for the restraint."

[6] The granting of monopolies was prohibited by Magna Carta. 2 Inst. 63.

The rule of law is that an agreement in general restraint of trade is illegal and void;[1] but an agreement which operates in partial restraint may be good, provided it be not unreasonable, and there be a good consideration to support it.[2]

While the law favors competition[3] it recognizes that there may be a ruinous competition, injurious alike to the public and the parties, and so a contract restraining this competition within reasonable bounds, or, as it is called, in partial restraint of trade, may be a positive benefit to the public at large, in which case it is deemed reasonable and sanctioned.[4]

The law recognizes that the good will of a business may be transferred with a sale of the business, the seller agreeing for a reasonable period, and within a reasonable orbit, not to enter into competition with the vendee.[5]

So likewise, but with greater limitations and to a less extent,

[1] Long v. Toul, 42 Mo. 545. Contracts in unlawful restraint of trade at common law were not unlawful as being criminal, or as giving rise to a suit for damages in favor of one prejudicially affected, but were simply void and unenforceable. United States v. Addyston Pipe, etc. Co., 85 Fed. Rep. 271; Mogul Steamship Co. v. McGregor (1892), App. Cas. 25; Hilton v. Eckersley, 6 El. & Bl. 47, 66.

[2] United States v. Knight Co., 156 U. S. 1; Oregon S. N. Co. v. Winsor, 20 Wall. 64. In Lang v. Werk, 2 Ohio St. 520, Judge Ranney, a learned jurist, gave the following rules: "(1) All contracts in general restraint of trade are opposed to public policy and void; (2) all agreements in partial restraint of trade are illegal, except when founded upon a valuable consideration, and when good and sufficient reasons appear for entering into such contract. But before such a contract can be enforced it must appear from the pleadings and the proofs (1) that the restraint is partial; (2) founded upon a valuable consideration; (3) that the contract is reasonable and not oppressive; (4) a declaration which does not contain the necessary covenants to show the contract reasonable, so as to rebut the presumption of law against its validity, is bad on general demurrer." See United States v. Addyston Pipe, etc. Co., 85 Fed. Rep. 271.

The inhibition against restraint of trade seems at first to have had no exception, but it early became apparent that in the interest of trade itself certain covenants in restraint thereof should be enforced. In some states, however, the restriction is made general by statutory provision that any contract "to limit, control, or in any manner restrict or regulate the amount of production or the quantity of any article to be raised or produced by mining, manufacture, agriculture, or any other branch of business or labor," or to control the market price thereof, or to prevent free competition in the production or sale of such an article, shall be void. Bingham v. Brands (Mich.), 77 N. W. Rep. 940.

[3] People v. Chicago Gas Trust Co., 130 Ill. 268.

[4] Mallan v. May, 11 M. & W. 652.

[5] Peltz v. Eichele, 62 Mo. 171; Dean v. Emerson, 102 Mass. 480.

the law recognizes the right of a professional man to bind himself for a limited period of time and within a limited distance, not to enter into direct competition with another of whom he has accepted a consideration for the promise.[1]

But there is a distinction between such contracts in reference to manufactures, trade and merchandising and contracts affecting professions, for in the former the restraint may be perpetual, in the latter it must be limited as to both time and space.

A contract of the former class may be perpetual, but must be restricted within a reasonable limit as to orbit, otherwise the public would be deprived of the benefit to be derived from the energy and exertion of the parties.

Contracts in partial restraint of trade are upheld not because they are advantageous to the individual with whom the contract is made, and a sacrifice *pro tanto* of the rights of the community, but because it is for the benefit of the public at large that they shall be enforced.[2]

The more important reasons are that such contracts injure the parties making them by diminishing their means of supporting themselves and families; they tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as to themselves; they discourage industry and enterprise, prevent competition and enhance prices; and they expose the public to all the evils of monopoly.

The agreements which, under the rules of the common law, would be held valid, though in partial restraint of trade, have been classified by Judge Taft in a late case as agreements: 1st, by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold; 2d, by a retiring partner not to compete with the firm; 3d, by a partner, pending partnership, not to do anything to interfere, by competition or otherwise, with the business of the firm; 4th, by the buyer of property not to use the same in competition with the business retained by the seller; 5th, by an assistant servant or agent not to compete

[1] Horner v. Graves, 7 Bing. 735; Rakestraw v. Lanier (Ga.), 30 S. E. Rep. 735.

[2] Mitchell v. Reynolds, 1 P. Wms. 181; Alger v. Thacher, 19 Pick. 51.

with his master or employer after the expiration of his time of service.[1]

No covenant in restraint of trade can be enforced unless it is merely ancillary to the main purpose of a lawful contract and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party. In deciding upon the reasonableness of such a restraint it is to be considered, 1st, whether it affords a fair protection to the interests of the party in favor of whom it is given; and 2d, whether it interferes with the interests of the public.[2]

To support a promise in restraint of trade, even though it be under seal, a consideration must be shown.[3]

It was formerly thought that the restraint might be unlimited as to time, but that it must be limited as to space. This doctrine has, however, received very material modification. The restraint may extend far enough to afford a fair protection to the purchaser, and what is such protection must depend on the nature of the business, and must be determined by the court in view of the circumstances in each case.[4]

Where there is no limitation on the restraint as to territory, the contract is void.[5]

Monopolies.— The definition of monopolies given by the early English cases and text-writers as meaning an exclusive right or privilege granted to an individual by the sovereign or parliament obviously throws no light upon the nature of a monopoly created by the agreement, combination or contract between

[1] It is for the party to prove and the court to determine that the restraint is reasonable. United States v. Addyston Pipe Co., *supra* (*ante*, p. 775, note 2).

[2] Tindall, C. J., in Horner v. Graves, 7 Bing. 735, cited in Bingham v. Brands (Mich.), 77 N. W. Rep. 940; United States v. Addyston Pipe, etc. Co., *supra*. See also Martin v. Murphy, 129 Ind. 464; Sternberg v. O'Brien, 48 N. J. Eq. 370.

[3] Mallan v. May, 11 M. & W. 665; Keeler v. Taylor, 53 Pa. St. 467.

[4] Rousillon v. Rousillon, 14 Ch. Div. 358; Oregon St. Nav. Co. v. Winsor, 20 Wall. 67; Beal v. Chase, 31 Mich. 490; Diamond Match Co. v. Roeber, 35 Hun, 426; Harrison v. Nute, 87 Ill. 215. In Oregon St. Nav. Co. v. Winsor, *supra*, a contract was upheld by which one of the parties covenanted not to run a steamer on any of the waters of the state of California. In Beal v. Chase, *supra*, a contract not to carry on a publishing business within the state of Michigan was upheld.

[5] Wiley v. Baumgardner, 97 Ind. 66; Deane v. Emerson, 102 Mass. 480; Kurtz v. Gokey, 68 N. Y. 300.

private persons, but applies only when the limitation upon the powers of congress or legislatures to grant such exclusive franchises or privileges is in question.[1]

Contracts which are prohibited as against public policy because of their tendency to create a monopoly are those contracts and combinations which pass at the present time under the denomination of trusts, having for their intention and effect the destroying of competition by cornering the market, or even by lowering the price of articles temporarily to such a degree as to ruin competitors not within the combination.[2]

It does not signify whether, as a matter of fact, competition is destroyed or not. As was said by Mr. Chief Justice Fuller in *United States v. Knight*,[3] it is not essential in order to vitiate a contract or combination that its results should be a complete monopoly. It is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition.[4] The character of the trade sought to be monopolized is not material. If it is lawful it need not be of the necessaries of life.[5]

[1] Slaughter House Cases, 16 Wall. 36. There is a monopoly when one single person buys up the whole of a commodity, fixing on it a price at his pleasure. 11 Co. 86*b*.

[2] An agreement providing for a combination of all interests engaged in a particular business under absolute dominion of a number of trustees is illegal and void. Bishop v. American Preservers' Co., 157 Ill. 284. The following cases sustain the proposition of the text and furnish excellent illustrations of the rule: People v. Sheldon, 139 N. Y. 251; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173; Nestor v. Brewing Co., 161 Pa. St. 473; Salt Co. v. Guthrie, 35 Ohio St. 666; Chapin v. Brown, 83 Iowa, 156; Anderson v. Jett, 89 Ky. 375; Moore v. Bennett, 140 Ill. 69; Vulcan Powder Co. v. Hercules Powder Co., 96 Cal. 510; Urmston v. Whitelegg, 63 L. T. (N. S.) 455; Jackson v. Akron, etc. Co., 51 Ohio St. 303.

[3] 156 U. S. 1.

[4] This is well illustrated by the case of Adams v. Brennan (Ill.), 52 N. E. Rep. 614, where the court held that a contract let by the Chicago board of education with the condition that "none but union labor should be employed," on account of which the city was obliged to pay a higher price for the work, was illegal. See Holden v. Alton (Ill.), 53 N. E. Rep. 556.

[5] People v. Duke, 44 N. Y. S. 336. Taft, J., in United States v. Addyston Pipe, etc. Co., 85 Fed. Rep. 286, referring to Roller Co. v. Cushman, 143 Mass. 353, and Gloucester, etc. Co. v. Russia, etc. Co., 154 Mass. 92, in which it was held that the rule was restricted to articles of prime or public necessity, said "that the common-law rule against restraint of trade extends to all articles of merchandise, and the introduction of such a distinction only furnishes another opportunity for courts to give effect to the varying economical opinions of its individual members."

It is not to be understood that all monopolies are unlawful, for it is the spirit and effect of the patent and copyright laws to insure to the party, and his assigns and legal representatives, the exclusive monopoly in the particular article patented or copyrighted; but these are limited in time and amount only to a protection of what he has produced.

Position of Federal Courts.— The rules of the law on these questions are nowhere more fully recognized than in the federal courts, as is clearly manifest from the cases cited in the notes.[1]

The power of the national government, however, extends only to such agreements injuriously affecting interstate commerce, and as to this congress has, in the exercise of its constitutional powers, legislated, and the federal courts have enforced the provisions of the law.[2]

Misapprehension has arisen in certain quarters with regard to the scope of the act of congress of July 2, 1890, known as the Anti-trust Law, and the decisions of the supreme court of the United States in cases arising under it.

This act applies to all contracts or combinations or conspiracies the effect of which is in restraint of trade or commerce among the states or with foreign nations, whether reasonable or unreasonable.[3]

[1] Robbins v. Taxing District, 120 U. S. 489; United States v. Knight Co., *supra;* United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290; United States v. Addyston Pipe, etc. Co., *supra.*

[2] Id.; *ante,* sec. 306 *et seq.*

[3] United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290. In this case the act was held to apply to railroad companies which had combined in establishing traffic rates for the transportation of persons and property. By this act congress did not attempt to assert the power to deal with monopoly directly as such, or to limit and restrict the rights of corporations created by the states or citizens of the states in the acquisition, control or disposition of property, or to regulate or prescribe the price or prices at which such property, or products thereof, should be sold, or to make criminal the acts of persons in the acquisition and control of property which the states of their residence or creation sanctioned or permitted aside from the provisions applicable, where congress might exercise the municipal power. What the law struck at was combinations, contracts and conspiracies to monopolize trade and commerce among the several states or with foreign nations. Fuller, C. J., in United States v. Knight Co., *supra.* In this case the contract related exclusively to the acquisition of refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the states or with foreign nations.

Combinations and conspiracies having for their object to restrain the freedom of contracts "to buy, sell or exchange goods to be transported among the several states" are held unlawful and of no effect, whenever the matter comes before the federal court in a proper case.[1]

Sec. 607. *Wagering Contracts.*— A wagering contract is an agreement to pay money or transfer property upon the happening of an event not certain to happen, or a contingency unknown to the parties, and in which they have no other financial interest than that created by the contract, and where, in cases of contract to deliver property, the parties have no intention to deliver.[2]

At common law wagers were valid unless they were about a subject-matter which would have condemned any other contract; and the rule as to the illegality of wagers was that a wager was not enforceable if it led to indecent evidence or was calculated to injure or pain a third person.[3]

The common law permitted gaming and gambling, which is the risking of a stake on a game or chance, in every form, and only inhibited those wagers which were immoral or tended to menace the public safety or private security. Lotteries, horse races, raffles and the like were to the Anglo-Saxons innocent forms of amusement.[4]

[1] United States v. Addyston Pipe, etc. Co., *supra;* United States v. Trans-Missouri Freight Ass'n, *supra;* United States v. Knight Co., *supra.*

[2] Fareira v. Gabell, 89 Pa. St. 99; Anson on Contracts (2d Am. ed.), 226; Merchants' S., L. & T. Co. v. Goodrich, 75 Ill. 554. "There is a clear distinction between a wager or a bet and a premium or reward. In a wager or a bet there must be two parties, and it is known before the chance or uncertain event upon which it is laid is accomplished who are the parties who must either lose or win. In a premium or reward there is but one party until the act or thing or purpose for which it is offered has been accomplished. A premium is a reward or recompense for some act done; a wager is a stake upon an uncertain event. In a premium it is known who is to give before the event; in a wager it is not known till after the event." Alvord v. Smith, 63 Ind. 62. The mere fact that the act is dependent on a future event or contingency does not make it a wager. Beedles v. Bliss, 27 Ill. 322. The risk and chance need not be equal. Shumate v. Com., 15 Grat. 661. The sale of a commodity, payable on condition of the election of a certain person to office, is a wager. Id.; Mareau v. Longley, 21 Me. 24.

[3] When so conducted as to tend to debauch public morals, wagering was an offense at common law. Swigart v. People, 154 Ill. 284; Anson on Contracts (2d Am. ed.), 229; Gilbert v. Sykes, 16 East, 150.

[4] The case of Cohen v. Virginia, 6

From time to time various forms of wagering contracts were prohibited by acts of parliament, the most important of these enactments being the statute of 9 Anne, quite generally re-enacted in this country.[1]

These contracts are treated in connection with other contracts contravening public policy, because in this country, irrespective of statute, they are commonly held illegal on grounds of public policy.[2]

Wagering contracts appear principally in three forms: *First. Common bets*, by which the parties stake money or something of value upon any race, fight, pastime, sport or chance,[3] the outcome of which is made the subject of the wager. *Second. Futures*, a contract taking the form of a sale of some commodity, and in its form or substance, if *bona fide*, nowise objectionable, or in nowise different from any ordinary sale of a thing to be delivered in the future; but it being the understanding of the parties, either expressed in the contract, as a condition or proviso, or so mutually understood by the course of dealing between the parties, outside of the writing, that the parties were not really intending an actual and *bona fide* sale. *Third. Options*, giving one party what in fact is a mere option to purchase personal property, the intention being, as in the case of futures, to settle on a future day by the payment of the difference between the then market price and the price at time of contract.[4] *Fourth. Contracts of insurance*, which, though in their nature wagers, are not regarded as illegal except where the assured has no interest in the subject of insurance.[5]

Every-day observation of the novice tells him that certain of

Wheat. 264, involves the rights of those conducting a lottery under the authority of the power delegated by congress to the District of Columbia expressly authorizing the conducting of a lottery.

[1] Petillon v. Hipple, 90 Ill. 420.

[2] Love v. Harvey, 114 Mass. 82; Eldred v. Malloy, 2 Colo. 320; Wilkinson v. Tousley, 16 Minn. 299; Irwin v. Williar, 110 U. S. 499.

[3] These are the words of the statute of Anne on this subject, which has been generally re-enacted in the United States.

[4] Such has been the effect of the contracts that in some states all options on personal property are prohibited. Schneider v. Turner, 130 Ill. 28. Cook v. Oxley, 3 T. R. 653, was a contract giving an option. Not all option stipulations in contracts are illegal; *e. g.*, an option to extend time or renew or cancel, etc. Pope v. Hanke, 155 Ill. 617.

[5] See INSURANCE.

the above contracts are not only legal but commendable, and it remains only to indicate which are illegal and why.

Insurance contracts, if based upon a good consideration and entered into by the party having an insurable interest, are valid, and inasmuch as they are a distinct subject, insurance will be made a separate topic head.

Modern Change of View.— Wagering contracts have never been deemed *per se* immoral. Indeed we are told by Tacitus that the ancient continental Saxon had a great passion for gambling and indulged it to a great extent; but more recently the courts have recognized a tendency to impoverish the one at the expense of the other, and to engender reckless and improvident habits, and in a reflex manner affect injuriously the general public. As a consequence wagering contracts gradually fell into disfavor, were condemned by the courts,[1] and this policy has resulted in statutes in most of the states more or less rigidly prohibiting the practice of wagering or games and gambling contracts; but games are not now regarded as unlawful.

If the subject-matter of the wager tended towards indecency or immorality, or towards the corruption of the public service, or the illegitimate control of elections and the like, the wager was void, not because it was a wager, but because any contract which might injuriously affect the subject would be illegal. So, independent of statute, many wagers were enforceable in the United States even where the common law was adopted.[2]

In order to constitute a wager of the second class, it is not necessary that both should risk a loss, but it is necessary that both should intend that the contract shall contemplate not an

[1] Mulkey, J., in Cothran v. Ellis, 125 Ill. 496, seems to have lost sight of this hereditary tendency and ancient policy, though he no doubt voices the sentiment of modern publicists when he declares gambling is the "national sin." Swigart v. People, 154 Ill. 284, involving the race track and pool-selling games, is one of the greatest cases in the books. The copious citation renders it especially valuable to student and practitioner. See also Waldron v. Johnson, *infra*, p. 783.

[2] Anson on Contracts (2d Am. ed.), 229; Gilbert v. Sykes, 10 East, 150. At common law all wagers are recoverable but such as are prohibited by statute, such as are against sound policy, and such as tend to a breach of the peace, to immorality or indecency, or injuriously affect the rights of third persons. Morgan v. Pettit, 3 Scam. 529; Swigart v. People, 154 Ill. 284. Most of the states, however, have statutes on the subject, and in some states the statutes do not cover all forms of wagers. Johnson v. Fall, 6 Cal. 359; Bass v. Peevey, 22 Tex. 295.

actual and *bona fide* transaction, but a risking by one of the parties to the stake.

Contracts of sale that do not contemplate delivery of the article, and where the intent is merely to risk the difference in price according to the fluctuation of the market at some future time, are considered void as being contrary to public policy.[1]

However, if one of the parties intends a *bona fide* sale, the contract may be enforced at his instance, though he has not at the time the article in possession.[2] To make a wager both parties must intend it to be such.[3]

Time contracts are scrutinized with great care by the courts to determine whether the parties really intend the delivery of property. The form of the contract is not allowed to govern, but, when its validity is challenged, evidence *aliunde* will be received to throw light upon the nature of the transaction.[4]

The position of the commission broker is exceedingly precarious. It is the rule that one who deals with an agent with

[1] White v. Barker, 123 U. S. 392; Pearce v. Rice, 142 U. S. 28; In re Green, 7 Biss. 155; Gregory v. Wendell, 39 Mich. 337; Augusta Nat. Bank v. Cunningham, 75 Ga. 366; Lyne v. Culbertson, 83 Ill. 33; Fortenbury v. State, 47 Ark. 188; Irwin v. Williar, *supra;* Jamieson v. Wallace, 167 Ill. 388; Pearce v. Dill (Ind.), 48 N. E. Rep. 788; Counselman v. Reichart, 103 Iowa, 430. And the broker who brings the parties together for the purpose of entering into such unlawful agreement cannot recover for services rendered or losses incurred by himself on behalf of either in forwarding the transaction. Irwin v. Williar, *supra;* Embrey v. Jemison, 131 U. S. 336. "The policy of the law," said Speer, Dist. J., in Waldron v. Johnston, 86 Fed. Rep. 757, "commands the courts to withhold their assistance from either party. Whether it be true, as insisted, that this policy, if respected by the courts, will serve to discourage dangerous speculation, will encourage the business community to that orderly and legitimate traffic and industry which is the sure precursor of success to the individual and large prosperity to the public, will withhold from the youthful or the uninformed those temptations towards daring ventures which often result in bankruptcy and ruin, and will make it more difficult for skilful operators to manipulate for their own profit the rise and fall in the prices of the great staples upon which the welfare of the people depends, it may not be here profitable or appropriate to discuss. It is sufficient to ascertain what is the definite policy of the law, and to obey it."

[2] Pixley v. Boynton, 79 Ill. 351; Gregory v. Wendell, *supra;* Harvey v. Merrill, 150 Mass. 1; 5 L. R. A. 200, and note; Cole v. Milmine, 88 Ill. 349; Rumsey v. Berry, 65 Me. 570.

[3] Frost v. Clarkson, 7 Cow. 724.

[4] Sprague v. Warren, 26 Neb. 326; 3 L. R. A. 679, and note. The question of intention is one of fact for the jury. Pope v. Hanke, 155 Ill. 617.

notice that he is using his principal's funds is liable to the principal for the money, irrespective of the character of the transaction,[1] and in many states the loser of money in such deals may recover it back from the broker.[2]

Sec. 608. *Effect of Illegality.*— If the object of the contract be one which is forbidden or discouraged by the law, then if the contract be executory the court will not enforce it.[3] "If," said Buller, J.,[4] "a party comes into a court of justice to enforce an illegal contract, two answers may be given to his demand: the one that he must draw justice from a pure fountain, and the other that *potior est conditio possidentis*."[5]

On the other hand, if the contract be executed the courts will not extend relief. If suit is brought for relief from the operation of, or to recover what has been parted with under, such executed contract, the court will apply the maxim *in pari delicto potior est conditio defendentis*.[6]

The manner in which the evidence of illegality comes before the court is not material. If the taint appears the action will not be allowed. The court will refuse to proceed. The defendant cannot waive his advantage.[7]

[1] Anderson v. Kissam, 35 Fed. Rep. 699; Lamson v. Beard, 94 Fed. Rep. 30.

[2] Tenny v. Foote, 95 Ill. 99.

[3] Kennett v. Chambers, 55 U. S. 38; Ind., D. & S. R. Co. v. Ervin, 118 Ill. 250.

[4] In Mount v. Stokes, 4 T. R. 564.

[5] *In pari delicto potior est conditio possidentis*,— meaning that where the parties are in equal fault the position of the party in possession is the better one.

[6] That is, where the parties are in equal fault the defendant is in the better position. Hill v. Freeman, 73 Ala. 200; Hutchins v. Welden, 25 Ind. 80; Hoffman v. McMullen, 83 Fed. Rep. 372. In Doe d. Raguet v. Roll, 7 Ohio, 71 (Part 2), the court used the following language: "This course, so totally opposite in the two cases, is intended to be subservient to the same end — the prevention of an immoral act. As long as the agreement continues executory there is an incentive to the commission of the deed; but when it is executed, no further motive of this kind exists, since the estate has already vested, or the money actually been paid."

[7] In Oscanyan v. Arms Co., 103 U. S. 268, Mr. Justice Field said: "If after receiving a pardon, or suffering the punishment imposed upon him [for robbery, arson, or other crime, committed for hire], the culprit should sue the instigator of the crime for the promised reward, the court would not hesitate a moment in dismissing his case, and sending him from its presence, whatever might be the character of the defense. It would not be restrained by defects of pleading, nor, indeed, could it be by the defendant's waiver." "In such cases," said Mr. Justice Swayne, in Coppell v. Hall, 7 Wall. 542, "there can be no waiver. The defense is allowed not for the sake of the defendant, but of

In the case of executory contracts, however, one of the parties may wish to disaffirm. In such a case it is said there is a *locus penitentiæ*, and he may recover his money back.[1] Where money is deposited in the hands of a third party to be paid over on the happening of an event, the illegal purpose is not effected till such third party has so paid it over. In such a case the depositor may recover it.[2]

"*In Pari Delicto*" *Means Equality of Wrong.*— And though parties may concur in an illegal act, the circumstances of the case may be such that they will not be deemed in all respects *in pari delicto*. Relief in such cases will be granted to the party who has acted under circumstances of imposition, hardship or undue influence.[3] Thus, one who has paid usurious interest may, at common law, recover the excess back, as the law considers the borrower as measurably within the power of the lender.[4]

It is laid down, however, that where usury is voluntarily paid and the transaction closed, the money so paid cannot be recovered; but so long as any part of the debt remains unpaid, money paid as usurious interest on the debt is regarded as paid on the debt and not as usury voluntarily paid.[5] And if the payee assigns the debt after it has been partly paid, thus cutting off the defense of usury, it is held by some courts that the usurious interest may be recovered.[6]

But it is to be borne in mind that there is a difference be-

the law itself. . . . Whenever the legality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. . . . A stipulation in the most solemn form to waive the objection would tainted with the vice of the original contract. and void for the same reasons. Wherever the contamination reaches it destroys. The principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violation."

[1] Taylor v. Bowers, 1 Q. B. D. (C. A.) 300; Mount v. Wait, 7 Johns. 434; Broom's Maxims, 720; Anson, Contracts (2d Am. ed.), 264.

[2] As where money is deposited with a stakeholder dependent on the result of a bet. See Hampden v. Walsh, 1 Q. B. D. 189; Knowlton v. Congress, 57 N. Y. 518; 103 U. S. 49.

[3] Duval v. Wellman, 124 N. Y. 156.

[4] Wheaton v. Hibbard, 20 Johns. 290; 11 Am. Dec. 284; Wood v. Lake, 13 Wis. 85. See Mobile & O. R. Co. v. Dismukes, 94 Ala. 139; 17 L. R. A. 113; Schermerhorn v. Tolman, 14 N. Y. 93; White v. Franklin Bank, 22 Pick. 181.

[5] Hewett v. Dement, 57 Ill. 500; Payne v. Newcomb, 100 Ill. 612.

[6] Woodworth v. Huntoon, 40 Ill. 132.

tween enforcing illegal contracts and asserting title to money which has arisen from them. This distinction has been stated in a recent case to be, that "wherever the party seeking to recover is obliged to make out his case by showing the illegal contract or transaction, or through the medium of the illegal contract or transaction, or when it appears that he was privy to the original illegal contract or transaction, then he is not entitled to recover any advance made by him in connection with that contract or money due him as profits derived from the contract; but when the advances have been made upon a new contract, remotely connected with the original illegal contract or transaction, and the title or right of the party to recover is not dependent upon that contract, but his case may be proved without reference to it, then he is entitled to recover."[1]

Sec. 609. *Impossibility.*—A contract to do that which is physically impossible is not binding, but if the thing is possible in itself it is no reply to an action for a failure to perform that the thing was impractical, or not within the power of the defendant to accomplish.[2]

If the matter is within the range of human possibility, even though it be a matter that a man of any prudence and foresight would not attempt to accomplish within the specified time or in the manner specified, nevertheless the promisor runs these risks.[3]

In accordance with the maxim that a man shall not take advantage of his own wrong, it is held that if by his own act one is disabled from fulfilling his contract, he is liable for the breach.

Sec. 610. *The Obligation of a Contract.*[4]—The essential result of a contract or agreement is a right vested in one party and an obligation incurred by the other; and inasmuch as this right and obligation are correlative, it follows that, from the moment the contract is complete, the parties are bound to

[1] Hoffman v. M'Mullen, 83 Fed. Rep. 372-384. This is supported by Brooks v. Martin, 2 Wall. 70; King v. Winants, 71 N. C. 469.

[2] Broom's Maxims, 249; McNeil v. Reid, 9 Bing. 68.

[3] Thornborough v. Whitacre, 2 Ld. Raym. 164. In this case the defendant agreed to deliver two grains of corn on Monday following, and progressively doubling the quantity every Monday during the year. It was held impossible. See Walker v. Tucker, 70 Ill. 527; Bennett v. Morse, 6 Colo. App. 122.

[4] 1 Powell on Contracts, 249.

each other and must remain so bound until this bond is dissolved in some of the various modes recognized by the law.

The States Cannot Impair These Obligations.— So important is this obligation that one of the few clauses in the national constitution restricting the powers of the states is that one known as the obligation of a contract clause,[1] which seems to have been derived, or at least suggested, by the prominence given to the term "obligation" in the civil law.[2] The inhibition applies to contracts between the states and others as well as to private contracts.[3]

The Nature of the Obligation.— The obligation arises primarily by the acts of the parties, but in a broader sense all their acts, as we have seen, are taken in reference to the law, and it is thoroughly settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as though they were expressly referred to or incorporated in its terms.[4]

This principle embraces alike those laws which affect its validity, construction, discharge and enforcement.[5]

[1] Section 10, article I, declares that no state shall pass any law "impairing the obligation of a contract." It is quite generally believed to have been suggested by James Wilson, and to have been suggested to him by his studies of the civil law. See Hunter, *arg.*, Sturges v. Crowninshield, 4 Wheat. *151.

[2] Sufficient has heretofore been said to indicate the nature and extent of the limitation of powers of the states in this respect. *Ante*, secs. 99, 100, 342, 343, note 1.

[3] Fletcher v. Peck, 6 Cranch, 87; State v. Young, 29 Minn. 528.

[4] Von Hoffman v. City of Quincy, 4 Wall. 535. "The obligation of a contract in law is that element of duty or promise which a party can be compelled to perform. If performance cannot be compelled, there is no legal obligation in the contract." Fitzgerald v. Grand Trunk R. Co., 63 Vt. 169. *Cf.* State v. Young, 29 Minn. 528-29. "A contract is an agreement in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract." . . . "It has been contended that, as a contract can only bind a man to pay to the full extent of his property, it is an implied condition that he may be discharged on surrendering the whole of it. But it is not true that the parties have in view only the property in possession when the contract is formed, or that its obligation does not extend to future acquisitions. Industry, talents and integrity constitute a fund which is as confidently trusted as property itself. Future acquisitions are, therefore, liable for contracts; and to release them from this liability impairs their obligation." Marshall, C. J., in Sturges v. Crowninshield, 4 Wheat. 122.

[5] Von Hoffman v. City of Quincy, 4 Wall. 535.

Obligation Distinguished from Contract.— We have heretofore noticed a distinction between a mere naked agreement and a contract; but it is evident from the language of that clause in the federal constitution which has been alluded to, against impairing the obligation of a contract, that there is a distinction recognized between the convention or contract and its obligation.[1]

This would sufficiently appear from the fact that the obligation is not extinguished by performance;[2] but it also appears that the obligation may be affected or impaired without directly affecting the contract itself, and leaving it for some purposes a valid and existing contract.[3]

It has been quite generally admitted that the words "obligation of," in connection with the contract, mean something other and different from the contract itself, otherwise the clause would have read, "no state shall pass a law impairing a contract."[4]

Obligation and Remedy Distinguished.— That there is a plain distinction between the obligation of a contract and the rem-

[1] "The error of those who controvert the constitutionality of the bankrupt law under consideration, in its application to this case, if they be in error at all, has arisen from not distinguishing accurately between a law which impairs a contract and one which impairs its obligation. A contract is defined by all to be an agreement to do, or not to do, some particular act, and in the construction of this agreement, depending essentially upon the will of the parties between whom it is formed, we seek for their intention, with a view to fulfill it. Any law, then, which enlarges, abridges, or in any manner changes this intention, when it is discovered, necessarily impairs the contract itself, which is but the evidence of that intention." "This leads us to a critical examination of the particular phraseology of that part of the above section which relates to contracts. It is a law which impairs the obligation of contracts, and not the contracts themselves, which is interdicted. It is not to be doubted that this term *obligation*, when applied to contracts, was well considered and weighed by those who framed the constitution, and was intended to convey a different meaning from what the prohibition would have imported without it." Per Washington, J., Ogden v. Saunders, 12 Wheat. 213–255.

[2] "A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to re-assert that right. A party is therefore always estopped by his own grant." Fletcher v. Peck, 6 Cranch, 87–135.

[3] The contract upon which suit is barred by limitation or by discharge in bankruptcy may still be sufficient to constitute a consideration.

[4] Gunn v. Barry, 15 Wall. 610; Louisiana v. St. Martin's Parish, 111 U. S. 716.

edies which the law affords under it is now thoroughly established, and the rule is that the inhibition does not extend to mere changes in the modes of procedure or substitution of remedies so long as there is left some adequate means of enforcing the obligation.[1]

It is generally affirmed that there must remain a judicial remedy according to the course of the common law,[2] but this expression is not without an exception.[3]

"No attempt has been made to fix definitely the line between alterations of the remedy which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced, the act is within the prohibition of the constitution, and to that extent void."[4]

[1] "The distinction between the obligation of a contract and the remedy given by the legislature to enforce that obligation has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct. Confinement of the debtor may be a punishment for not performing his contract, or may be allowed as a means of inducing him to perform it. But the state may refuse to inflict this punishment, or may withhold this means, and leave the contract in full force. Imprisonment is no part of the contract, and simply to release the prisoner does not impair its obligation." Marshall, C. J., in Sturges v. Crowninshield, 4 Wheat. 122–200.

[2] *Ubi jus ibi remedium:* "There can be no civil right where there is no legal remedy." Johnson, J., Ewell v. Daggs, 108 U. S. 149.

[3] As applied to the vast majority of contracts such expressions are correct; for, as a general rule, wherever the law recognizes an obligation, it gives a judicial remedy to enforce it. But there are exceptions, as, generally, in the case of state contracts, where, without ignoring the obligation, and without regard to the validity or nature of the contracts themselves, the law, from motives of public policy, exempts the party from direct judicial action to enforce them. When read with their context and in view of the subject-matter then in hand, the expressions referred to cannot be understood as denying the obligation of these latter contracts. They must be understood as referring to those agreements or obligations — such as nude pacts, or obligations to exercise gratitude, benevolence and the like — of which the civil law takes no account, and not to those contracts which courts will recognize, whenever they have an opportunity, by the presence before them of parties claiming rights or exemption under such contracts." State v. Young, 29 Minn. 474–528.

[4] Von Hoffman v. Quincy, 4 Wall. 535–553, citing Bronson v. Kinzie, 1 How. 311; McCracken v. Hayward, 2 id. 608.

Sec. 611. *Dissolution.*— An agreement and obligation once formed binds the parties until it is dissolved by one of the modes recognized by law. These are: Mutual agreement between the parties; novation; Merger in some other form of agreement, or security; some event subsequently arising rendering the performance impossible, *e. g.*, by some condition subsequently arising, such as death, sickness, act of God, act of enemies of the state, unforeseen conditions; complete performance,[1] limitation, the passing of time,[2] or discharge in bankruptcy, which has been noticed.

By Agreement to Rescind or to Proceed No Further.— The parties to an executory contract may by mutual agreement discharge each other from the contract. In such a case the release by one party is the consideration for the release by the other.[3] In England negotiable instruments are considered an exception to this rule,[4] but they are not so regarded in this country.[5] But even in the case of negotiable instruments a surrender of the evidence of the debt, if without fraud or mistake, operates to discharge the liability.[6] The above does not apply to the case of a contract fully performed. In such a case there must be a release of the cause of action arising from full performance.

It is an elementary rule that agreements under seal cannot be changed by a mere agreement of less solemnity,[7] and it results that as to contracts under seal they cannot be modified by a subsequent parol understanding.[8] But after a breach of a contract under seal the cause of action may be released by a new oral contract.[9]

[1] Complete performance, though sometimes spoken of as a discharge, can scarcely be said to discharge the contract, and, as we have seen, it does not destroy the obligation of the contract. See Anson, Contracts, 337.

[2] The enforceable tie of a contract may be dissolved by the efflux of time under statutes of limitation, but such statutes operate upon the remedy rather than effect a dissolution of contract. See "Limitation."

[3] Kelly v. Bliss, 54 Wis. 187.

[4] Foster v. Dawler, 6 Exch. 839.

[5] Myers v. Byington, 34 Iowa, 205.

[6] Larkin v. Hardenbrook, 90 N. Y. 334.

[7] "It has become a maxim that nothing is so consonant to natural equity as that every contract should be dissolved by the same means which rendered it binding." Broom's Leg. Max. (8th ed.) 877. See Loach v. Farnum, 90 Ill. 368; Brookshire v. Brookshire, 8 Ired. Law, 74; 47 Am. Dec. 341–348; Goss v. Nugent, 5 B. & Ad. 58.

[8] B. & O. & C. R. R. Co. v. I. C. R. R. Co., 137 Ill. 30.

[9] Delacroix v. Bulkley, 13 Wend. 71.

This rule must be received in a modified way, subject to another which cannot be said to be an exception, but to arise on a different state of facts, that the *conduct* of one person, indicative of an intention not to require precise performance, and which has caused another to act to his detriment, or to place himself in a position which he otherwise would not have assumed, may operate as an estoppel against insisting upon the precise terms of the contract.[1]

In such cases the conduct need not be accompanied by any solemnity, but a *mere agreement*, if relied upon, must be of equal dignity with the original contract.[2] So a new parol contract of itself is not sufficient; but if such a new contract is acted upon and the performance recognized and adopted by the other party, this combination of circumstances constitutes a substitution of the original stipulations.[3]

By a Substituted Agreement.— The parties may, by entering into a new agreement between themselves in relation to the same subject, either expressly or by implication waive the original contract.

If the waiver is by implication, it must clearly appear from the inconsistency of the new terms with the old ones.[4] The authorities are not harmonious on the question whether a contract, required to be in writing under the statute of frauds, may be modified by a subsequent oral agreement. It is the better opinion that such a contract cannot be varied by a subsequent agreement unless such new agreement be in writing.[5]

There is, however, a distinction between a substitution of one agreement for another and a delay in performance at the request of one of the parties.[6] In the latter case the contract is not changed.

[1] Moses v. Loomis, 156 Ill. 392; Monson v. Bragdon, 159 Ill. 65.

[2] "A contract may be waived or set aside, and more especially so in the contemplation of a court of chancery, either by the mutual consent or conduct of the parties, or by the conduct or consent of the party in whose favor and for whose benefit such stipulation is made." Watson v. White, 152 Ill. 364.

[3] Richardson v. Cooper, 25 Me. 45; Worrell v. Forsythe, 141 Ill. 30; Smith v. Smith, 55 Ill. 204.

[4] Reed v. McGrew, 5 Ohio, 330; Russell v. Stowe, 36 Ill. 18; Hargrave v. Conroy, 19 N. J. Eq. 218.

[5] Swain v. Seamans, 9 Wall. 272.

[6] Hickman v. Haynes, L. R. 10 C. P. 606; Anson, Contracts (2d Am. ed.), 343.

By Novation.— As we have seen, a substituted contract is one substituting new terms between the same parties,[1] but in many instances it suits the convenience of the parties to substitute a new person as debtor, or a new promisor or promisee.[2] There must be more than a change of parties; one must be released and a new one substituted. Such a substitution is termed a novation.[3]

It will be seen that it resembles somewhat an assignment, excepting that in a sale or assignment it is the thing which is sold, whereas in a novation the change is in the parties and not in the subject or the terms of the contract.

The Roman law, while it would not recognize any rights of third persons in contracts made for their benefit, as was sometimes allowed by the common law, recognized these contracts of novation.[4]

Novation is never presumed, but must always be proved. The promise to pay the debt must be a valid and binding promise to work a discharge of the old debtor,[5] and to constitute a novation the discharge of the old debtor must be unqualified.[6]

And further, there is not a novation without the consent of the three parties — the creditor, the original debtor, and the substituted debtor; for there is to be carefully noted the distinction between a novation and a mere promise to answer for the debt of another.[7] The one is within the statute of frauds, the other is not.[8]

[1] Stewart v. Keteltas, 36 N. Y. 388; Rogers v. Rogers, 139 Mass. 440.

[2] Wayde v. Luer, 3 Den. 410; Ludington v. Bell, 77 N. Y. 138.

[3] This is a word foreign to the common law, and has its natural meaning only in the civil law.

[4] Hamlin v. Drummond, 91 Me. 175.

[5] Spycher v. Werner, 74 Wis. 456; 5 L. R. A. 414; Eden v. Chaffee, 160 Mass. 225. "Were it not for the statute of frauds, it would seem that the discharge of the old debtor would be a sufficient consideration to make valid the new promise; and it would logically follow that if the new promise be in writing, so as to comply with the statute of frauds, such promise would be valid. But, where the discharge of the original debtor also works a discharge of the substituted debtor's debt to him in consideration of the substituted debtor's promise to pay the same to the creditor, the statute does not apply, for the new promise is still to pay his own debt, but to a substituted creditor, and works a complete novation." Hamlin v. Drummond, 91 Me. 175.

[6] West, etc. Bronze Co. v. Portrey, 50 Neb. 801; Lowe v. Blum, 4 Okla. 260.

[7] Dean v. Ellis, 108 Mich. 240.

[8] Eden v. Chaffee, 160 Mass. 225.

Merger.— Novation is sometimes spoken of as a merger,[1] but merger need not have the same attributes necessary to novation, nor need novation have the characteristics necessary to a merger.

What is meant by merger is that the identical contract or agreement be evidenced by an instrument of greater dignity; as where an agreement rests in parol, and is put into a writing under seal, or where the obligation of the contract passes into a higher form of security, as in the case of a judgment recovered.[2]

It is sometimes said that the oral negotiations of parties are merged in a written contract evidencing their intention; but merger is not used in such cases in its strict technical sense, because the written contract is of no higher nature than the oral one.[3]

Impossibility of performance arising subsequent to the making of a contract may, under some circumstances, excuse performance. A party will be released from his obligation if performance is rendered impossible by act of God,[4] the provisions of a law, or the conduct of the other party;[5] but non-performance cannot be excused by mere inevitable accident or the happening of an unforeseen contingency.[6]

Sec. 612. *Privity.*— Under the subject of parties to contracts we have considered the capacities and incapacities of those who enter into and are directly instrumental in the formation of contracts, *i. e.*, the capacity of contracting parties; but in some instances the law allows persons who have not thus been instrumental in the formation of a contract to avail themselves of its provisions or be affected by its stipulations.

[1] Anderson's Law Dict., tit. "Novation."

[2] Anson on Contracts (2d ed.), 431; Taylor v. Root, 4 Keyes, 344.

[3] Id.

[4] Dewey v. Union School Dist., 43 Mich. 480. As where the subject-matter is destroyed (Shear v. Wright, 60 Mich. 159), or the party dies before time for performance, where contract calls for a personal act. Smith v. Wilmington Co., 83 Ill. 498; Howe Sewing Machine Co. v. Rosenstill, 24 Fed. Rep. 583; Green v. Gilbert, 21 Wis. 395.

[5] Ingle v. Jones, 2 Wall. 1.

[6] Jones v. United States, 96 U. S. 24. As in case a party taking a lease for a number of years agrees to mine a certain number of tons of coal per annum and the coal in the mine be exhausted. Walker v. Tucker, 70 Ill. 527.

This result is brought about in two ways: *First*, under the doctrines of agency, by which one person is allowed to be represented by another — a topic which will receive separate treatment.[1] *Second*, by reason of a relation which may arise in several ways and which passes under the technical term "privity."[2]

If the distinction between these two grounds is kept clearly in mind, much of the apparent confusion is avoided.

By the doctrines of privity, persons standing in certain relations[3] to those who actually make the contract and pass the consideration, or furnish the subject-matter, are sometimes held to have a sufficient connection with the contract or the subject-matter to be allowed to avail themselves of promises made for their benefit.

It proceeds upon the theory that the law operating on the conduct of the party creates a duty or implies an obligation, or, as it is said, establishes privity.[4]

Third. It is claimed that there is recognized in some jurisdictions a third rule, viz.: That, irrespective of agency or privity, any person for whose benefit a simple contract is made may enforce it by an appropriate action in his own name; and while there are expressions which standing alone will justify the view, it is doubtful if any state in the Union is *committed* by *decision* to that rule.[5]

Privity arises in two ways — by operation of law and by the acts of the parties themselves through the medium of a contract, expressed or implied.[6] Privity may exist by reason of the re-

[1] Some of the extreme cases allowing a third party to sue on a promise made to another for his benefit really proceed on the ground of agency — an entirely distinct principle. See Marston v. Bigelow, 150 Mass. 45; 5 L. R. A. 43, and cases. Even in Lawrence v. Fox, a leading case, one of the grounds is that of agency.

[2] The doctrine of privity always determines who may enforce it, and is most practically discussed along with the rules of procedure, which determine who may sue upon a contract, *i. e.*, parties to actions.

[3] In Lawrence v. Fox, *supra*, another ground of decision was the *relation* of debtor and creditor which existed between the third person and the promisee, and the earlier cases relied on are of the same character.

[4] Lawrence v. Fox, 20 N. Y. 273.

[5] Early Massachusetts and New York cases state the rule broadly, but these decisions fall far short of the rule. Marston v. Bigelow, *supra*. Lawrence v. Fox is the extreme, and every later case has taken views closer to the rule requiring privity.

[6] Andrews' Stephen's Pl., 32.

lationship existing between the third person and the promisee. The relation sometimes arises, not alone by the acts of the parties, but by a change in the relations which takes place subsequently to making the contract, without any intention of creating a new contract; *e. g.*, by death or marriage such a change may take place.[1]

According to the Roman law no one not a party to a contract could acquire rights under it. Only the person who uttered the binding words, or went through the binding formalities, could sue and be sued. Aside from the rules of agency, that law would not take notice that a stipulation was made in behalf of another than he who made the contract.[2]

It is obvious that this was a natural result of enforcing only contracts accompanied with certain formalities.

For the same reason these rules obtained in the English law until after an action was allowed on simple contracts; and so far as solemn contracts are concerned, the rule has always been at common law, and generally under the codes, that only parties to a contract under seal can sue on it; that is, only a covenantee can sue, even though the covenant be expressly made for the benefit of another.[3]

But as to simple contracts, after the time when their obligation was recognized, the rule was under some circumstances relaxed, and where a contract was expressly made for the benefit of a third person who occupied some relation of privity to the consideration, the subject-matter,[4] or to the promisee,

[1] In case of death the administrator and heir become in privity. Between husband and wife a duty of support exists, and a promise procured by one for the benefit of the other is supported because of this privity; but kinship without obligation is not generally held sufficient. Marston v. Bigelow, 150 Mass. 45.

[2] Sanders' Justinian (Hammond's ed.), 457.

[3] Andrews' Stephen's Pl. 33, note 1; Moore v. House, 64 Ill. 162; Willard v. Wood, 135 U. S. 309. But it is said in some late cases that this distinction being a technical one, and having no longer any merit to commend it, it ought not to be longer recognized. Jefferson v. Asch, 53 Minn. 446; 25 L. R. A. 257. And see Emmitt v. Brophy, 42 Ohio St. 82; Bassett v. Hughes, 43 Wis. 319. And statutory changes in some states have caused the adoption of a different rule in the courts in this regard. Dean v. Walker, 107 Ill. 540; 47 Am. Rep. 467. A statute which abrogates the distinction between sealed and simple contracts changes this rule.

[4] It is claimed that the common law went further and required nothing further than a clearly expressed intention that the contract was for the benefit of the person suing. Law-

such person was allowed to enforce the promise by an action. This result was never based solely on the mere fact of the agreement, but on some collateral fact establishing the relation of privity.[1] The line of cleavage is the controversy over what constitutes privity, and in many states the mere relation of debtor and creditor has been held sufficient. It also became early established at common law, that where the property or money of one was deposited with another, who accepted it under a promise to pay it over to a third, a *quasi*-relation of trust was implied, upon which might be based an action for money had and received, or an action to recover the thing;[2] and in some early cases, near kinship was allowed as a basis of what was called a privity in blood, but in the later English law the doctrine has been severely contracted.[3]

The early Massachusetts cases extended the rule farther than the English law had ever done, and it was at one time held to be well settled that wherever a promise is made for the benefit of a third person such person might sue on it,[4] and the expressions in these cases are not so guarded and limited as are the decisions in the later cases; and subsequent decisions in that state have limited the doctrine until the law of Massachusetts is typical of the conservative view of the subject.[5]

Early expressions in the New York courts, *dicta* rather than decision, likewise extended the rule beyond its reasonable limits; and in a leading case where one person borrowed of an-

rence v. Fox, *supra*, relying on Dutton v. Poole, Vent. 318; Schermerhorn v. Vanderheyden, 3 Johns. 140.

[1] Pollock on Contracts, 196; Austin v. Seligman, 18 Fed. Rep. 519; Gifford v. Corrigan, 117 N. Y. 256.

[2] Such is the case of Eddy v. Roberts, 17 Ill. 505, and the case of Lawrence v. Fox, 20 N. Y. 273. Where a defendant has in his hands money which in equity and good conscience belongs to another, the law operates on the acts of the parties and implies a promise to pay. 1 Cranch, App. 423–443; Alderson v. Ennor, 45 Ill. 128; Hosford v. Kanouse, 45 Mich. 620; Benner v. Weeks, 159 Pa. St. 504; Brewer v. Dyer, 7 Cush. 337. *Indebitatus assumpsit* is an equitable action. Mellen v. Whipple, 1 Gray, 317.

[3] Pollock on Contracts, 198; Austin v. Seligman, *supra;* Marston v. Bigelow, *supra.*

[4] Hall v. Marston, 17 Mass. 400; Brewer v. Dyer, 7 Cush. 337.

[5] The recent Massachusetts cases refuse to go beyond the limits laid down in Mellen v. Whipple, *supra*, which fell within the rule of *quasi*-trust relation, where one receives money or a thing to give to another. Exchange Bank v. Rice, 107 Mass. 37, discrediting Brewer v. Dyer, 7 Cush. 337; Marston v. Bigelow, 150 Mass. 45; 5 L. R. A. 43.

other, who owed a third, and promised to repay the money to the third person, who had no interest in the transaction and occupied no relation to either party excepting that of a creditor of the promisee, he was allowed to maintain a suit upon it. This ruling was based upon the fiction of agency, or another view more equitable but equally fictitious, that, being a creditor of the promisee, he was sufficiently in privity.[1]

These extreme cases mark the limit to which the American courts have gone, and the following rules may be taken as quite well established by the consensus of opinion:

1st. Under ordinary circumstances one who is not a party or a privy to a contract cannot be bound by it without his consent.[2]

2d. Neither will the law allow one to derive any advantage from a contract in which he neither has any pecuniary interest, nor takes any steps to bring it about.

3d. Under certain circumstances and with important limitations one party may be allowed to derive an advantage from a promise made for his benefit, even though he has not had a hand in its making.

The right of a party to maintain an action on a promise, not under seal, made by another for his benefit, although formerly much controverted, is now the prevailing rule.[3] Every state, under some circumstances, allows this.

[1] In Vrooman v. Turner, 69 N. Y. 280; 25 Am. Rep. 195, citing and following King v. Whitely, 10 Paige, 465, and Lawrence v. Fox, 20 N. Y. 268, the right of the third party to maintain an action is restricted to those cases where there is an intent by the promisee to secure some benefit to such third party, and some privity between the two, some obligation or duty owing from the former to the latter, which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally.

[2] Boston Ice Co. v. Potter, 123 Mass. 28.

[3] Hendrick v. Lindsay, 93 U. S. 143; Austin v. Seligman, *supra*. See Brent v. Davis, 9 Md. 217; Isom v. Johns, 2 Munf. (Va.) 272; Rush v. Good, 14 S. & R. (Pa.) 226. Insurance cases even require an insurable interest. Mutual Life Co. v. Stibbie, 46 Md. 302; Maloure v. Brown, 16 M. & W. 128; Board of Education v. Robinson, 34 Pac. Rep. 296; Allen v. South Bost. R. Co., 150 Mass. 200; Sterling v. Ryan, 72 Wis. 36; Allen v. Woodward, 23 N. H. 544; Bull v. Brockway, 48 Mich. 523; Walker v. Counant, 69 Mich. 321; Schunster v. Kansas City R. Co., 60 Mo. 290; Garrett v. Conklin, 52 Mo. App. 654; Stoudt v. Hine, 45 Pa. St. 30; Hopkins v. Beebe, 26 Pa. St. 85; Allen v. Irwin, 1 S. & R. 549; Calais v. Whidden, 64 Me. 249; Louis v. Sawyer, 45 Me. 332; Wescott v. Sharp, 50

4th. But in order to make an enforceable action of this kind, the third person in whose favor the promise is made must be in privity either in consideration or a privity to the stipulation, *i. e.*, there must be some relationship of debtor or creditor, some conceivable interest, some obligation growing out of status or the like, upon which to found the necessary equity of allowing a third person who has had nothing to do with the making of a contract, and may not even know of its formation, a remedy upon it in the courts.[1]

Such is the doctrine of the New York courts, which, as above remarked, carried the principles of privity to their farthest limit.[2]

There must be some relation of duty or liability between the promisee and the third person.[3]

It is required in all states that some relation to the subject-matter of the contract or the consideration, or some duty to

N. J. L. 392; Nolan v. Manton, 46 N. J. L. 231; Whitehead v. Peck, 1 Kelly, 140; Crews v. Heard, 7 Ga. 60; Nat. Bank v. Grand Lodge, 98 U. S. 123.

[1] Prof. Wharton, in a valuable note to Austin v. Seligman, 18 Fed. Rep. 525, says: "But from the extension not unnaturally applied to this ruling of Lawrence v. Fox, the courts after a while started back. 'I do not understand,' said Rapello, J., 'that the case of Lawrence v. Fox has gone so far as to hold that every promise made by one person to another, from the performance of which a third person would derive a benefit, gives a right of action to such third party, he being neither privy to the action nor the consideration. To entitle him to an action the contract must have been made for his benefit. He must be the party intended to be benefited.' And this limitation not being found sufficiently stringent, it was afterwards declared that 'to give a third party who may derive a benefit from the performance of the promise an action, there must be: *First*, an intent by the promisor to secure some benefit to the third party; and *second, some privity between the two, the promisor and the party to be benefited*, and some obligation or duty owing from the former to the latter, which would give him a legal or equitable claim to the benefit of the promise, or an equivalent to him personally.' And with a still more perceptible retreat to the old rule, Danforth, J., in a later case, excludes from the right of suit on a contract, all strangers to whose incidental benefit it would, if performed, inure. On the other hand, we have a strong line of authorities in which the condition of privity of contract is apparently dispensed with, and in which the right of beneficiaries to sue on contracts is sustained whenever the intention of the contract was that they should specifically reap its fruits." With deference it is submitted that the cases cited by Prof. Wharton do not proceed to the length indicated by the note.

[2] Simson v. Brown, 68 N. Y. 355; Garnsey v. Rogers, 47 N. Y. 233; Gifford v. Corrigan, 117 N. Y. 257.

[3] Townsend v. Rackham, 143 N. Y.

the person who obtains the promise, must be borne by the third person in order that he shall be allowed a benefit under it.[1]

Of the different qualities of privity there have been recognized privity to the stipulation, *i. e.*, where the party obtaining the promise was so related to the third person claiming as to be in some sense termed his agent,[2] though this relation may not be disclosed, or one may be so interested in the subject-matter that any contract in relation to it must inure for his benefit. This may be called privity in estate.

Privity in blood, or near relationship, has sometimes been recognized as sufficient, but this in itself is not sufficient unless that relationship is one where there is some obligation upon the person contracting owing to the third person in whose favor he secures the promise.[3]

Sec. 613. *Assignability.*— Every contract gives to one person a right and imposes upon another an obligation.

It may be an agreement to sell and convey property, or to furnish materials and services, or to perform personal services, but in all cases it contemplates the doing by some person for another of some specified act. It "conveys an interest merely in action," and creates what is called a *chose in action*.[4]

Our law favors trade and commerce, and consequently most of that which is embraced within the term "property" may be sold and transferred at the will of the owner.[5] Indeed, the right to sell is one of the essential attributes of property.[6]

On the other hand, a contract is made between two definite parties, the one agreeing to do for the other; and unless ex-

516; Coleman v. Huyler, 83 Hun, 548; 33 N. Y. S. 360. In a late case in New York it is held that a promise by grand-parents to parents that if the name of the plaintiff was changed the grand-parents would pay $500, or loan $500 to plaintiff, is upon good consideration, and plaintiff is sufficiently in privity to maintain action. Babcock v. Chase, 92 Hun, 264.

[1] See articles in 10 Harv. Law Rev. 180.

[2] This is one of the grounds of Lawrence v. Fox, *supra*.

[3] Marston v. Bigelow, 150 Mass. 45, 5 L. R. A. 43.

[4] See 2 Cooley's Blk. (4th ed.) 441, note.

[5] "Circulation and transfer of property are the life and soul of trade, and must not be checked in any instance. There is no reason for confining the power of assignment to the two instruments which I have mentioned [bills of exchange and insurance policies], and I will show you other cases in which courts have allowed it." Per Buller, J., in King's Bench Court. Master v. Miller, 4 T. R. 342 [1791].

[6] Wynehamer v. People, 13 N. Y. 378.

pressly provided for in the contract, or unless the contract is of such a nature that the law implies assignability or negotiability, it does not rest in the power of either party to introduce a new person into the agreement, so that, except in the case of contracts negotiable by the law merchant, choses in general were not assignable under the common law.

Assignability and *negotiability* are terms of different import. The former includes merely what may be transferred to another, while the latter designates such contracts as may be transferred to a third person, with the additional right in that third person to sue in his own name upon the contract.[1]

Prof. Dicey in his work on Parties to Actions gives as his sixth rule that "the right to bring an action cannot be transferred or assigned," and states that this rule is involved in the maxim that a chose in action is not assignable. The rule is stated by him quite too broadly,[2] as modified by his subsequent text.[3] A more accurate statement is that of Broom: "It is, indeed, a well-known rule of law, that a chose in action, *e. g.*, a debt, cannot in general be assigned *so as to vest in the assignee a right of action upon it in his own name*, nor do causes of action already accrued run with the property in goods or deeds."[4]

It is important to note that Prof. Dicey in his text says that the term *chose in action* is used rather indefinitely,[5] sometimes for the thing to be recovered by action, *e. g.*, damages for a breach of contract or tort, and sometimes for the right to recover such damages. For the purpose of the present rule, it may perhaps be best defined as a claim to be asserted by an action at law."[6] It will thus be seen that he extends the meaning of the word *chose* far beyond its definition as given by

[1] See Negotiable Instruments. A purchaser of a chose in action, nonnegotiable, takes it subject to all equities of the original parties. A second or subsequent assignee takes it subject to all equities existing between any prior assignor and assignee. Sutherland v. Reeve, 151 Ill. 393. See note in 5 L. R. A. 620, *sub.* Hill v. Hoole.

[2] Gruber v. Baker, 20 Nev. 453; 9 L. R. A. 302. After a contract is performed and compensation due, the right to recover the price may be assigned. Sloan v. Williams, 138 Ill. 46.

[3] This text is a fine presentation of the English law of the subject.

[4] Broom's Maxims, 473.

[5] This is a good illustration of the confusion likely to follow a misconception of a fundamental fact,—in this case the meaning of "chose."

[6] Dicey on Parties, *67.

Blackstone — farther even than its more extended meaning as established in American law.[1]

While it was a rule of the *ancient* law that choses in action were not assignable, after the introduction of equity and the law merchant the rule had very slight operation, and affected the form of procedure rather than the rights of parties.

The original objection to assignability was based on the ground of champerty and maintenance, which if carried to the extreme would allow a traffic in lawsuits, by which persons of very limited means might be obliged to engage in a contest with persons of unlimited power and influence.

The reason of the rule, however, never obtained in courts of equity, and was held to apply only to personal actions in law courts.

As has been hinted, the reasons upon which the common-law rule denying the assignability of choses in action was based were never very generally approved, and courts of equity never refused to recognize and protect the rights of parties arising under the purchase and assignment of causes of action which were not merely personal.[2] And in the process of time the

[1] It should be borne in mind that the term "chose" in the English law does not embrace mere personal torts, but includes only contracts and torts growing out of contracts, or torts connected with contracts or personal property. *Ante*, p. 125. "But conceding that a tort be one of the elements that go to make up this cause of action, it will be found to be assignable. It will be seen to be of that class of torts the right of action for which would survive to the personal representatives of the claimant; and 'the power to assign and to transmit to personal representatives are convertible propositions.' Zabriskie v. Smith, 3 Kern. 333. And further, it is, within the decisions both *before and since* the Code, of a nature that was formerly assignable in equity, and is now assignable at law. In McKee v. Judd, 2 Kern. 625, it is held 'that demands arising from injuries *strictly personal* (whether arising from tort or contract) are not assignable, but that *all others are*.' 3 Kern. 333–335, 336; 15 N. Y. 432." Byxbie v. Wood, 24 N. Y. 607–612. See Ackley v. N. C. C. Ry. Co., 171 Ill. 100, for discussion and citation.

[2] 1 Cranch, App. 423. "It is laid down in our old books that for avoiding maintenance a chose in action cannot be assigned or granted over to another. Co. Lit. 214*a*, 266*a*; 2 Roll. 45, 140. The good sense of that rule seems to me to be very questionable; and in early as well as modern times it has been so explained away that it remains at most only an objection to the form of the action in any case. In 2 Roll. Abr. 45 and 46, it is admitted that no obligation or other deed may be granted so that the writing passes; but it is said that the grantee cannot sue for it in his own name. If a third person be permit-

rules of equitable assignment were recognized in the courts of law to the extent of allowing the assignee to bring a suit, but compelling him to bring it in the name of the assignor, giving security.[1]

This is simply preserving the shadow of the old rule while denying its substance; and it is now well understood that contracts may be made assignable by the original parties if they see fit, even though they may not be negotiable in their character, and such seems to have been the rule of the law merchant as recognized in England from the earliest times.[2]

There is a difference between the right to substitute parties and the right to assign a cause of action growing out of a breach of contract for personal services, and it is well settled that after the breach a cause of action may, under some circumstances, be assigned.

So where the contract relates to the keeping or disposition of property, the subject of the contract being the subject of sale, the rights of the parties under the contract may be assigned.[3]

A cause of action against a common carrier growing out of the loss of a package may be assigned.[4] Bills of lading which represent the property may be sold.[5]

So the contract existing between a stockholder and a corporation which constitutes him a shareholder may be assigned by the assignment of the shares of stock.[6]

The result of the authorities is, first, that wherever the subject of the contract is matter which may be a subject of sale, the contract may be assigned with the same facility with which the thing itself may be sold;[7] second, that where the subject of the contract is the performance of personal services, in most cases after the breach or performance, such contract, the cause

ted to acquire the interest in a thing, whether he is to bring the action in his own name or in the name of the grantor, does not seem to me to affect the question of maintenance." Master v. Miller, 4 Term Rep. 340.

[1] Ransom v. Jones, 1 Scam. 291; Palmer v. Merrill, 6 Cush. 282; 52 Am. Dec. 782; Dicey on Parties, *71.

[2] 1 Cranch, App. 427.

[3] People v. Tioga, 19 Wend. 73; Blackwood v. Brown, 32 Mich. 104; McKee v. Judd, 2 Kern. 622.

[4] Merrill v. Grinnell, 30 N. Y. 594.

[5] Bank v. N. Y. & L. E. & W. Ry. Co., 106 N. Y. 195; National Bank v. Dearborn, 115 Mass. 219.

[6] Mech. Bank v. N. Y. & N. H. R. R. Co., 13 N. Y. 600.

[7] Wall v. De Nutiewicz (Ct. App. D. C. 1896), 24 Wash. L. R. 408.

of action arising, may be assigned in such a manner as to vest the beneficial interest in the assignee, even though a tort may be involved.

So that while personal contracts cannot be changed before breach, most choses in action may be assigned. But causes of action for mere personal torts are not assignable.[1]

The rule of the codes which provides that all actions shall be brought in the name of the real party in interest have wisely dispensed with the shadow and allowed the substance to control.[2]

Sec. 614. *Agency.*— So soon as one's business reaches any considerable magnitude it becomes indispensable that others are associated to co-operate in its transaction.

These associations give rise to a body of rules which govern the liability of the parties to them.

We have heretofore noticed association under the guise of a corporation, and have mentioned another form of association termed "partnership," which constitutes in another sense a relation of agency; but agency is not the principal object of the contract of partnership, and the relation of agency in that case does not arise by employment, but as an incident to the partnership association.

Under the topic "Agency" it is designed to state the principles governing a relation which arises out of the performance of acts for and in behalf of another, where the relation is not one of equality, but of employment, and also to distinguish it from another somewhat similar relation, where the person occupying the subordinate position performs labor or services for the employer, a relation which has heretofore passed under the name of "master and servant." These relations differ in the following particulars:

The agent performs the act as the act of the principal in relation to some collateral matter.

The servant performs some service for the principal.

[1] Only by reducing such a cause to judgment does it become a debt or a chose. Hunt v. Conrad, 48 Minn. 557; 14 L. R. A. 512. It has been held that where the code provides that an action will survive after verdict, such action may be assigned after verdict rendered. Zogbaum v. Parker, 55 N. Y. 120.

[2] Zabriskie v. Smith, 13 N. Y. 333; Andrews' Stephen's Pl., 32; Ackley v. N. C. C. Ry. Co., 171 Ill. 100.

The agent always engages in a transaction with a third person. The mere servant, as such, does not.[1]

The relation of agency is so ancient and common that it has long since passed into a maxim of the law that "he who does an act through the medium of another is in law considered as doing it himself."[2]

An agent is one who acts on behalf of another (who is termed the principal), being theretofore authorized to act, or, professing to act in behalf of another, his act is ratified and adopted by that other, or one who, though not professing to act for another, has actually been engaged to perform an act and does it without disclosing his principal.

Mode of Appointment.— From this statement it appears that the relation of agency may arise by appointment or by conduct, *i. e.*, direct employment, or even by voluntary officious intermeddling[3] followed by ratification; but in the latter instance no act can be the subject of ratification which was not in the first instance avowedly performed on behalf of another[4] who was in existence at the time the act was performed.[5]

[1] "An agent, properly speaking, is one who enters into an employment for the purpose of bringing the employer into legal relations with a third party." Anson on Contracts (2d Am. ed.), 439; Smith's Merc. L. 159.

[2] *Qui per alium facit per seipsum facere videtur.* Broom's Leg. Max. 816.

[3] If one assumes the character of agent, though there be no employment, he is bound by all the incidents of that relationship. 2 Kent's Com. 616; Nelson v. Mackintosh, 1 Stark. 237; Dennis v. McCagg, 32 Ill. 429; Watson v. Union Steel Co., 15 Ill. App. 509; Casey v. Casey, 14 Ill. 192; Halberg v. Nichol. 149 Ill. 249.

[4] Stark v. Starr, 94 U. S. 477. A subsequent assent is equivalent to an original authority. Clark v. Van Remsdyk, 9 Cranch, 153; Hoosac Min. Co. v. Donant, 10 Colo. 529. Ratification is not a new contract and a new consideration is not necessary to support it. Drakeley v. Gregg, 8 Wall. 242; Grant v. Beard, 50 N. H. 129; Com. Bank of Buffalo v. Warren, 15 N. Y. 577. Ratification of a part of a contract is a ratification of the whole. Gaines v. Miller, 111 U. S. 395; Henderson v. Cummings, 144 Ill. 325; Benedict v. Smith, 10 Paige Ch. 126; Maddux v. Bevan, 39 Md. 502. The contract must be ratified as made. Rogers v. Holden, 142 Mass. 196. To bind the principal the ratification must be with full knowledge of all material facts. Bennecke v. Conn. Mut. Ins. Co., 105 U. S. 355; Proctor v. Tows, 115 Ill. 138; Craighead v. Peterson, 72 N. Y. 279. Ratification will be presumed from silence of the principal after he has had notice. Field v. Farrington, 10 Wall. 141; Alexander v. Jones, 64 Iowa, 207. But if an unauthorized act is

[5] See Mechem on Agency, §§ 124, 125.

On the other hand, where there is an actual employment of an agent, it is immaterial, so far as binding the principal is concerned, whether the agent acts in his own name or the name of his employer.[1] He may sue or be sued on the contract, the only difference being in the mode of proving the relation of agency between the third person and the undisclosed principal, and the right to hold either or both principal and agent.[2]

There is still another way in which the relation may be made to appear. Wherever one clothes another with apparent authority or acts in such a way, either during a single transaction or through a long course of dealing, that an ordinarily prudent man would be led to suppose that the relation of agency exists,[3] and this apparent authority is acted upon by a third person, the relation of agency will be held to exist and the alleged principal will be bound without regard to the secret understanding. It is not material, in such a case, whether he intended to be bound or not.[4]

In certain cases it is essential that the appointment shall be by some act of equal dignity with the act which is to be performed by the agent.[5] Thus, a power of attorney to execute a deed or solemn instrument, which is only good when under

done by a stranger in the name of another, the latter will be bound only by affirmative ratification. Ward v. Williams, 26 Ill. 451. The act must have been done for the principal. Beveridge v. Rawson, 51 Ill. 504; Hamlin v. Sears, 82 N. Y. 327. The assent must be manifested in an unequivocal manner. Keeler v. Salisbury, 33 N. Y. 648.

[1] Tuthill v. Wilson, 90 N. Y. 423.

[2] See *infra*, "Undisclosed principal," p. 814; United States Bank v. Dandridge, 2 Wheat. 64; Hoyt v. Thompson, 19 N. Y. 208.

[3] This is equally true of a corporation. Olcott v. Tioga R. R. Co., 27 N. Y. 546, *infra*.

[4] Collins v. Cooper, 65 Tex. 460; Gallinger v. L. S. Traffic Co., 67 Wis. 529; Johnson v. Christian, 128 U. S. 374. The question is not what authority was intended to be given to the agent, but what authority was a third person dealing with him justified in believing was given him. Griggs v. Selden, 58 Vt. 561. "But all of the elements of an estoppel must be present. There must be conduct calculated to mislead, and it must be under circumstances which justify the claim that the alleged principal should have expected that the representations would be relied and acted upon; and further, it must appear that they were relied and acted upon in good faith to the injury of an innocent party. Mechem on Agency, secs. 85, 86; S. T. & H. R. R. Co. v. Chappell, 56 Mich. 190." Clark v. Dillman, 108 Mich. 625. A company cannot hold out one as its agent and then disavow responsibility for his acts. Creswell v. Lanahan, 101 U. S. 347.

[5] Ingraham v. Edwards, 64 Ill. 526.

seal, must be in writing and executed with the formalities which would be required in case the principal acted for himself.[1] This rule, however, is not adhered to where the signature is affixed by the agent in the presence of the principal and at his request, for there the agency only extends to the mere act of signing, the conveyance being made by the principal.[2] Nor does it apply to a contract to sell land by an agent, although such a contract must be in writing in order to comply with the statute of frauds.[3]

Who May be a Principal.— In order to have the capacity of a principal or employer of an agent, the person must be *sui juris* and *compos mentis*,[4] but the converse of this proposition does not hold good in its entirety.

Who May Act as Agent.— It is not essential that an agent should possess the complete capacity to contract in all matters. Thus, it is not essential that they be entirely *sui juris;*[5] nor would it in all cases affect the liability of the *compos mentis* principal and other contractor that the agent who had actually executed his trust was shown to have been *non compos mentis.* A married woman or an infant may act as an agent.

The several species of agency are classified as to the nature of the employment, and are distinguished by various names, *e. g.*, auctioneer, attorney, proxy, delegate, factor, broker, commission merchant, bailiff, etc.

The character of agency as affecting the scope of employment or orbit of service is designated as universal *general* and *special.*

[1] Watson v. Sherman, 84 Ill. 263; Dickerman v. Ashton, 21 Minn. 538. The addition of a seal where unnecessary will not render it necessary that the original authority be under seal. Worrall v. Munn, 1 Seld. 239.

[2] Emerson v. Providence Hat Mfg. Co., 12 Mass. 237; Gardner v. Gardner, 5 Cush. 483; 52 Am. Dec. 740.

[3] McWhorter v. McMahan, 10 Paige Ch. 386.

[4] Dexter v. Hall, 15 Wall. 9. An infant cannot appoint an agent. Armitage v. Widoe, 36 Mich. 154; Fetrow v. Wiseman, 40 Ind. 155. Neither at common law could a married woman. Phillips v. Burr, 4 Duer, 113. Within the scope of the partnership business each partner is the agent of all. Andrews v. Congar (U. S.), 26 L. Ed. 90. Each partner is a principal and may appoint an agent to act for all. Payton v. Baker, 62 Iowa, 704; Durgin v. Somers, 117 Mass. 55; Carley v. Jenkins, 46 Vt. 721.

[5] Brown v. Hartford Fire Ins. Co., 117 Mass. 479. Wife may act as agent. Felker v. Emerson, 16 Vt. 653.

Species of Agents.— In common speech it is understood that an attorney[1] is a lawyer; but in law, or legal phrase, this is not always the case.

An attorney is one who is appointed as any other agent is, but ordinarily the name is given to one who is given a power to perform more solemn acts in the place and stead of the principal, and, in the sense of an attorney who acts in the place of a principal, need not be a lawyer.[2]

A proxy is one who is appointed to act in the place of a principal, but not generally to contract in every-day affairs. The term "proxy" is usually applied to one who attends meetings and votes.

Factors, brokers and commission merchants are all forms of agents connected with traffic in merchandise.

A broker is one employed to make bargains or contracts between others, and in this sense he acts as an intermediary, and to a certain degree is an agent of both.[3]

A commission merchant is one to whom goods are consigned to sell in the name of the principal, receiving a commission for their sale.

A factor is one to whom goods are consigned for sale, with power to sell in his own name without disclosing the name of the owner. The owner, therefore, trusts him with his goods. He may sell in his own name, and has a lien on the goods consigned to him.

Among merchants it is usual for a factor to advance money on the goods; hence, the mutual accommodation accounts for the mutual confidence.

The principal contracts upon the faith of the credit of the factor, and obviously it is no answer to a creditor of a factor to whom such goods have been sold on credit, and who seeks a set-off, that they were in fact the goods of another.

A supercargo is a factor who is sent with goods for the purpose of disposing of them.[4]

[1] See People v. May, 3 Mich. 606.

[2] Hall v. Sawyer, 47 Barb. 119. The nature of the employment should control. If one employs a lawyer to perform services of a nature not connected with his office as an attorney and counselor, there should be no privilege as a witness, nor should any other incident of the relation of client and attorney be allowed.

[3] See Ewell's Evans' Agency, pp. 5–9; Pott v. Turner, 6 Bing. 702; Higgins v. Moore, 34 N. Y. 417.

[4] 1 Beawes' Lex Merc. (6th ed.) 47.

Another form of agency is called *del credere*, and seems to be distinguishable from other forms only by the presence of a stipulation that the agent shall guarantee the collection of the accounts.[1] Such an agency must always arise by express contract and can never be implied.[2]

Character of Agency.— General agency is of two classes: (*a*) Universal agency, authorizing the agent to transact any and all of the principal's business; (*b*) restricted general agency, where one is authorized to transact all business of a particular kind.[3]

A special agent, on the other hand, is authorized to act only in a particular transaction.

It is a matter of difficulty in many cases to determine whether an agent is general or special. As regards the principal and third parties, the distinction is important, but it is frequently necessary to decide, in order to determine the principal's liability, not only whether the authority was general or special, but whether the agent's acts were within the apparent scope of his authority.[4]

One dealing with a professed agent risks his being such, and is bound to know the extent of his authority.[5] But if one is apparently an agent, a third person dealing with him is not bound to inquire whether there are secret limitations, unless he is put upon inquiry by facts which come to his knowledge.[6]

Whether an agent is general or special is always a question of fact.[7] The usages and customs of the business in which the parties are engaged must always constitute an important

[1] Benj. Sales, § 598; Burton v. Goodspeed, 69 Ill. 237.

[2] Wittkowski v. Harris, 64 Fed. Rep. 719.

[3] See Mechem on Agency, § 6; Keith v. Herschberg Opt. Co., 48 Ark. 138; Gulick v. Grover, 33 N. J. L. 467; 97 Am. Dec. 728.

[4] Ewell's Evans on Agency, 2, 102; Mech. Bank v. N. Y. etc. R. Co., 13 N. Y. 599, 632. In most cases the distinction only throws back one step the process of investigation. Johnson v. Milwaukee & W. Inv. Co., 46 Neb. 480.

[5] Sanford v. Handy, 23 Wend. 260; Owings v. Hull, 9 Pet. 607; Mechem on Agency, §§ 276, 283.

[6] Wheeler v. McGuire, 86 Ala. 398; 2 L. R. A. 808. See cases in next note.

[7] Dickinson Co. v. Miss. Valley Ins. Co., 41 Iowa, 286. The general officers of a business corporation, *e. g.*, its manager, are general agents. And one dealing with such an officer in a matter relating to its business operations, and not involving its corporate powers, has a right to rely on his apparent authority, and cannot be charged with notice of by-laws re-

factor in the question, and will generally furnish the test of the character of agency.[1]

Scope of Authority.[2]— The character of the agency, whether it be universal general or special, indicates the orbit within which the agent is to act. The scope of authority is a different matter, and relates rather to the various specific acts by means of which the business authorized to be transacted may be conducted; in other words, is the means by which the end is sought to be accomplished legitimately within the authority of the agent in a given case, irrespective of whether the agency be general or special.[3]

Bearing in mind that an agency is instituted for the purpose of transacting business, it is apparent at the outset that the nature of the business must of itself impliedly limit the scope of authority to those things naturally germane to and usual or reasonably necessary to accomplish the object;[4] and in applying these tests one may reason in analogy to the reasoning of Chief Justice Marshall in *McCulloch v. Maryland*[5] upon the

stricting his authority. Johnson v. Milwaukee & W. Ins. Co., 46 Neb. 480. A bank teller who, to the knowledge of the officers of the bank, is in the habit of certifying checks of customers, is a general agent for that purpose, and the bank is bound by his acts. Farmers' & Merchants' Bank v. Butchers' & Drovers' Bank, 16 N. Y. 125; Phœnix Ins. Co. v. Stocks, 149 Ill. 335.

[1] Goodenow v. Tyler, 7 Mass. 36; Nelson v. Cowing, 6 Hill, 336; Phillips v. Moir, 69 Ill. 156; Cox v. Midland Ry. Co., 3 W. H. & G. 278.

[2] In Phenix Ins. Co. v. Stocks, 149 Ill. 335, an agent of the insurance company had authority only to secure insurance, receive premiums and issue policies, and not to bind the company in respect to adjustment of loss; and in an action by a policy-holder against the company it was held that notice and demand on the agent was notice and demand on the company. The court said: "Persons dealing with an agent cannot know, nor are they required to know, the limitations upon his power to represent his principal. The company is bound by the acts of its agent in the exercise of powers within the apparent scope of his authority, unless limitation upon such powers is brought to the notice of the assured."

[3] Doan v. Duncan, 17 Ill. 272; Butler v. Maples, 9 Wall. 766.

[4] Id.; Shaw v. Stone, 1 Cush. 243.

[5] 4 Wheat. 414. Precisely as it was argued in McCulloch v. Maryland, that a power without the means of accomplishing it would be a nullity, so it is laid down that every agency carries with it:

"(A.) Powers *prima facie incident* to every ascertained authority.

"(*a*) All the *necessary* and *usual* means of executing the authority with effect.

"(*b*) All the various means *justified* by the *usages* of trade.

power of the United States to accomplish an object by the incorporation of a bank.

For instance, a bank[1] is incorporated for the purpose of conducting a banking business. It appoints its general agents, and they need no further authority than their general appointment to transact the ordinary affairs of the company. But an officer indorses, in the name of the bank, a note for the accommodation of another bank or an individual.[2] This is beyond the scope of the ordinary business of the bank,[3] perhaps beyond its power, because *ultra vires* its object. Manifestly, such an act is beyond the scope of the authority of the agent. So in any case, whether the agency be general or special, the authority to act must be circumscribed within the usual and ordinary limits of the business.

In case of individuals, by an appointment as attorney in fact, to transact all business in the principal's name which the principal might transact, the attorney in fact may stand in the place of the principal for all matters of business; but even there it will not do to say that he might contract that the principal should marry, or enter into any such extraordinary contract as is not recognized in the affairs of men as proper to be transacted through an agent.[4] As to corporations,[5] it is obvious that their power to transact business circumscribes the scope of an agent's authority; and again, that the scope of authority may be limited by the character of business the agent is appointed to transact.

Authority is distinguished from instructions, although courts and text-writers are not always sufficiently guarded in the choice of terms. While a violation of instructions will render

"(B.) These are to be ascertained by interpretation and construction.

"(*a*) When the authority is given by a formal instrument.

"(*b*) When the authority is given by an informal instrument.

"(*c*) When the authority arises from implication.

"The ordinary scope may be limited or extended:

"(*a*) By parol evidence: (1) Of custom and usage. (2) In other cases.

"(*b*) By conduct of principal." Ewell's Evans on Agency, p. 142 et seq. See especially Mechem on Agency, Book 2, ch. 1, §§ 276 et seq.

[1] The cashier of a bank is a special agent. Elliott v. Abbott, 12 N. H. 549; 37 Am. Dec. 227. If incorporated, the directors are its general agents.

[2] Id.

[3] Gulick & Holmes v. Grover, 33 N. J. L. 467; 97 Am. Dec. 728.

[4] Gulick v. Grover, *supra*.

[5] Elliott v. Abbott, 12 N. H. 549; 37 Am. Dec. 227.

the agent liable to his principal, it will not affect the binding quality of acts performed unless the third person has knowledge of the limitation as to the manner of acting.[1]

The Duty of the Agent.— The first duty of an agent is obedience to instructions;[2] and although he may bind his principal within the apparent scope of his authority,[3] even though he acts contrary to his instructions, he will generally render himself liable to his principal for any loss occasioned by his misconduct.[4]

Absolute fidelity and loyalty to the interest of his principal is likewise a requirement of the law.[5] There is no distinction in such cases between the requirements of the moral law and the municipal law.

One cannot serve two masters unless it be thoroughly and distinctly understood by all parties concerned.[6] Neither may the agent become in any manner interested in a transaction of his principal.[7]

[1] The act of an agent within his apparent or real authority, but contrary to his instructions, will bind his principal in all cases, provided the person dealing with such agent knew of such prior acts indicating authority, and dealt with the agent in reliance thereon. Johnson v. Milwaukee & W. Inv. Co., 46 Neb. 480. The court in this case said: "It is argued in this case that where one deals with a corporation he is bound to take notice of its charter and by-laws, and this has received some support in the decisions." But in Rathbun v. Snow, 123 N. Y. 343, cited and quoted in the former case, the court says "that third persons may act on the apparent authority conferred by principal upon agent and are not bound by secret limitations, qualifying verbal appointment; that the defense based upon the limitation in the by-laws of the company, of which the plaintiff had no knowledge, cannot be sustained." See Sage v. Shepard & Morse Lum. Co., 39 N. Y. S. 449; Phenix Ins. Co. v. Stocks, 149 Ill. 335; Mut. Life Ins. Co. v. Kirchoff, 133 Ill. 368. Where one attempts to hold principal for acts of agent he must be held to the exercise of good faith. He cannot collude with agent to defraud principal, or to stretch supposed authority of agent to possess himself of the property of principal without consideration. Mayer v. Moore, 42 Atl. Rep. 721. See cases *ante*, p. 808.

[2] Coker v. Ropes, 125 Mass. 577.

[3] Johnson v. Milwaukee & W. Inv. Co., 46 Neb. 480; Breen v. Miehle Printing Press & Mfg. Co., 8 Pa. Dist. Rep. 151; People's Bldg., L. & S. Ass'n v Keller, 50 S. W. Rep. 183; Edgerly v. Cover. 77 N. W. Rep. 328.

[4] Whitney v. Merchants' Union Ex. Co., 104 Mass. 152.

[5] Jackson v. Pleasonton, 29 S. E. Rep. 680; Mechem on Agency, 454. The principal is entitled to all the knowledge and skill of the agent. Norris v. Taylor, 49 Ill. 17.

[6] C., W. & Z. Ry. Co. v. Iliff, 13 Ohio St. 250.

[7] Keech v. Sanford, Sel. Cases Ch. 61; May v. Le Claire, 11 Wall. 236; Davis v. Hamlin, 108 Ill. 39.

It has become a maxim of the law, particularly applicable to agency, that no man shall be allowed to act where his interest and integrity are in conflict.[1]

The agent may not make a secret profit, and it is immaterial what form the transaction takes.[2]

Uberrima fides is the rule, and a court of conscience will always grant relief, on behalf of the principal against the unfaithful agent, according to the conception the particular court may have of good faith, morality and fair dealing.[3]

It is in such cases, strictly speaking, that a court of chancery is called a court of conscience;[4] and even as in ancient times it was said that equity was like the chancellor's foot, in that it differed with different men, so, necessarily, the extent of relief must depend entirely upon the character and qualification of those who occupy the judicial bench.

There are chancellors whose moral sense may be shocked by the unfairness of a transaction, while other chancellors, whose sense of fairness or conceptions of morality and good faith are different, may see nothing in the transaction to criticise.

High-sounding phrases of morality may be followed by a decision which releases the unfaithful agent who has successfully deceived his principal. This result is merely the natural consequence of the necessity of leaving the application of the law to men whose conceptions of right and wrong are less keen

[1] Cases, p. 811, n. 7.

[2] The rule is aimed at a secret profit. It does not amount to an inhibition against a fair contract between principal and agent allowing a liberal profit. Ruckman v. Bergholz, 37 N. J. L. 43; Kerfoot v. Hyman, 52 Ill. 512; People v. Overyssel Tp., 11 Mich. 222; Green v. Knoch, 92 Mich. 26; Switzer v. Skiles, 3 Gilm. 529; 44 Am. Dec. 723.

[3] Buckner v. Calcote, 28 Miss. 466; Ferguson v. Dent, 24 Fed. Rep. 412. If an agent seeks to uphold a transaction between himself and his principal, or a principal to avoid a transaction between himself and his agent, the burden is upon the agent to show that he gave to his principal the same advice in the matter as an independent disinterested advisor would have done; and that he made a full disclosure of all he knew concerning the property, and that the principal knew with whom he was dealing and made no objection, and finally that the consideration was fair and just. Bank of Ohio v. Torrey, 9 Paige, 649; Comstock v. Torrey, 57 Barb. 453; Brooks v. Barry, 2 Gill, 83; Moore v. Mandelbaum, 8 Mich. 433; G., C. & S. Ry. Co. v. Kelly, 77 Ill. 434; Condit v. Blackwell, 22 N. J. Eq. 481.

[4] Buckner v. Calcote, *supra*.

than those of others.[1] But the rules of law are simple and well settled.[2]

A purchase by an agent from his principal in the form of a negotiation between himself and his principal is not absolutely void, but it is *prima facie* fraudulent, and voidable at the instance of the principal.[3]

It devolves upon the agent, whenever the transaction is questioned by the principal or any one representing him, to show by clear and satisfactory evidence that the transaction was fair, and that he made a full disclosure of every material fact which might affect the judgment of his principal.

A purchase by the agent, taking the form directly or indirectly of a purchase from himself, as the purchase of an executor at his own sale, is void, because the agent cannot be both the seller and the purchaser. Such a transaction is absolutely void.[4]

A Third Duty.— It is the duty of an agent to keep an account of his stewardship.[5] In the absence of a strict account every presumption will be against him. It is his duty, within ordinary and customary periods, to submit to his principal this account,[6] and if, by contract or according to custom, there are

Compare Tyler v. Sanborn, 128 Ill. 142; Ross v. Payson, 160 Ill. 349, and cases cited, with Richards v. Cline, 176 Ill. 431.

[2] Equity looks with suspicion upon transactions between principal and agent where there is opportunity to make an undue profit. Cook v. Berlin Mills, 43 Wis. 433; Eldridge v. Walker, 60 Ill. 230; Hughes v. Washington, 72 Ill. 84; Francis v. Kirker, 85 Ill. 190. The rule is not based upon the existence of actual fraud, but upon the public policy of preventing any temptation to fraud. Mechem, Agency, secs. 455–57, 461; Cotton v. Holliday, 57 Ill. 178; (voidable) G., C. & S. R. Co. v. Kelly, 77 Ill. 434; Miles v. Wheeler, 43 Ill. 127; Tyler v. Sanborn, 128 Ill. 147.

[3] People v. Township Board, 11 Mich. 222; Taussig v. Hart, 58 N. Y. 425; Tewksbury v. Spruance, 75 Ill. 187; Ross v. Payson, 160 Ill. 349; Mechem on Agency, sec. 462.

[4] Schenck v. Dart, 22 N. Y. 420; Michoud v. Girod, 4 How. 557; Davoue v. Fanning, 2 John. Ch. 226; Thornton v. Irwin, 43 Mo. 153. If one who has accepted an agency to buy for another buy for himself, he will be treated as a trustee. Reid v. Stanley, 6 Wall. 369. See Brown v. Cowell, 116 Mass. 461.

[5] Keighler v. Savage Mfg. Co., 12 Md. 383; 71 Am. Dec. 600. It is his duty to keep principal's goods and his own separate. If they cannot be distinguished, all will be held to belong to principal. Marine Bank v. Fulton Bank, 2 Wall. 252.

[6] Clark v. Moody, 17 Mass. 145; Haas v. Damon, 9 Iowa, 589; Langley v. Sturtevant, 7 Pick. (Mass.) 214.

settled periods for accounting, he is liable to an action for an accounting, in law or in equity, for failure to do so, without any further request; but if according to the custom there is no fixed time, or according to the course of dealings it has been the custom to request an account, the demand for an account should precede the bringing of a suit.[1]

Mode of Contracting.— Where an agent transacts business with a third person it is obviously his duty to disclose his agency; and where he enters into a solemn agreement, the body of the agreement itself should indicate the parties between whom the contract is made, and if, instead of so doing, it appears that the agent himself is one of the contracting parties, it does not avail to release him that he subsequently show that in fact he was contracting merely as agent. It is not sufficient under all circumstances that he subjoin to his name, which he signs in proper form, a clause or sentence indicating that he is the agent for another, for this latter may be merely *descriptio personæ*, and constitutes only an identification of the individual.[2]

The contract should be executed in the name of the principal, and the principal's name signed to it, with the addition of words indicating that it is by procuration or by an agent.[3]

Consequences of Non-disclosure.— If the agent would avoid personal liability he must disclose the fact that he is acting, not as principal, but in the character of agent. If in fact there is an actual agency or authority, but the fact of agency is undisclosed, then, under ordinary circumstances, the other contracting party has the right to show the fact of agency in order to bind the principal; but in such cases the existence of the agency actually shown will not relieve the agent from liability,[4] but it allows a resort to either by the third party.

[1] Bedell v. Janney, 4 Gilm. 193; Armstrong v. Smith, 3 Blackf. (Ind.) 251; Heddens v. Younglove, 46 Ind. 212. See "Actions of Account."

[2] Post v. Pearson, 108 U. S. 420.

[3] Id. As to the mode of signing negotiable paper, see that topic.

[4] He is liable as the real principal. Bickford v. First Nat. Bank, 42 Ill. 238; 89 Am. Dec. 436; French v. Hardin County, etc. Co., 67 Ill. App. 269; Baldwin v. Leonard, 39 Vt. 260; 94 Am. Dec. 324; Beymer v. Bonsall, 79 Pa. St. 298; Wheeler v. Reed, 36 Ill. 81; Welch v. Goodwin, 123 Mass. 71; Newman v. Gruff, 101 N. Y. 63; Mitchell v. Beck, 88 Mich. 342; Mackey v. Briggs (Colo.), 26 Pac. Rep. 131. Even though the party with whom he contracts knows that he is acting only as agent for some undisclosed principal. Wilder v. Cowles,

With regard to the right of the third party to look to the principal when discovered, there can be no doubt.[1]

It has been a question of considerable doubt and difficulty as to whether, after learning that there was an undisclosed principal, the third party contracting could pursue both as though there were a joint and several liability; and it has been held that both might be held until satisfaction was secured against one;[2] but, on the other hand, the prevailing rule seems to be that the third person has but an election in such cases;[3] and while the mere bringing of a suit alone will not constitute conclusive evidence of an election,[4] any circumstance showing that he had, after full knowledge of his right to sue either, elected to sue one and proceeded to judgment, will conclude him from afterward resorting to the other.[5]

The election must be made within a reasonable time after disclosure, and what is a reasonable time, in view of all the circumstances of the case, is a question of fact. The question as to whether certain conduct amounts to an election is also a question for the jury.[6] The third party cannot be deemed to have made an election unless he had knowledge both of the fact of the agency and of the name of the principal. This knowledge is indispensable.[7] It has been held that the commencement of an action does not show an election,[8] and that nothing less than satisfaction will discharge.[9]

This rule regarding the liability of the undisclosed principal applies to all simple contracts, whether written or oral, and

100 Mass. 487; Royce v. Allen, 28 Vt. 234; Ye Seng Co. v. Corlitt, 9 Fed. Rep. 426.

[1] Ford v. Williams, 21 How. 287; Byington v. Simpson, 134 Mass. 169; 45 Am. Rep. 314; Freund v. Hixon, 49 Pac. Rep. 640; Maxey Mfg. Co. v. Burnham, 89 Me. 538.

[2] Cobb v. Knapp, 71 N. Y. 348; 27 Am. Rep. 51; Beymer v. Bonsall, 79 Pa. St. 298. See Story, Agency, secs. 266–270; 2 Kent, Com. *631.

[3] Elliott v. Bodine (N. J.), 36 Atl. Rep. 1038. See note in 2 L. R. A. 812.

[4] Raymond v. Proprietors Crown & E. Mill, 2 Met. 319.

[5] Armstrong v. Stokes, L. R. 7 Q. B. 598; Paterson v. Gaudasefen, 15 East, 62; Kingsley v. Davis, 104 Mass. 178; Jones v. Ætna Ins. Co., 14 Conn. 501.

[6] Merrill v. Kenyon, 48 Conn. 314; 40 Am. Rep. 174; Cobb v. Knapp, 71 N. Y. 348; Thomson v. Davenport, 9 B. & C. 78. See Sanger v. Warren (Tex.), 40 S. W. Rep. 840.

[7] Merrill v. Kenyon, *supra;* Bartlett v. Hawley, 126 Mass. 92.

[8] Cobb v. Knapp, *supra.*

[9] Maple v. Railway Co., 40 Ohio St. 313; 48 Am. Rep. 685. See the general subject treated under Procedure, Election of Parties.

whether required to be in writing or otherwise.[1] But it does not apply to instruments under seal, unless the instrument was one to the validity of which the seal was not essential, and the principal has ratified or affirmed it, or his interest appears upon its face.[2]

It has been held in this country that where a third person has dealt with one, supposing him to be the principal, but afterward discovers that he was acting for an undisclosed principal, such third person cannot hold the principal liable, after disclosure, if the latter has in the meantime paid the agent or altered the state of the account so that he would be prejudiced if held liable.[3]

This rule, however, has been severely criticised. It was founded on a dictum of Lord Tenterden in *Thomson v. Davenport*,[4] which has been discredited by later English cases. The rule adopted in England seems much more in harmony with justice.

It is that the principal is not liable where, before the other party has intervened with his claim, the principal has settled with, paid, or credited the agent in good faith and in reliance upon such a state of conduct or representations on the part of the other party as to reasonably lead the principal to infer that the agent had already settled with such other party.[5]

Rights of the Undisclosed Principal.— The rights which a principal has arising from non-disclosure by one who is authorized to act for and on his behalf are different from the rights of a third person with whom the agent deals without making the disclosure.

The matter arises in practice where the agent acts under instructions not to disclose who the principal is, or where, on his own motion, he rightfully or wrongfully contracts without disclosing his principal.

Against the Agent.[6]— It is quite plain and well settled that in such cases the agent may render himself liable to the principal

[1] Briggs v. Partridge, 64 N. Y. 357; 21 Am. Rep. 617; Byington v. Simpson, 134 Mass. 169; 45 Am. Rep. 314.

[2] Mechem on Agency, sec. 702; Briggs v. Partridge, *supra;* Stowell v. Eldred, 39 Wis. 614; Moore v. Granby Min. etc. Co., 80 Mo. 86.

[3] Fradley v. Hyland, 37 Fed. Rep. 49; Emerson v. Patch, 123 Mass. 541; Knapp v. Simon, 96 N. Y. 284.

[4] 9 B. & C. 78.

[5] Heald v. Kenworthy, 10 Exch. 739; Irvine v. Watson, 5 Q. B. D. 414.

[6] Agency is but one species of fidu-

not only for a breach of contract, but to account for the proceeds of the transaction.

In fact, all that he obtains belongs to his principal, and so long as he retains it he may be compelled to turn it over to his principal, together with all accumulations and profits which he has made out of dealing with the subject-matter.[1]

As against a third person the rule must be somewhat different. To a certain extent and under some limitations the principal has rights, even as against a third person, arising out of a contract with that third person made by the agent, although the third person is not informed of the fact of agency or the identity of the principal.[2]

This is an exception to the rule that one cannot be bound by a contract all of the terms of which he has not fully assented to.[3]

The rule seems to have its origin in the law merchant and

ciary relations which pass under the term of trusts, and which is peculiarly a subject of equity jurisdiction. For this reason much which might be here given, but which is common to all trust or fiduciary relations, will be treated under the subject of "Trusts and Accounting."

[1] Mechem on Agency, §§ 453, 469. If an agent employed to purchase an estate himself becomes the purchaser, he will be treated as a trustee for his principal. Reed v. Stanley, 6 Watts & S. 369. And the *cestui que trust*, the principal, has in all cases the option to take the property, even though converted into another form, or to recover its value. May v. Le Clair, 11 Wall. 217; Stephens v. Buell, 2 Wall. 229; Keech v. Sanford, Sel. Cas. Ch. 61; 1 Lead. Eq. Cas. 48. As to tracing trust funds, see Mechem on Agency, § 780.

[2] George v. Clagett, 7 T. R. 355 (1795). "It is now well established that a principal can maintain an action on a written contract made by his agent in the agent's name, the contract not disclosing the name of the principal; and also that the plaintiff may show by parol evidence that such agent was in fact acting for him. It has also been held that the plaintiff may prove by parol that the other contracting party named in the contract was the agent of an undisclosed principal, in which state of the case the plaintiff could have his remedy against either at his election. Parol evidence will also be admitted in such cases to charge the principal, or enable him to sue in his own name; but the agent who has so bound himself will never be allowed to contradict the writing by proving that he contracted only as agent, and not as principal. New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 381; Ford v. Williams, 21 How. 287; Baldwin v. Bank, 1 Wall. 234; Nash v. Towne, 5 Wall. 689; Higgins v. Senior, 8 Mees. & W. 844; Thomson v. Davenport, 9 Barn. & C. 78: 1 Pars. Cont. (5th ed.) 64; Smith, Lead. Cas. (6th Am. ed.) 421." Prichard v. Budd, 76 Fed. Rep. 710–713.

[3] Boston Ice Co. v. Potter, 123 Mass. 38, cited Mechem, Agency, § 771. This and the other cases there cited

to have been confined to mercantile contracts of brokerage, insurance, sales, bailments, etc., where something of value is to be transferred, and does not extend to all executory contracts to do or to perform.[1]

The rule as stated by Evans is that an undisclosed principal may sue, and be sued upon, *mercantile* contracts made by his agent in his own name, subject to any defenses or equities which, without notice, may exist against the agent.[2]

It is plain that the rule cannot be universal and cannot be extended to such length as to practically make all executory contracts to perform services or furnish goods, supplies, material, and the like, assignable.[3]

Neither can it extend to contracts where the innocent third person was contracting for something which he desired specifically to come from the person with whom he dealt; and it is no answer to his position to state that the party was really but an agent, for every man has a right to choose with whom he will contract and to whom he shall be bound.[4] The rules of privity must be respected.

The principal's right is based upon the policy of the law merchant, and rests upon his liability to the third person. Allowing this reciprocal right makes the contract mutual.[5]

Like other cases where persons who are strangers to the contract seek to enforce it, the above rule does not apply to sealed instruments.

Dissolution or termination of the contract of agency may be brought about in the same manner that any other contract may be dissolved, and, in addition thereto, whenever the agent is guilty of misconduct, the principal has the right to treat the agency as at an end or to insist upon the relation, as he sees fit.

As we have seen, the assumption of the character of the agency binds the assumed agent, and after such assumption it

are not agency cases, but are in point on the question of privity, as heretofore pointed out.

[1] Since the law merchant has been blended with the common law of the land, the distinction is lost sight of. See Prichard v. Budd, *supra*.

[2] Ewell's Evans' Agency, 531. In McConnell v. East P. L. Co., 100 Ga. 129, the rule is stated to apply *to all cases*, but the statement is too broad.

[3] Mechem on Agency, § 771.

[4] Boston Ice Co. v. Potter, *supra*.

[5] The principal must assume responsibility for all of the agent's acts, agreements and liabilities. McConnell v. East P. L. Co., *supra*, citing Mechem on Agency, § 773.

requires some positive, unequivocal act or notice to put an end to the relation and relieve the agent from the burdens and duties of agency.[1] Where the agent becomes vested with an interest in the subject-matter, it is not within the power of the principal to revoke such an interest; but in such cases the agency is not strictly an agency to negotiate a new contract, but a power to execute a trust.[2]

Sec. 615. *Partnership.*— The relationship which grows out of the contract of partnership has been variously defined, but it is difficult to frame a definition which shall be justly accurate in including all of the elements which must be present and excluding those which must not exist.[3]

Perhaps one taken from a distinguished English writer on commercial law, whose work is not so commonly in the hands of American lawyers as some to which reference may be made, will serve the present purpose of the author, which is to direct attention to the fact that the definitions do not sufficiently distinguish the association of partnership from several other forms of association by which several persons combine their capital, skill and labor in enterprises for the purpose of gain.

The practical thing is to make these distinctions plain,[4] and in treating corporations an attempt was made to distinguish a corporation from other forms of association.[5]

It was there pointed out that corporations were associations for governmental, business, charitable or religious objects. So, without incorporating, men associate for religious, charitable and business or mercantile objects.

The fact of association and objects, then, do not distinguish the one relation from the other. But even as to its objects one feature is always present—a partnership is a creature

[1] 2 Pom. Eq. Jur. 956. See Rhode v. Bate, L. R. 1 Ch. 252.

[2] See Mechem on Agency, § 204.

[3] The subject of partnership has been so ably and concisely treated by Professor Mechem in his Elements of Partnership, a work justly popular among students, that the writer feels justified in giving to this subject only such treatment as will perhaps make the distinctive features of the contract of partnership stand out in plain contrast with other contracts providing for the association of capital and effort, adding to this the fundamental principles of the subject, and in addition showing how specific rules flow naturally from these fundamental principles.

[4] See observations on definition, *ante*, sec. 60.

[5] Section 472 should be read in this connection.

of the law-merchant, and business is the object of the association.[1]

The form of association is always contractual. The partners are all principals and joint owners of the business. They are joint owners of the profits. They never lose their identity, but are always regarded as acting, though for some purposes the firm may be regarded as an entity. There is no such thing as a succession of members without a change of the firm. Every member is the general agent of the firm.

Mr. Smith says: "Partnership is the result of a contract, whereby two or more persons agree to combine property or labor for the purpose of a common undertaking and the acquisition of a common benefit. There may be a partnership in one transaction as well as in a continuing business, and between persons out of trade as well as in trade, since, in either case, there may be a combination of property or labor, in order to a common undertaking and a common profit."

The Ancient Test Unreliable.— Mr. Smith continues: "This community of profits is the criterion whereby to ascertain whether a contract be really one of partnership, for one partner may stipulate to be free from *loss*, and the stipulation will hold good as between himself and his companions, though it will not diminish his liability to strangers. So one partner may contribute all the money, all the stock, or all the labor necessary for the purpose of the firm. But if there be not a community of profit, there is no *real* partnership; while, on the other hand, where such community of profit exists, each of the sharers in it is and may be treated by the creditors of the whole body as a partner,[2] although he may have stipulated with his companions not to be responsible for the engagements entered into by them with strangers, to whom he, notwithstand-

[1] "Trading partnership" is the name for pure partnerships. It distinguishes them from societies formed for pleasure, where dealing is not contemplated. See *ante*, sec. 472.

[2] The author is not giving assent to the doctrine, but is using it to direct attention to the growth of the rule and the real tests of the relation. Mr. Smith relies on Waugh v. Carver, 2 H. Blk. 235; 2 Sm. Ld. Cas. 1316; Mechem's Cases on Partn. 67. Mr. Smith seems himself to hold that the mere participation in profits is not enough, but that he must *share as owner*. This can only be where he is an owner of the business. In many cases the only visible assets are the profits, *e. g.*, in professional partnerships. See *post*, p. 822.]

ing, will be liable, and very justly so; for by taking a part of the profits he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts; and on this ground it is that a *dormant partner*, that is to say, one who is a sharer in the concern, but does not appear to the world as such, is held responsible for its engagements."[1]

Element of Agency Omitted.— It will be observed that there is no mention here made of the relation of agency which exists between partners. It is one of the essential elements of partnership that each partner is an agent of the firm, and there are courts that hold that the law of partnership is but a branch of the law of agency. However important the feature of agency is, it cannot be that agency is the generic word in partnership, but a species. Partnership differs from a mere agency in this: that a partnership is not a contract of employment, and each partner, while an agent, is at the same time a principal.[2]

Each partner is a joint owner — an agent never is.

The relation rests upon at least three principal elements: (*a*) Community of interest in business (not necessarily of capital); (*b*) community of ownership in the profits; (*c*) the agency of each in regard to the firm business.

Not any of these elements alone necessarily makes a partnership, but if they combine the result is a partnership irrespective of any intention of the partners.[3] If they are not present there is no partnership, even though the parties speak of the relation as such.[4]

The extent of each may be limited, as between the partners, by special contract.[5]

[1] Smith's Mer. Law, pp. 44, 45.

[2] Parsons claims that the agency is based upon joint ownership of firm property (Pars. on Part. 170), but this view is not tenable; at least it is not the sole ground of the agency. Such an agency is an incident of the particular contract. Van Keuren v. Parmelee, 52 N. Y. 523.

[3] Beecher v. Bush, 45 Mich. 188; 40 Am. Rep. 465; Mechem's Cases on Partn. 86. The intention is not immaterial, but not controlling. "Where a partnership is claimed to exist, not in writing, the intention of the parties is a material fact to be ascertained from their conduct and declarations; but where the agreement is in writing its true construction must be determined, and from that construction it is to be found whether a partnership exists." State Nat. Bank of S. v. Butler, 149 Ill. 575. See Beecher v. Bush, *supra*.

[4] Livingston v. Lynch, 4 Johns. Ch. 573.

[5] Parsons, in his work on Contracts, speaking of community of interest

As will more clearly appear as we proceed, a partnership is an agreement to combine, to enter into a relation of community of interest, and the one word which describes the situation is *combination.*

The three branches of combination are community of interest in a business, community of interest in the profits of that business, equality of agency of each partner.[1] Having directed attention to the three great topics of partnership, we will examine them separately.

Participation in Profits.—It may be useful at the outset to direct attention to a subject which frequently constitutes a stumbling block to students, and upon which courts have not agreed, viz.: The nature of the participation in the profits which will constitute a partnership, or which may exist without constituting that relation.

The same learned author above quoted says: "Further, it is to be observed that, to constitute a *community of profit* as is here intended, a partner must not only share in the profits of his companions, but must share in them *as a principal, i. e.*, he must not be a mere agent, factor or servant, receiving, in lieu of wages, a sum proportioned to the profit gained by his employers, or a certain portion of a fund which includes the profits, but is not dependent upon them for existence."[2]

and agency, says: "We think the relation rests upon both these foundations together. It is true there may be a copartnership where one or more of the partners has no interest in the capital stock, by agreement among themselves. But even then all own together the profits and so much of the funds or capital of the firm as consists of profits. Partners are, undoubtedly, some way agents of each other. But the principle of agency alone will not explain the whole law of their mutual responsibility. Out of the combination of this principle with those which grow out of the community of property and of interest, the law of partnership is founded. And this law may often be illustrated by a reference to the principles of agency, but must still be regarded as consisting of a distinct system of rules and principles peculiar to itself." Page 149.

[1] See Parsons on Contracts, Book 1, ch. 12, sec. 11.

[2] Smith's Mer. Law, 47. That is, he must be more than an employee whose compensation is measured by a proportion of profits of the business; he must be a principal, *i. e.*, interested in the business or sharing in the profits will not make him a partner. See Beecher v. Bush, *supra*, relying on Cox v. Hickman, 8 H. of L. Cas. 268; Mechem's Cases, 70. In Fougner v. First Nat. Bank, 141 Ill. 124, the court said: "The test, or one of the tests, whether a person not ostensibly a partner is, nevertheless, in contemplation of law, a partner, is whether he is entitled to participate

The participation in profits which is frequently made the principal inquiry is in reality but an incident to the character of interest which each partner has in the business, and will be more fully explained in that connection.[1]

The Governing Principles.— Nearly every specific rule governing the rights and liabilities of partners will be found to flow from and depend upon some one of the following fundamental propositions:

First. *The nature of the relation* of the partners is contractual, existing by virtue of executory contract, which does not submerge the identity of the individuals and establish the personality or status of the firm as is done in the case of the corporation.

Second. *Character of Ownership.*— The partners are joint owners of the business and of everything incident to it, including the actual capital invested and the profits which arise from it; and their ownership is a joint ownership, as distinguished from a common ownership.[2]

Third. *The Agency of the Partners.*— The partners are agents of the firm and of each other within the scope of the business which it is the object of the firm to transact. This agency is implied rather than expressed, and results naturally from their joint ownership in the enterprise. It is peculiar in this: that it is not an agency growing out of employment, but an agency

in the profits." After quoting from Cox v. Hickman, 8 H. L. 268, it is said: "In the application of this rule many decisions are to be found by the courts of last resort in this country to the effect that, notwithstanding a party may contract to receive a part of the profits of a business, he cannot be held liable as a partner. On the other hand, many others — sometimes by the same courts — hold the contrary. These cases are all reconcilable on the distinction that in the first class of cases there was a mere hiring of service, property or money to be paid for out of the profits of the business in which it was engaged, while in the latter there was a proprietary interest in the business." In Meehan v. Valentine, 145 U. S. 622, it is said: "Those persons are partners who contribute either property or money to carry on a *joint* business for their common benefit, and who *own and share* the profits thereof in certain proportions." Jernee v. Simonson (N. J. Eq.), 43 Atl. Rep. 370.

[1] See *post*, p. 828, note 5.

[2] 2 Blk. 399. This idea of joint ownership, as distinguished from ownership in severalty, in common, and in coparcenary, should be mastered at the outset. It is quite as important in real estate and pleading as it is here. The principle is of the substance, and all formal matters, such as joinder in actions and the like, are mere shadows of it.

resulting from joint interest.[1] The rights, liabilities and duties of a principal combine with the rights, liabilities and duties of an agent.[2]

Fourth. *That the liability for torts is several*,[3] but may be treated as joint and several at the election of the injured party,[4] is a proposition not peculiar to partnerships, but applying to all persons.

Nature of the Relation.—To one who does not thoroughly comprehend the distinction between the legal idea of status or personality, and the relation growing out of a joint ownership, it is difficult to determine whether a partnership is a contractual relation merely, or a status, and the authorities may seem not always in harmony upon the question. For most purposes the firm is not regarded as a person, but because of the joint nature of the ownership the existence of the firm is recognized.

The question is, Does the result of conduct or contract, which the law will regard as establishing a partnership, create a new legal entity, or juristic person, such as the law recognizes as having a standing apart from that of the individual members? It is plain that in a true sense it does not.[5]

From the standpoint of a corporation this question has been heretofore examined. What is there said sufficiently explains the idea involved in this question.[6]

All of the authorities agree that a partnership arises out of contract,[7] and it is universally agreed that it does not create a new legal entity for all purposes.[8]

In the aspect of personality a corporation differs from all other associations between individuals to accomplish a common

[1] Swift, System of Laws, 272, top (*a*).

[2] Livingston v. Roosevelt, 4 John. 251; 4 Am. Dec. 273; Mechem's Elements of Partnership.

[3] Andrews' Stephen's Pl., sec. 25.

[4] As to the qualification of the rule when the tort involves a contract, see Castle v. Bullard, 23 How. 183.

[5] The firm cannot maintain a suit—it is not *persona standi in judicio.*

[6] *Ante*, p. 493.

[7] Therefore any person competent to contract may enter into a partnership. The contracts of partnership of infants, insane persons or married women are on the same basis as their other contracts. See *supra*, title Contracts; Mechem on Partnership, ch. 3. A corporation cannot become a partner without special authority conferred for that purpose. Mechem, Elem. of Partn., sec. 26.

[8] The law of England knew no such body as a firm or artificial body. In Scotland it is regarded as a person, *i. e.*, it has a status. Pollock on Partn., p. 18.

object, but a partnership resembles in this respect several other associations from which it is to be distinguished by other incidents, *e. g.*, unincorporated joint-stock associations and syndicates.

The firm as a body distinct from the members is, however, under some circumstances recognized as having an existence, although not ascribed a personality or rising to the dignity of a status.[1] When this idea is examined critically it will be found to depend on joint ownership and joint contract. A joint contract is an entire thing and is not a contract with each contracting party.

The entity of the association is regarded as controlling important rights and important liabilities; *e. g.*, a creditor of the firm stands in better position as to partnership property than does a mere creditor of one of the partners, who cannot reach that partner's interest until the firm creditor is satisfied.[2] And he must first exhaust the individual property of the partner.[3]

Conversely, a creditor of the firm cannot resort to the indi-

[1] Jessell, J., in Pooley v. Driver, L. R. 5 Ch. Div. 458, says: "You cannot grasp the notion of agency (between partners) unless you grasp the notion of a firm as a separate entity." Quoted in Meehan v. Valentine, 145 U. S. 611. But this separate entity is not different in principle from the entity of joint contractors. A joint contract is not a contract with each. And. Steph. Pl., p. 36, note 3. In Clark v. Laird, 1 Mo. App. 106, the court said: "Two concerns are different entities, each with legal capacity to buy and sell to each other, although they had parties belonging to both firms." It was said in Henry v. Anderson, 77 Ind. 363, that "Although individuals compose partnerships, yet the partnership is a legal entity, distinct and different from the persons who constitute its component parts. This distinction is shown in many instances, notably in that rule which requires individual property to be first applied to the payment of individual debts and partnership property to partnership debts." But is it not clear that the true explanation lies in the nature of the ownership, which originally could only be reached in equity? Some of the code states recognize the entity of partnership by permitting one firm to sue another where the two firms have a common partner. Newlon v. Heaton, 42 Iowa, 593. A partnership or general joint-stock company is just as distinct and palpable an entity in the eye of the law as distinguished from individuals composing it as is a corporation, and can contract as an individualized and unified party with one of its members as effectually as a corporation with one of its stockholders. Walker v. Wait, 50 Vt. 668.

[2] Reeves v. Ayers, 38 Ill. 418; Scudder v. Delashmutt, 7 Iowa, 39; 71 Am. Dec. 428; Eighth Nat. Bank v. Fitch, 49 N. Y. 539; Riedeburg v. Schmitt, 71 Wis. 644; Mendenhall v. Benbow, 84 N. C. 646.

[3] Murrill v. Neill, 8 How. 414.

vidual liability until he has exhausted the firm property. These rules, however, depend upon the principle that firm contracts are joint and not joint and several, and also upon the character of the ownership of firm property.

For the security of his interest in debts due him by the other partners in relation to firm business, a partner also has a lien upon the firm assets superior to the claim of a creditor of an individual partner.[1] This is but the natural result of the joint tenancy in firm property, the extent of which depends upon the state of the account between the partners. So it is not strictly a lien, though so called.

These illustrations will serve to show that the existence of the firm as an entity is regarded, but only in a modified sense, and to preserve the equitable rights of the parties.

Notwithstanding the observations of the court in *Cox v. Hickman*,[2] the writer cannot but believe that the identity of the firm, as it is sometimes called in modern cases, is but the joint interest recognized by the common law, and much of that which is said to result from agency really traces back to the same source.

Swift, in his System of Law, says: "The *incidents* to joint estates are, that the act of each tenant in many cases is considered as the act of the whole. A verbal lease by one, reserving rent to himself, shall inure to the benefit of all. The surrender of a lease to one, that was given by all, shall inure to the benefit of all. Delivery of possession to one, or an entry or re-entry by one, has the same operation; the possession of one is the possession of all, so as to prevent either from gaining a title by the possession of fifteen years. So, if either of the joint tenants come within the description of the saving clause of the statute respecting the possession of lands, he saves the estate for all. They cannot sue or be sued without joining or being joined in the suit, in all actions that relate to the joint estate."[3] These rules cover every position, to accomplish which the modern cases resort to the idea of entity of the firm.

Name.—The identity of the partners may be lost in the firm name, because, excepting by the provisions of local law, a part-

[1] Walsh v. Adams, 3 Den. 125.

[2] *Infra*, pp. 828, 835.

[3] Swift's System of Laws of Connecticut, p. 272 (1795).

nership is not obliged to do business in the name of the partners, or any of them, but may adopt a fictitious name,[1] or may do business under the name of one partner, and in such cases the right to continue in such use may become a question of difficulty.[2]

In all such cases the question is whether the business transacted is firm business.[3]

The name may be changed with the consent of all the partners.[4]

If one of the partners carries on a separate business it becomes a matter of some difficulty to determine on whose account he is trading, and there the name will be important, perhaps controlling.[5]

Character of Ownership.— Most of the definitions declare in substance that a partnership is a voluntary association between two or more persons to combine their property, labor or skill, or any of these, in some business for the purpose of mutual profit.[6]

As has been heretofore pointed out, if the parties apply for and receive a charter from the state, the association is changed from that of a partnership to that of a corporation.

It must not be supposed, however, that every unincorporated association by individuals of their capital, whether it be talents, skill, or labor, or property, for the purpose of engaging in a lawful enterprise for a common profit, constitutes a partnership.[7]

Every partnership is of this nature, but not every combination of this nature is a partnership.

There are other features which distinguish a pure partnership from joint associations, syndicates, or organized societies not for profit.

[1] Edgerton v. Preston, 15 Ill. App. 23; Wright v. Hooker, 10 N. Y. 51.

[2] Higgins v. Higgins Soap Co., 144 N. Y. 462; 27 L. R. A. 42.

[3] Mechem, Elem. of Part., secs. 82–84; Ontario Bank v. Hennessy, 48 N. Y. 545.

[4] Crocker v. Colwell, 46 N. Y. 212.

[5] Manufacturers' & Merchants' Bank v. Winship, 5 Pick. 11.

[6] See Mechem's Elements of Partnership, p. 2; 1 Lindley on Partnership (Ewell's ed.), p. 1.

[7] Mechem, Partn., § 50. For example, connecting lines of railroads. Merrick v. Gordon, 20 N. Y. 93. Professional partners who contribute no capital except time and talents are still owners of the business and subject to all the rules of the relation. See Warner & Post v. Griswold, 8 Wend. 665 (a firm of attorneys).

Men may combine their capital in an enterprise for their mutual profit without incorporation and yet not constitute themselves partners.[1] The distinguishing test in this respect is found in the manner of ownership[2] and the presence or absence of the mutual agency. In a partnership the ownership of the partnership business is always joint in its nature, though not having all the same elements found in ancient joint-tenancy in land.[3] This joint ownership naturally draws with it the ownership of the profits and the relation of agency; but we have seen that it is not every person who receives for his services in a business a portion of the profits or gross earnings[4] who thereby becomes a partner. In order that this result follow, he must be a *joint owner* of the business out of which the profits arise, and takes the profits, not as compensation, but because he is owner.[5]

In a syndicate there is neither joint nor common ownership,

[1] A speculating agreement between two to purchase and sell a piece of property and share in the profits does not necessarily make them partners. Marine Bank v. Ogden, 29 Ill. 261.

[2] Baldwin v. Burrows, 47 N. Y. 199; Magovern v. Robertson, 116 N. Y. 61; 5 L. R. A. 589.

[3] "For many purposes a firm, though managed by its members, is a distinct concern and possesses a sort of individuality. The assets are held in a sort of community, but the partners do not hold as common tenants or joint tenants. The property is distinctly separated from that belonging to the individual members, and it constitutes an identical and entire interest." Hubbardston Lumber Co. v. Covert, 35 Mich. 253. Quoted in Mich. Trust Co. v. Chapin, 106 Mich. 384. It follows that there can be no homestead interest in partnership realty. Mich. Trust Co. v. Chapin, *supra*.

[4] Patterson v. Blanchard, 5 N. Y. 186.

[5] Putnam v. Wise, 1 Hill, 234–39; Taylor v. Perkins, 26 Wend. 124–30. "The law declares that those who take the profits of a trading concern *as such* are liable to the losses, even if they have stipulated to the contrary. Waugh v. Carver, Smith's Lead. Cas. 786, and the notes thereto. The phrase, 'taking the profits *as such*,' is not a happy one, and there is some difficulty at times in defining what it means, but I think it means at all events this. It is not possible, according to common law, to cause a trading concern to be carried on on the terms that the advantages of a partnership, including the participation in profits, and the partnership lien and security over the assets of the firm, shall belong to those who have but a limited liability. I am aware of no case or authority inconsistent with the proposition thus guarded." Per Blackburn, J., in Cox v. Hickman, 8 H. L. Cas. 268. From this it appears that the learned judge did not regard Waugh v. Carver as going to the extent of holding that the mere taking of profits was conclusive, and such seems to be the light in which Mr. Smith viewed that case. *Ante*, p. 822.

but the legal title to property is placed in the hands of a third person who is a trustee, and the parties do not agree to venture the property in a going business. A syndicate, strictly speaking, is not for business, but to hold the property for the purpose of a rise in its value. It is speculative rather than in the nature of trade or traffic. The owners of shares may transfer their interest without dissolving the association.

In a joint-stock association the ownership is that of tenants in common rather than joint ownership,[1] and they, too, may assign their shares.[2] This perpetuation of a body, although there is a change of men, is what is called perpetual succession, and is one of the peculiar features of a corporation, but it is not peculiar to that association. It does not obtain in a partnership which is based on peculiar personal trust and confidence. The *delectus personæ* — the selection of the person — is essential.[3]

This joint ownership carries with it all the peculiar incidents of that relation which are established and recognized by the English law. A peculiarity of this relation of joint ownership was the doctrine of survivorship, by which, in the earliest period of modern English law, the property of a joint owner who died descended absolutely to the survivor, a principle which, in a modified form and for special purposes, is even yet applied to partnership property.

Having mentioned the importance for many purposes of understanding the legal idea of joint ownership, an attempt will be here made to state the rule, show its origin and something of its application to the present subject. The matter is accurately and concisely stated by Wood in his Institutes of the Law of England:[4]

"An estate in joint tenancy is where a man is seised of lands or tenements, and makes a feoffment to two or more and their heirs, or makes a lease to them for life, or *where two or more have a joint estate or possession of a chattel, real or personal, or*

[1] This distinction is very clearly made by Chancellor Kent in Livingston v. Lynch, 4 Johns. Ch. 573.

[2] A partner has no individual assignable interest in the assets of the firm until the firm debts are paid. Kenneweg v. Schilansky, 31 S. E. Rep. 949.

[3] *Ante*, pp. 562, 563, note.

[4] Wood's Institutes was published in 1722. It is highly commended by Blackstone, who uses it very freely. The corresponding part of Blackstone is vol. 2. p. *399.

a joint interest in a debt, duty, covenant or contract, and the part of him that dieth goes not to the executor, but the whole to the survivors or survivor." This is called the *jus accrescendi.*[1]

The Rule Never Applied to Merchant Traders.— "An exception is to be made of two joint merchants, for the *benefit* of the stock and debts,[2] which they have as partners, goes to the executor of him that dies and to the survivor, according to their shares, by the law merchant, for encouragement of trade, though the debts and credits as against third persons survive.[3] Every joint tenant is seised *per my et per tout, i. e.*, seised by every parcel, in every parcel and in the whole jointly with his companion."

Broom in his Maxims[4] says that it was "the well-known rule of the law merchant, that, for the encouragement of commerce, the right of survivorship, which is ordinarily incident to a joint tenancy, shall not exist amongst trading partners — *jus accrescendi inter mercatores pro beneficio commercii locum non habet,*—[5] a rule which applies to manufacturers as well as to merchants;[6] to trade fixtures also, which, being removable, are

[1] Finch in his treatise on the law (1595) says: "Sundry men possessing the same thing by purchase are joint tenants or tenants in common. Joint tenants which possess by the same title. As if two, three or more be enfeoffed of certain lands to hold to them and their heirs, or during their own or another's life, or disseise another to their own use, or a lease be made, *or a horse or other chattel personal* given unto them. And here the survivor shall have the whole in the same sort as he had his part, excepting only present interests of the thing itself granted by him that dieth." Finch's Law (2d book), p. 97.

[2] Not the stock and credits, but the beneficial use thereof.

[3] The common law knew no other rule, if indeed there was any law on the subject except the law merchant. It is probable that the following statute was but declaratory of the law merchant: "The wares, merchandises, debts or duties that merchants have as joint traders or partners shall not go to the survivor, but shall go to the executor of him that is deceased; and the executor may join in an action with a surviving merchant. 31 Edw. III., 7; Coke on Littleton, fol. 182; 2 Levinz. 108; 1 Vern. 217. In copartnerships between merchants it is not necessary to provide against survivorship. So, where there are two joint merchants and one of them dies, the other shall have account against their factor, without the joining of the executor of the deceased. Lord Raymond, 340." Beawes' Lex Merc. 37.

[4] Broom's Max. 455.

[5] Co. Litt. 182*a*; Brownl. 99; Noy, Max. (9th ed.) 79; 1 Beawes' Lex Merc. (6th ed.) 42.

[6] Buckley v. Barber, 6 Exch. 164, by comparing which case with Crossfield v. Such, 8 Exch. 825, and Morgan v. Marquis, 9 Exch. 145, the signification and operation of the maxim as to *jus accrescendi* will be perceived.

part of the stock in trade; and has been[1] extended to real as well as personal property, so that all property, whatever be its nature, purchased with partnership capital for the purpose of the partnership trade, continues to be partnership capital and to have to every intent the quality of personal estate."[2]

This account shows sufficiently the nature of the joint tenancy of partners in personal property, and how, by the law merchant, recognized by the statutes of England, the doctrine of survivorship became modified as applied to partnership property.

So much of the law of joint tenancy and survivorship as applies to real property generally will be left for that subject, it being sufficient here to mention that partnership holding of real estate is treated rather as a trust estate for the benefit of all parties, partners and creditors,[3] the strict rules of the common law as to estates in land never having been applied in America to lands held by partners.

Whether real estate is partnership property it is often difficult to determine, and depends upon the intention of the part-

[1] Buckley v. Barber, *supra*.

[2] Per Sir J. Leach, M. R., in Phillips v. Phillips, 1 My. & K. 663, and in Fereday v. Wightwick, 1 Russ. & My. 49; Townsend v. Devaynes, Mont. Partnership (2d ed.), note, p. 96 (2 A.); per Lord Eldon, C., Selkrig v. Davis, 2 Dow, 242; Houghton v. Houghton, 11 Sim. 491; Crawshay v. Maule, 1 Swanst. 521, cited Baxter v. Newman, 8 Scott N. R. 1035. Phillips v. Phillips, *supra*, was overruled as to a different point therein by Taylor v. Taylor, 3 De G., M. & G. 190.

[3] Trowbridge v. Cross, 117 Ill. 109; Holton v. Guinn, 65 Fed. Rep. 450; Erwin's Appeal, 39 Pa. St. 535; 80 Am. Dec. 542, and cases cited in note to Goldthwaite v. Janney, 28 L. R. A. 161. In Shanks v. Klein, 104 U. S. 18, the court held that the real estate of a partnership is to be treated as partnership property. This was a case where the title was in the surviving partner. The court, in speaking of the rights of the surviving partner and creditor, said: "It is an equitable right accompanied by an equitable title. It is an interest in the property which courts of chancery will recognize and support. . . . Real estate so situated is appropriated to the satisfaction of the partnership debts, and for that purpose and to that extent it shall be treated as personal property of the partnership, and like other personal property pass under the control of the surviving partner. English courts and a preponderance of authority in American courts are on the same side of the question." In Allen v. Withrow, 110 U. S. 120, it was held that real property owned by a partnership and purchased with partnership funds is, for the purpose of settling the debts of the partnership and distributing its effects, treated in equity as personal property. Mechem's Elements of Partnership, secs. 108, 109; Hewitt v. Rankin, 41 Iowa, 35.

ners, which may be inferred from the use of the property as partnership assets and from other circumstances.[1] The use by the partnership does not make it the property of the firm, and neither is it to be conclusively held to be the property of the individual member in whose name the title is.[2]

So long as the business is continuing and the extent of the liabilities of the firm to creditors is unascertained, or the various rights and liabilities of the partners unliquidated by an accounting, the real estate is held, at least in equity, in the same light as though it were personal estate for all partnership purposes, and, with other partnership effects, subject to the payment of firm debts and losses and return of the capital originally advanced by each partner.[3]

When these objects are accomplished the interest of partners in real estate is held to be that of tenants in common.

The general rules and principles of the law of partnership which govern and relate to the disposition of partnership property do not apply in their full extent to real estate. They have only the interest of tenants in common, and one partner can convey but his own interest therein.[4] Such was the law of England.[5]

Relation of Ship-owners.— The maritime law of England never recognized joint ownership in ships, and, strictly speaking, there could be no partnership in such property, so that it was admissible for the owners in common of a ship to sell and transfer their interest therein. As a matter of course, in the management of the ship they might become partners by agreement.[6]

Sale of Partner's Interest on Execution.— A partner's interest in firm property may be applied in satisfaction of his individual debt, but it results from the rule that the claims of the

[1] Robinson Bank v. Miller, *infra*.

[2] Goldthwaite v. Janney, 102 Ala. 431; 28 L. R. A. 161; Mechem on Partnership, § 104 et seq.

[3] Kruschke v. Stefan, 83 Wis. 373; Hewitt v. Rankin, 41 Iowa, 35; National Union Bank v. National Mech. Bank, 80 Md. 371; 27 L. R. A. 476; Delmonico v. Guillaume, 2 Sandf. Ch. 366.

[4] Coles v. Coles, 15 Johns. 159; 8 Am. Dec. 231.

[5] Id. The cases affirming and illustrating these propositions are very numerous. Many of them are cited in an exhaustive note to Robinson Bank v. Miller, 153 Ill. 244; 27 L. R. A. 449.

[6] Williams v. Lawrence, 47 N. Y. 462. See Kirby v. Schoonmaker, 3 Barb. Ch. 46; Lawy. Ed., vol. 5, p. 809, note.

other partners and of the firm creditors upon the partnership assets are superior to the claim of a creditor of an individual partner that some difficulty will be experienced in applying the partnership interest to the payment of an individual debt without interfering with these rights.

The character of ownership is such that no partner has any particular title to any specific thing, but at most has a right to an accounting to ascertain his interest and profits and the right to avail himself of these.

Courts are unanimous in holding that a creditor can have no more nor any greater rights in the premises than his debtor, but the attempts which are made to subject the individual interest of a partner to levy and sale on ordinary legal process have resulted in many absurdities in doctrine and loss to all parties. The uncertain contingent interest of a partner is placed in its most unfavorable form when offered for sale on execution.

It has been held that an officer having an execution against an individual may, and must, seize the whole of the partnership assets, but that he may only sell the interest of the debtor partner.[1]

But on the other hand it has been held, and it is the better view, that the officer can get no better right than the partner, and that he has no right to take exclusive possession.[2]

All the courts agree that no specific chattel can be taken

[1] Walsh v. Adams, 3 Den. 125; Claggett v. Kilbourne, 1 Black, 346; United States v. Hack, 8 Pet. 271.

[2] Garvin v. Paul, 47 N. H. 158; Hutchinson v. Dubois, 45 Mich. 143. Judge Cooley seems to question the right of the officer to take possession of the property. He says: "If any levy of an execution upon such an interest can be made, it must be so made and enforced as to protect all rights of others. One man's interest must not be sacrificed because another who is associated with him in business happens to be in debt. Specific chattels must not be taken on the execution because the specific chattels are owned by the firm and not by either of the partners. Gibson v. Stevens, 7 N. H. 352; Morrison v. Blodgett, 8 id. 238; Treadwell v. Brown, 43 id. 290; Brewster v. Hammet, 4 Conn. 540; Matter of Smith, 16 Johns. 102; Wiles v. Maddox, 26 Mo. 77. The utmost extent of the officer's right — *if he can levy at all* — must be to seize the interest of the partner, whatever it may be, subject to all the partnership debts and to the final accounting. Church v. Knox, 2 Conn. 514; Tappan v. Blaisdell, 5 N. H. 193; Sirrine v. Briggs, 31 Mich. 443; Reinheimer v. Hemingway, 35 Pa. St. 432; Knerr v. Hoffman, 65 Pa. St. 126." Hutchinson v. Dubois, 45 Mich. 173–176.

out of a larger mass;[1] that is, there can be no seizure of part of a stock of goods, although the debt be small and the stock large.

To allow the creditor or the officer holding a writ in his favor to interfere and take any sort of manual possession of the goods, or *pedis possessio* of the place of business of a partnership, is an absurdity, and some courts have been conscious of it. It has been said that "one man's interest must not be sacrificed because another who is so associated with him in business happens to be in debt."[2] Still, an interference with the partnership business, disastrous in its natural consequences, has been generally allowed.

In one case it was held that the levy might be made and the interest of the partner be ascertained by a bill filed and determined before sale on execution.[3] In most states the law is that the sale must take place without any opportunity to judge of the value of the partner's unascertained interest, the officer selling and the purchaser buying an unknown contingent interest. This practice is unjust and improvident as to all parties, but it is in accordance with the law.[4]

There is no reason why such an absurdity should be allowed to continue. The remedy, however, is with the legislatures of the various states, unless perhaps in some cases a court of equity would on terms restrain the seizing and selling on the ground of irreparable damage, ordering an account as part of the relief.

It should be provided by statute that a paper levy be made by the sheriff, recorded in the same manner as chattel mortgages are recorded, and in analogy to the practice in levying and selling real property in Illinois. Following this paper levy should be a process, as in cases of accounting, and in this manner the partner's interest be ascertained to a certainty. And such ascertained interest could be either sold or satisfied by the firm without destroying or materially interfering with the firm business. The law on this subject is neither certain nor satisfactory.[5]

[1] Cases cited in note 2, p. 833.

[2] Per Cooley, J., Hutchinson v. Dubois, *supra*.

[3] Johnson v. Wingfield, *infra*. Citing Morrow v. Fossick, 3 Lea, 129.

[4] Atkins v. Saxton, 77 N. Y. 195; Swan v. Gilbert, 67 Ill. App. 236; Johnson v. Wingfield (Tenn. Ch. App.), 42 S. W. Rep. 203; Williams v. Lewis, 155 Ind. 45; 7 Am. St. Rep. 403.

[5] Freeman on Executions, sec. 125;

The Agency of Partners.— Lord Wensleydale, in a leading English case much quoted and approved in the United States, said: "The law as to partnership is undoubtedly a branch of the law of principal and agent,[1] and it would tend to simplify and make more easy of solution the questions which arise on this subject if this true principle were more constantly kept in view.[2] Mr. Justice Story lays it down in the first section of his work on Partnership. He says: 'Every partner is an agent of the partnership, and his rights, powers, duties and obligations are *in many respects* governed by the same rules and principles as those of an agent; a partner virtually embraces the character of both principal and agent.' Pothier says: '*Contractus societatis non secus ac contractus mandati.*'"[3]

It requires the combination of agency with joint ownership to constitute a pure partnership; but, as we have seen that agency, and joint ownership also, may exist outside of the part-

Gerard v. Bates, 124 Ill. 150; Mechem, Elem. of Partnership, sec. 100.

[1] Lord Cranworth, in the same case, said: "The liability of one partner for the *acts* of his copartner is in truth the liability of a principal for the acts of his agent. Where two or more persons are engaged as partners in an ordinary trade, each of them has an implied authority from the others to bind all by contracts entered into according to the usual course of business in that trade. Every partner in trade is, for the ordinary purposes of the trade, the agent of his copartners, and all are therefore liable for the ordinary trade contracts of the others. Partners may stipulate among themselves that some one of them only shall enter into particular contracts, or into any contracts, or that as to certain of their contracts none shall be liable except those by whom they are actually made; but with such private arrangements third persons, dealing with the firm without notice, have no concern. The public have a right to assume that every partner has authority from his copartner to bind the whole firm in contracts made according to the ordinary usages of trade. This principle applies only to persons acting openly and avowedly as partners, but to others who, though not so acting, are, by secret or private agreement, partners with those who appear ostensibly to the world as the persons carrying on the business." Cox v. Hickman, *supra*.

[2] It is with deference submitted that this statement, that partnership is a branch of agency, is *obiter*, and not sustainable. The two relations are essentially different. The relation of partners is *sui generis*, a genus by itself quite distinct from agency. The opinion of Lord Blackburn in the same case is more guarded, and is quite within the reason of the matter.

[3] Pand., lib. 17, tit. 2, Introduction; Cox v. Hickman, 8 H. L. Cas. 268; Mechem's Cases, 70, followed in Beecher v. Bush, 45 Mich. 188; 40 Am. Rep. 465; Mechem's Cases, 86; State Bank v. Butler, 149 Ill. 575.

nership, it is plain that there is something peculiar about the partnership in both these respects. This peculiarity is the manner in which the ownership and agency are joined.

The feature of agency is no more the principal incident of a partnership than is the joint ownership.

It is improper, therefore, to state that one incident or feature of several that must be present in a given combination to constitute a whole is the principal incident or most important element. Every element that is essential must be present; and so in this case, while the idea of partnership cannot be understood without comprehending and including the doctrine of agency, the other elements should not be lost sight of or be subordinated.

Dormant partners are equally bound with the active managing partners, in the same manner that an undisclosed principal is held. It is not a question of giving credit on the faith of a name, but a question of fact as to who is the firm.[1]

Liability by Holding Out.— Cases frequently arise where one is held to be liable as a partner in a firm when, as a matter of fact, there never has been any agreement constituting the relation between the alleged partners.[2]

These are called partnerships by holding out. "Where a man *holds himself out* as a partner or allows others to use his name, then on principles of estoppel he cannot deny the character he has assumed or permitted, and upon the faith of which third persons have acted."[3]

There must be a voluntary and actual holding out, either express or by appearances, to the person seeking to enforce the liability. It is not, however, necessary that the conduct alleged to constitute holding out should have been known to other per-

[1] "I take it that, *as matter of law*, those who are partners in a trading firm do confer upon those who are permitted to manage the concern authority to make all contracts which, in the exigency of the business, are necessary and proper and customary. The *prima facie* authority may be restricted by express agreement, but unless those who deal with the firm have notice of this restriction, they are entitled to hold all who are partners bound by the *prima facie* authority conferred on the manager, and that equally whether the persons sought to be charged were persons to whom the creditors gave credit or dormant partners of whose existence they were unaware." Cox v. Hickman, 8 H. L. Cas. 268.

[2] Mechem, Elem. of Partn., § 69.

[3] Mollwo, March & Co. v. Court of Wards, L. R. 4 P. C. 435.

sons or known generally, but the one seeking to enforce the liability must have exercised reasonable prudence and must have actually acted on the assumption and holding out.[1] In this way one may become liable to one person as partner who is not necessarily so as to others who have not relied upon such representations or conduct.

Whether there has been a holding out is a question of fact, and the burden of proof is upon the person who seeks to fix the liability.[2]

Duty of Partners as to Firm Business.— This doctrine of agency draws with it the personal fiduciary relationship which exists between the partners, the necessity for good faith and the rules in relation to the liability of the firm on account of the acts of the agent; while, because each partner is also a principal, the doctrine of liability of partners for acts within the scope of the firm's business in which they have in no wise participated, and which they have not sanctioned, obtains as a corollary.

Without any special agreement on the subject, each partner is bound to devote his time and energy to the interests of the firm business,[3] and, except under peculiar circumstances, neither can charge the other for his services in the management of the concern.[4] It follows that compensation for unusual and unequal services cannot be claimed or allowed on the ground of the implied contract.[5] It is likewise a breach of the contract to engage in any rival business.

Even a surviving partner, who is winding up the affairs of the concern, cannot make a charge for his services.[6]

Scope of Authority.— The general principles of agency will suggest the natural limitations upon the authority of partners.

[1] Morgan v. Farrel, 58 Conn. 413; 18 Am. St. Rep. 282; Fletcher v. Pullen, 70 Md. 204; 14 Am. St. Rep. 355.

[2] Fletcher v. Pullen, *supra.*

[3] If he neglects this duty he may be required to make good the loss to the firm on an accounting. Marsh's Appeal, 69 Pa. St. 30; 8 Am. Rep. 206.

[4] Lewis v. Moffett, 11 Ill. 398; Hanks v. Baker, 53 Ill. 292; Paine v. Thacher, 25 Wend. 450; Marsh's Appeal, *supra.*

[5] Caldwell v. Leiber, 7 Paige, 483.

[6] Mechem, El. Partn., § 119. *Cf.* 1 Lindley, Partn. (Ewell's ed.) 775. On the death of a partner all that the surviving partner can be required to do gratuitously is that he proceed at once to wind up the business and render an account. If, however, with assent of the administrator, he employs extra labor to finish existing contracts, and even enters upon new contracts, he is entitled to compensation. Schenkl v. Dana, 118 Mass. 236; Willett v. Blanford, 1 Hare, 253.

The general rule is clearly that the scope of the partnership business must necessarily limit the power of the partner to bind his firm, and the nature of the business must itself suggest other limitations.[1]

A partner cannot use the firm property, credit or money for his individual benefit. He cannot bind the firm by giving the firm note for his individual debt.[2]

Third persons dealing with a partner, knowing that he is handling the money of the partnership, cannot acquire title to it unless through the instrumentality of some transaction in which the firm is interested.

This is true to even a greater degree as to firm property. It has been held that a third person receiving partnership property on account of an individual debt of one of the partners does not acquire title to it, whether he has notice of the actual ownership of the property or not;[3] but the rule seems to be that if he takes it in good faith without notice he gets title.[4]

The receipt of cash or currency is different, for the reason that no one is required to inquire as to the title of the possessor of money unless he is put upon notice.[5]

[1] Marsh v. Gold, 2 Pick. 285.

[2] Calkins v. Smith, 48 N. Y. 614.

[3] Rogers v. Batchelor, 12 Pet. 221. The implied agency of a partner extends only to the disposition of partnership property for partnership purposes.

[4] Dob v. Halsey, 16 John. 34; 8 Am. Rep. 293.

[5] "One partner cannot give away partnership property or things procured by partnership money, and the donee will be deemed to be a trustee for the partnership and required to account for such gifts. Nor can one partner give a partnership obligation in payment of his individual debt without the consent of the other partners. Nor can a partner transfer or create a lien upon the partnership property for the payment of his individual debt to a creditor who has knowledge that the property so transferred or pledged is partnership money. And this doctrine will apply to partnership money paid by one partner to his individual creditor, if the latter knows that the money belongs to the partnership." Babcock v. Wandish, 53 N. J. Eq. 376. In this case the court also said: "The question remains whether the doctrine applies when the partner uses not property but money of the partnership in the discharge of his individual debt. In my judgment there is a marked distinction between the two cases. This results not from the old notion that money has no 'ear marks,' but because money has the quality of currency, passing from hand to hand for all *bona fide* transactions without the necessity of inquiry on the part of him who receives it to ascertain the title of the party who pays it. When the property thus passes, the recipient may be put upon inquiry as to its title. When money passes, no inquiry

Sealed Contracts.— It was formerly a general rule that one partner could not bind the firm by a contract under seal. The tendency of modern times is to relax the strictness of the rule, and it does not apply to contracts within the ordinary scope of the business which are required to be under seal, such as composition deeds, or releasing debts which it is the business of each partner to collect.[1] If, without authority from the other members, a partner executes in the name of the firm an instrument to which a seal is necessary, such instrument is the deed of that partner alone and does not bind the firm. But if the firm authorized the execution and afterwards acquiesced in its operation, it is the deed of the firm.[2]

Liability for Torts.— All the partners are liable for the torts of each committed while acting within the scope of the business.[3] This may extend to torts with malice, such as libel and slander.[4]

So, the firm may be liable for misrepresentation made in the purchase of property, the innocent partner being answerable for the fraud of his associates.[5]

Illegal Contracts.— "The liability of a partner, arising out of this implied assent and undertaking to be responsible for the acts of his copartner on behalf of the firm in the ordinary business and transactions thereof, cannot be held to extend to illegal contracts. An agency or authority to a partner to violate the provisions of a public statute cannot be implied; nor can it be implied that such illegal act is within the scope of the partnership, which could only exist for lawful purposes."[6] But where the contract is within the scope of the business carried on by the firm, the agency to transact it, though in a sense implied, is within the scope of the partnership business, and it will not relieve one partner to show that he did not know of the par-

is required. In the former case, the knowledge which inquiry would produce would charge the recipient; in the latter case, nothing but actual knowledge will charge him."

[1] Everit v. Strong, 5 Hill, 163.

[2] Gibson v. Warden, 14 Wall. 244.

[3] Stockwell v. United States, 13 Wall. 531. They are bound for the consequences of illegal transactions, such as gambling contracts. Tenney v. Foote, 95 Ill. 99.

[4] Van Aernam v. Bleistein, 102 N. Y. 355.

[5] Chester v. Dickerson, 54 N. Y. 1; Castle v. Bullard, 23 How. 172.

[6] Hutchins v. Turner, 8 Humph. 415.

ticular transaction.[1] Of course the rule "*in pari delicto*," etc., must be observed.[2]

Dissolution.— A partnership may be dissolved in various ways.[3]

The relation being created by contract, it is obvious that it can be dissolved in the same manner; that is, by the mutual consent of the parties.

The partnership may expire by the terms of the agreement.[4]

The death or disability of one of the parties naturally precludes the further continuance of the firm. A sale in good faith by one partner of his interest in the firm works a dissolution.[5]

All of these are within the contemplation of the parties when they enter into the contract.

Dissolution by Decree of Court.— A partnership may be dissolved by a court of equity against the consent of a party. One party may be guilty of such a breach of the express or implied terms of his contract as to justify a court in decreeing a dissolution.[6]

The usual causes for such a decree are any wilful acts or fraud against the firm in direct violation of the articles of copartnership. Engaging in direct competition with his firm

[1] Tenney v. Foote, 95 Ill. 99.

[2] *Ante*, p. 784.

[3] A dissolution, in order to revoke the authority of partners to bind the firm in transactions with persons who have been in the habit of dealing with the firm, must be so open and notorious as to give them actual notice; but mere purchasers of negotiable notes of the firm, who have not dealt directly with the firm, are not entitled to such notice. A letter properly directed and posted would be actual notice, but a newspaper notice, though the paper were mailed, is not actual notice. Hutchins v. Bank, 8 Humph. 418.

[4] "A provision in a partnership contract in which the amount of capital to be invested is limited to a certain sum, that in the event of the death of either partner the business shall be continued by the survivor for a certain period, the estate of the deceased partner to bear the same share of the losses of the business as would have been received and borne by such partner had he lived, is nothing more than an authority to the survivor to continue an existing business with the capital already invested, and does not render the decedent's estate liable for debts contracted in the firm name after his decease." Stewart v. Robinson, 115 N. Y. 328; 5 L. R. A. 410. See Philbrook v. Newman, 114 Cal. 635, 34 L. R. A. 265.

[5] Murray v. Bogert, 14 Johns. 318.

[6] A partner may make himself liable in damages for a wrongful dissolution contrary to a contract. Bagley v. Smith, 10 N. Y. 489.

would constitute a violation of the implied terms of the contract.

If a number of the partners should exclude another partner from participation in the management or profits of the business, it would justify a court either in restraining them from a continuance of such conduct or dissolving the firm and decreeing an accounting.

Gross neglect of business or palpable mismanagement, persisted in, would also be a ground for dissolution.

Incompatibility of temper, accompanied with frequent altercations, would justify such a decree.[1]

A voluntary or involuntary bankruptcy of one of the partners — in fact, anything which transfers his interest in the business — would work the result.[2]

The breaking out of a war which would cause the partners to bear the relation of alien enemies to each other, or which would necessarily prohibit the business they were engaged in, would dissolve the partnership.[3]

Effect of Dissolution.— A dissolution of the partnership does not immediately put an end to the partnership business or destroy all of their relations.

The partners still continue joint tenants, with the right in each to perform all such acts in the name of the firm as may be necessary in winding up the business, liquidating accounts, or collecting and paying debts.

Each partner has the same power over the joint property as he had before the dissolution, excepting that the object of the power must be to close up the firm business.[4]

A dissolution by death vests the legal title of the partnership property or effects in the survivor and renders him liable to the extent of the property for all the debts.[5]

As we have seen, his ownership is in trust, and he is in this case obliged to dispose of the firm assets and close up the business of the old firm; but this does not necessarily mean that the business theretofore carried on shall be discontinued at that place.

[1] Bishop v. Breckles, 1 Hoff. Ch. 534.
[2] 3 Kent, Com. 59.
[3] Bank of N. O. v. Mathews, 49 N. Y. 12.
[4] Robbins v. Fuller, 24 N. Y. 570.
[5] Lawrence v. Tr. Leake & Watts Orphan House, 2 Den. 577.

The good will of the firm may be preserved and the business perpetuated, and there are certain rules which protect the survivors. It consists in the probable benefit arising from reputation and continued use.[1] It is connected with the same business at the same place.[2]

It is well settled that the good will of the firm dissolved by death is regarded as a valuable asset, which shall be offered and disposed of in such a way as to make a portion of its value available to the estate of the deceased partner, notwithstanding the fact that he can no longer assist in carrying on the business.[3]

Rights in trade-marks are anomalous and are subject to preservation and sale as a part of the business on dissolution by consent,[4] by decree or by death.

Suits Between Partners.— The partnership contract is one to engage in a fiduciary relation, to contribute time and money and endeavor for a common profit; but there is no promise involved which renders or may render one party a creditor of the other in the first instance. Their duty, express or implied, is to do all these things and account with each other.

It follows from this that one partner cannot sue another partner in an action at law for a debt arising out of the business until there is a neglect or refusal to account.

Partners may, by an account stated, create a relation of debtor and creditor which will sustain a common-law action for the money,[5] or they may sever their interest and contract between themselves with reference to partnership property in

[1] Rice v. Angell, 73 Tex. 350; 3 L. R. A. 769; Mechem, El. of Partn., § 87.

[2] Mechem, Elem. of Partn., § 89.

[3] Evans v. Evans, 9 Paige Ch. 178; Dougherty v. Van Nostrand, 1 Hoff. Ch. 68.

[4] See Menendez v. Holt, 128 U. S. 514. The trade-mark is an asset and an important element in the good will of the business. Smith v. Walker, 57 Mich. 456. Where a partner retires from a firm, assenting to or acquiescing in the retention by the other partners of the possession of the old place and future conduct of the business under the old name, the good will, including the firm mark, remains with the latter, as of course. Menendez v Holt, *supra*. A firm may trade under a fictitious or arbitrary name, or under a personal name made up of the names of the partners. If the name be a personal name, the continuing partner, under the right of the good will, may not use it unless such name has been made a trade-mark. Mechem, Elem. of Partn., § 86.

[5] If one partner gives another a note it may be sued on. Gridley v. Dole, 4 N. Y. 486.

such a manner that an action will lie for the breach of such a contract.[1]

So that the rule against partners suing each other is limited both as to the subject-matter and the form of the suit.

They may sue in equity for a dissolution and account, or for an accounting without a dissolution, or in matters which have grown out of a partnership dealing, but which have gone further and ripened into a cause of action distinct from the partnership business.[2]

Like reasons prevent the firm suing a partner; and there is an additional objection, that the firm includes all, and one cannot be both plaintiff and defendant. A partner suing the firm involves the same objectionable features.

Sec. 616. *Master and Servant.*— Another form of contract under which individuals act for and with each other is a form of association which passes under the technical name of master and servant; and however much the general features and specific incidents of the relation have changed, it is not practical or desirable that the name should be changed.[3]

The Nature of the Relation.— In the English law, even at so late a time as when Blackstone wrote (1765), the relation of master and servant had not entirely emerged from the conditions which allowed it to be classed as a status. For this reason he treats the subject under the law of persons, and the servant was treated as in some measure of the household, bearing a personal relation to the master and under his dominion,[4] so much so that the master might inflict a reasonable punishment; but under our law punishment can only be inflicted where the parties stand *in loco parentis*.[5]

Wilson, who speaks of our law as it was after the Revolution, says: "The contract between a master and a servant arises upon the hiring. If a servant is retained generally, with-

[1] Sprout v. Crowley, 30 Wis. 187.

[2] Mechem, Elem. of Partn., § 134.

[3] See Schouler, Dom. Rel. 599. The great change in the nature of the subject requires that it be treated merely as a contract. See remarks in Boysen v. Thorn, 98 Cal. 578; 21 L. R. A. 233.

[4] 2 Wilson's Works, pp. 330-333; Cooley's Blk. (3d ed.) 421. Upon a parity of reasoning, actions for debauching a wife or enticing away children were based upon the loss of services. Ellington v. Ellington, 47 Miss. 341; Butterfield v. Ashley, 6 Cush. 249.

[5] Schouler, Dom. Rel. 6.

out expressing any limited time, the law will construe it to be for a year.[1] The reasonable foundation of this rule is that, through the revolutions of the seasons, equality shall be preserved in the contract; that the master shall not have it in his power to dismiss the servant when there is little work to be done, nor the servant have it in his power to depart when there is much.[2] The contract, however, may be made for any term longer or shorter than a year.[3] If, during the term of the contract, the servant become sick, this is a condition incident to humanity. In his sickness the master is bound to take care of him and provide for him;[4] nor can a deduction of wages be made for the time during which he is detained from service.[5]

"If a servant marry, the marriage dissolves not the contract to serve. If, without any reasonable cause, he depart from

[1] Custom has modified the contract in the case of menial servants, so called, that is, domestics or farm hands, so that the contract may be terminated on a month's notice; but this rule is not universal. See authorities in Adams v. Fitzpatrick, 125 N. Y. 124. An agreement to pay for future services at the rate of a certain sum per year is not of itself a hiring for a year, or for any definite time. Prentiss v. Ledyard, 28 Wis. 131.

[2] This rule, by its reason, is confined to certain classes of servants. It is said by Cooley not to have been adopted in America, but this is putting it too strongly. The rule no doubt was as stated by Wilson, but it has *not survived*, perhaps, in many cases. See Cooley's Blk. (3d ed.) 425. It is stated by able authority that where there is a general hiring the contract is understood to be for a year, upon the reason stated by Justice Wilson. Story on Cont., sec. 962, quoted in Adams v Fitzpatrick.

[3] If a party contracts to labor for another, for a fixed period of time, at a certain rate per month, the contract is entire and he must fully perform, else he cannot recover; but if payment was to be made from time to time, then he can recover on part performance. Hamlin, Hale & Co. v. Race, 78 Ill. 425; Leopold v. Salkey, 89 Ill. 413.

[4] The ancient reason for the rule has ceased and the rule is changed. Schouler, Dom. Rel. 617.

[5] This rule, while in accordance with the ancient law (Nichols v. Coolahan, 10 Met. 449; Rex v. Maddington, 2 Burr. 675; Bell v. Thompson, 4 East, 546), has been modified in modern times. The modern rule is that a serious, permanent sickness discharges the contract; but an entire contract is conditioned upon this contingency, and the servant may recover according to the contract price for what he has performed. If he resumes his services, the master is not obliged to pay for the time lost. McDonald v. Montague, 30 Vt. 357; Ryan v. Dayton, 25 Conn. 188; Wolf v. Howe, 24 Barb. 174; Hillyard v. Crabtree, 11 Tex. 264; Green v. Gilbert, 21 Wis. 400; Holmes v. Stummel, 17 Ill. 455; 11 Chi. Leg. News, 1887.

his service within the term for which he is retained, he can recover no wages.[1]

"A contract for services is on both sides personal, and is discharged by the death of either of the parties.[2] This is the rule at the common law."[3]

Because of the peculiar nature of the contract the English courts allowed an action for enticing away servants, or for harboring them after they had quit the service of the master; for the act of enticing, the form of the action was trespass, while for harboring them it was case.[4]

The law allowing an action against a third person not a party to the contract was peculiar to this contract. It was not until a later time that the mere inducing of one person not a servant to break his contract was actionable, and in those cases some degree of force, fraud or malice must appear in the *res gestæ*.[5]

The law at the present time cannot be said to be well settled. Some courts still recognize the distinction between contracts of service and ordinary contracts, and they reason upon the ancient foundation.[6] There is no more reason for holding one liable for merely inducing a servant to quit his master's service than there is for inducing any independent contractor to break his contract.[7]

[1] This is simply because of the entirety of the contract, and the modern law is as pointed out *ante*, sec. 603, pp. 759–60. Where it is stipulated that in case of a disagreement a *bona fide* disagreement is necessary to entitle either party to put an end to the contract, disagreement must be for a reasonable and just cause. Swanzey v. Moore, 22 Ill. 63. Directly contrary, Durgin v. Baker, 32 Mo. 273.

[2] That is, in such a case a recovery *pro tanto* could be had.

[3] 2 Wilson's Works, 329.

[4] Hart v. Aldridge, Cowp. 54 (1774). In Lumley v. Gye, 2 El. & Bl. 216; 75 E. C. L. (1853), the court held a theatrical performer within the servant class. Anson says that the law of England remained unsettled till 1881, when it was settled in Bowen v. Hall, 6 Q. B. D. 439, on the broad ground that any one who, *intending to injure* another, induces a third person to break a contract, is liable. Lord Coleridge in a strong dissent gives an elaborate history of the rule. See Anson on Contracts (Knowlton's 2d ed.), *210.

[5] Van Horn v. Van Horn, 52 N. J. L. 284; Bowen v. Hall, *supra;* Morgan v. Andrews, 107 Mich. 33; Walden v. Com., 84 Ky. 312; Boysen v. Thorn, 98 Cal. 578; 21 L. R. A. 253.

[6] Heywood v. Tillson, 75 Me. 225; 46 Am. Rep. 373; Bixby v. Dunlap, 56 N. H. 456; 22 Am. Rep. 475.

[7] Glencoe L. & G. Co. v. Hudson, 138 Mo. 439; Cooley, Elem. of Torts, 101. A statute of Mississippi forbidding interference with contract of service was held constitutional. Hoole v. Dorroh, 22 S. Rep. 829.

In our law the relation is greatly changed. We know no such dependent class of individuals as menial servants.[1] The relation is purely contractual, and (except in case of seamen) has no incidents of servitude.[2] For these reasons the subject has been transposed from the department of personal relations to the domain of contracts, and it will be found that all the rights and obligations growing out of the relation depend upon contracts express or implied.[3]

The obligation of the contract of service is to serve or respond in damages, and only in very exceptional cases is there any other remedy; but in no case can the party be compelled to serve, though in these exceptional cases he may be enjoined from performing for another.[4]

Distinguishing Features.— The relation of master and servant is to be distinguished from that of agency, and from that of an independent contractor, and also from that of partnership.

In some instances, as we have had occasion to notice, it is not easy to distinguish a partnership from a contract of service, *e. g.*, where the employee receives his compensation out of the profits.

There is considerable similarity between agency and a contract of service, and the two principal maxims of each are common to both, namely: "*Qui per alium facit seipsum facere videtur*"[5] and *respondeat superior*.[6]

[1] Cooley's Blk. (3d ed.), p. 425.

[2] Boysen v. Thorn, 98 Cal. 578; 21 L. R. A. 233. No contract which involves in it an enforceable obligation to actually serve another can be specifically enforced, and a contract which contemplates the disposal of one's conduct and volition to another person or his assigns for an indefinite service is void. So in the Massachusetts case a contract made by an adult inhabitant of a foreign country with a citizen of the United States to serve him, his executors and assigns, for five years, without fixing the nature or the extent of the service, but it being understood that it was in the capacity of a domestic, for $10 and *customary freedom dues* which may have been fixed by the foreign law, and which contract may have been valid by the foreign law, was held to be invalid in Massachusetts. Parsons v. Trask, 7 Gray, 473. *Cf.* Robertson v. Baldwin, 165 U. S. 275.

[3] Walker, in his American Law, treated the subject of agency as a part of the topic of "Master and Servant," but it is quite obvious that there is a clear distinction.

[4] De Rivafinoli v. Corsetti, 4 Paige Ch. 270; Walcutt v. Gaskins, 18 Misc. (N. Y.) 118.

[5] "He who does an act through the medium of another party is in law considered as doing it himself." Broom's Leg. Max. 816.

[6] Let the principal be held responsible. Broom's Leg. Max. 842.

The distinction between the relation of agency and a contract of service lies principally in the nature of the service to be performed. The agent's principal duty is to negotiate contracts between his principal and third persons; that is the typical ear-mark of agency.

The occupation of a servant consists in the performance of some act of service for another under his directions as to the time and manner of doing it.

An independent contractor is one who agrees to perform a labor or service for another, but he is distinguishable from a servant in this: that he is not in the performance of this labor under the direction and control of the person hiring him.[1]

The contractor has no duty of obedience, and the hirer is not considered a superior, and hence the maxim *respondeat superior* does not apply. He is laboring on his own behalf, in his own manner; hence the maxim *Qui per alium facit per seipsum facere videtur* does not apply.[2]

The Duty of the Servant to the Master.—1st. The servant owes the duty of obedience to the lawful demands of the master or those whom he places in authority.[3]

In case of domestic services this obedience should be universally cheerful and respectful.

The nature of the service must, to a certain extent, govern the necessity for sobriety and the right to insist upon the observance of certain rules as to personal habits.

2d. The exercise of care and diligence in and about the matter connected with the scope of his employment is equally incumbent upon a servant or an agent; and further,

3d. Loyalty to the affairs of his master to the same degree that would be required of an agent.

In many instances the master and employer is obliged to trust the secrets of his business or trade to his employees, and it is their duty to preserve inviolate these secrets and not to communicate them to others, or to make use of them for their own private gain. For a breach of this duty he may have an

[1] Cooley's Elem. of Torts, 224; Cincinnati v. Stone, 5 Ohio St. 38; Morgan v. Bowman, 22 Mo. 548; Illinois Steel Co. v. Schymanowski, 162 Ill. 460.

[2] Robbins v. Chicago, 4 Wall. 657; Cooley's Elem. of Torts, 224.

[3] Thompson on Neg. 1010; Thompson v. Hermann, 47 Wis. 602; Illinois Steel Co. v. Schymanowski, 162 Ill. 460.

action, and courts of equity will restrain a servant, under the pains and penalties of contempt, from making disclosures, or communicating facts, the knowledge of which has been obtained through the course of employment. This extends to secrets of title as well as of trade, or any other secrets of the party important to his interest.[1]

And it may be that, even after the relation of master and servant has been severed, the courts will protect the master and will prevent either the use or disclosure.[2]

So the use of compilations made in the course of conducting commercial agencies may be protected, although not copyrighted.[3]

4th. A servant engages to exercise care, diligence and skill, and if he negligently causes loss, either by direct construction or negligent performance, he is liable to make good the loss to his master.

The duty of the master toward the servant is the duty of care for his safety, and for a failure in its exercise he is liable to the injured servant, even though other causes may have contributed to the injury.[4] He is not an insurer, but only obliged to exercise the same degree of care he would for his own safety.[5]

The master is bound to furnish a reasonably safe place in which to work.[6]

He is bound to furnish reasonably safe implements and machinery.[7]

[1] Story's Eq. Jur. 592; Peabody v. Norfolk, 98 Mass. 459.

[2] Solomon v. Hertz, 40 N. J. Eq. 400; Fralich v. Despar, 165 Pa. St. 24; Louis v. Snellie, 75 L. T. R. 226.

[3] Carson v. Ury, 39 Fed. Rep. 777; Eastman v. Reichenbach, 20 N. Y. S. 110; Little v. Gallus, 38 N. Y. S. 487.

[4] Clyde v. Rich. & D. Ry. Co., 59 Fed. Rep. 394; G. T. Ry. Co. v. Cummings, 106 U. S. 700; Pullman P. C. Co. v. Laack, 143 Ill. 242.

[5] Karr Supply Co. v. Kroenig, 167 Ill. 560.

[6] But no duty can rest upon an employer to guard against every contingency or to guarantee that accidents shall not result to those in his service. Fosburg v. Phillips Fuel Co., 93 Iowa, 54. The age, construction and state of repair of buildings and the different methods of conducting business must be taken into account by a servant. Cooley's Elem. of Torts, 225.

[7] Wilson v. Sioux M. Co., 16 Utah, 392; Monmouth Mfg. Co. v. Erling, 148 Ill. 522. He does not warrant the strength or safety of machinery or appliances. Essex Co. Elec. Co. v. Kelly, 57 N. J. 100. But he must exercise such care in selecting as every prudent man is expected to employ in providing himself with the conveniences of his occupation. Ladd v. New Bedford R. Co., 119 Mass. 412;

He is bound to select fellow-servants reasonably competent and prudent.[1]

He is bound, where the nature of the business requires an overseer or superintendent, to select one who is reasonably competent and prudent.[2]

It is his duty at all times to watch over and protect his servants from harm, and warn them of danger.[3]

Under this head several propositions may be laid down:

1. The master will be held responsible if, knowing of any peril which is known to the servant also, he fails to remove it in accordance with assurances made by him to the servant that he will do so.[4]

2. The master may be guilty of negligence entailing liability

20 Am. Rep. 331; C. C. & I. C. Ry. Co. v. Troesch, 68 Ill. 545; 18 Am. Rep. 548; Reilley v. Campbell, 59 Fed. Rep. 990.

[1] Id.; Allen v. Galveston, H. & S. A. R. Co., 14 Tex. 344. To continue in the employment an incompetent servant after his incompetency is known, or, in the exercise of reasonable care, might have been known, "is as much a breach of duty and a ground of liability as the original employment of an incompetent servant." Gilman v. East R. Cor., 10 Allen, 233. There must not be unnecessary delay. L. S. & M. S. R. Co. v. Stupak, 123 Ind. 210; and see Norfolk & West. R. Co. v. Hoover, 79 Md. 253; 25 L. R. A. 710, and note; Cooley's Elem. of Torts, 228.

[2] If the foreman is negligent or unskilful in the exercise of these duties, which are always the duty of the master, the latter is liable. Wenona Coal Co. v. Holmquist, 152 Ill. 581.

[3] Stucke v. Orleans R. Co., 23 S. Rep. 342. This is particularly true of youthful and inexperienced servants, but the servant must use ordinary care as in other cases. Macken v. Alaska Ref. Co., 100 Mich. 276; Chicago v. Maroney, 170 Ill. 520; Railroad Co. v. Fort, 17 Wall. 553; Fairbank v. Haentzche, 73 Ill. 236, at p. 241 (bottom); A., T. & S. F. Ry. Co. v. Plunket, 25 Kan. 188. "The duty of an employer to give instructions to one about to work on dangerous machinery exists only when there are dangers in the employment of which he has or ought to have knowledge, and which he has reason to believe his employee does not know and will not discover in time to protect himself from injury. In the early cases the doctrine was applied in favor of boys. In favor of adults it should be applied with great caution." Stuart v. West End St. Ry. Co., 163 Mass. 391.

[4] Cooley's Elements of Torts, 228. Where, on a special occasion, a master agreed to look after the roof of the mine in which his servant was working, and the evidence shows that the servant was busy, with no time to look after the roof, and does not show that his attention was drawn to the fact that the duty of inspection was being neglected, he cannot be said to be guilty of contributory negligence when injured by falling rocks. Westville Coal Co. v. Schwartz (Ill.), 52 N. E. Rep. 276.

upon him in commanding the servant to go into exceptionally dangerous places, or to subject himself to risks which, though the servant may be aware of the danger, are not such as he had reason to suspect were within the employment. This applies with especial force to the case of an order given to a child of immature years.[1]

3. It is actionable negligence to expose persons to perils which, though open to observation, they, by reason of their youth or inexperience, do not fully understand and appreciate.[2]

These are among duties which he may employ another to exercise; but in the discharge of such duties, that other, no matter what his appellation be, is a vice-principal or *alter ego* — he cannot be a fellow-servant. Such matters the principal cannot delegate so as to divest himself of his responsibility.[3]

As a matter of course, the liability of the master is modified by the rule, to be mentioned subsequently, that the servant is to exercise care, judgment and prudence for his own safety.[4]

Practical Difficulties in Applying These Rules.— The omission of the master to exercise proper care for the safety of a servant gives rise to a vast amount of litigation, but in most instances the real master does not participate in the performance of the labor, or in the actual oversight of the service, but leaves it to another, called in law his *alter ego* (other self). The question is generally involved with the doctrine of *vice-principal*, and in this manner its solution is rendered more difficult.

Another rule rendering the matter more complicated is the one requiring of the servant the exercise of ordinary care for

[1] Houston v. Brush, 66 Vt. 331; Cooley's Elem. of Torts, 227.

[2] Hinckley v. Horazdowsky, 133 Ill. 359; 8 L. R. A. 490; Veginman v. Morse, 160 Mass. 143; Davis v. St. L., I. M. & S. R. Co., 53 Ark. 117; 7 L. R. A. 283; Cooley's Elem. of Torts, 226.

[3] Mullin v. Cal. Horse Shoe Co., 105 Cal. 77; Cooley, Elem. of Torts, 229; C. & A. Ry. Co. v. May, 108 Ill. 288; Wolcott v. Studebaker, 34 Fed. Rep. 8, note; Pullman P. C. Co. v. Laack, 143 Ill. 254; Monmouth M. Mfg. Co. v. Erling, 148 Ill. 522; Corcoran v. Holbrook, 59 N. Y. 517; 17 Am. Rep. 369; Ford v. Fitchburg R. Co., 110 Mass. 240; 14 Am. Rep. 598. "The negligent performance or omission to perform a duty which the *master owes* to his employees is at common law the negligence of the master, whatever the grade of the servant who is in that respect careless." Ell v. Northern Pac. Ry. Co., 1 N. Dak. 336.

[4] Cooley's Elem. of Torts, 230, and cases cited.

his own safety, which is always necessarily involved. In addition to these sources of confusion, in very many cases the injury is sustained while the servant is engaged in some temporary work outside of the scope of the service he contracted to perform, and outside of the duties he has been in the habit of performing. When these combine in one case, as they frequently do, the solution is one of extreme difficulty to court and jury.

The Fellow-servant Doctrine.— A master is not liable to a servant for injuries received from any ordinary risk incident to the character of the services contemplated by the hiring. These are assumed by the servant as impliedly a part of his contract.

Among these ordinary risks the courts have, by judicial reasoning in modern times, included the risk of injuries caused by fellow-servants in the same line of employment.[1]

No trace of such an exception to the general rule *respondeat superior* is found in the English or American law prior to 1837.

This new rule constitutes an exception to the general rule that the master is liable to any third person injured by his servant acting within the scope of his employment.[2]

Of this exception Sir Frederick Pollock says: "Our law can show no more curious instance of a rapid, modern development. The first evidence of it is in *Priestly v. Fowler*.[3]

"The reason of the rule is that the servant is implied to assume the ordinary risk incident to his business, including the risk of accidents caused by a fellow-servant.

"The theory of *Priestly v. Fowler* is that the master is not bound to take more care of his servant than he may be reasonably expected to do of himself, and that a servant has better opportunities than his master of watching and controlling the conduct of his fellow-servants."[4]

[1] The leading American case establishing the rule, Farwell v. Boston, etc. Ry. Co., 4 Met. 49 (1842), is not the earliest case.

[2] Lalor v. C., B. & Q. Ry. Co., 52 Ill. 101. In Farwell v. Boston, etc. Ry. Co., *supra*, it is treated as an incident to the rule imposing ordinary risk upon the servant, and the learned court said no exception existed as to injuries caused by fellow-servants. Whether it is an incident to the rule of assumed risks or an exception to the rule *respondeat superior* depends upon which is regarded as the principal rule. Some confusion may be avoided by regarding the difference in this point of view.

[3] 3 M. & W. 1.

[4] Webb's Pollock on Torts, 116.

Some corroboration of the reasoning of the English court is found in the fact that three years later, and apparently without reference to the English rule, the court of South Carolina reached the same conclusion.[1]

The rule became firmly established by an elaborate decision of the supreme court of Massachusetts,[2] and this exception to the ancient rule *respondeat superior* has given rise to a vast mass of legal decisions.[3]

Who Are Fellow-servants.[4] — This is a question as to which no definite rule can be framed which will furnish a safe criterion of decision. Each case depends largely upon the facts and circumstances of that particular case. It is generally called a question of fact for the jury,[5] but the courts generally decide each case in the manner most suitable to attain a given end.

Those who, having a common master, are hired for the same duties or habitually associate in the same line of employment, are by all courts held to be fellow-servants. The difficulty in determining the relation of employees of a common master arises in several well-defined phases, which so frequently appear either separately or in conjunction that they are subject to classification and have given rise to rules applicable to the situation.

The Consociation Rule.[6] — If servants of a common master associate in labor for a sufficient length of time that it can be reasonably said that the conduct of one can be judged and influenced by the other,[7] the jury may hold them to be fellow-

Jurists and publicists differ as to the reasonableness of the rule. See Field's opinion in C. & M. Ry. Co. v. Ross, 112 U. S. 383.

[1] Murray v. S. C. R. R. Co., 1 McM. L. R. 385, 36 Am. Dec. 268.

[2] Farwell v. Boston, etc. Ry. Co., 4 Met. 49; 38 Am. Dec. 339.

[3] The fellow-servant doctrine has, however, been abrogated in at least one state (Kansas), and has been modified to a greater or less extent in England and many states by statutes known as "Employers' Liability Acts."

[4] It should be understood that the same person may be a fellow-servant and a vice-principal at the same time, depending upon the character of the act involved. C. & A. Ry. Co. v. May, 108 Ill. 288.

[5] M. & O. Ry. Co. v. Massey, 152 Ill. 151.

[6] The fact that servants of a common master habitually labor together is not alone decisive. On the other hand, that one habitually exercises supervision is not decisive. C. & A. Ry. Co. v. May, 108 Ill. 288.

[7] It was said in Rolling Mill Co. v. Johnson, 114 Ill. 57, that the servants of the same master, to be co-employees so as to exempt the master from liability on account of injuries sus-

servants from the fact of such association. The nature and extent of the association governs, and no fixed rule is established. The association is but evidence from which the trial tribunal may judge the nature of the relation at a particular time.[1]

Who is a Vice-principal.—In the prosecution of enterprises involving the labor of servants, it not infrequently happens that the master does not participate in any degree in actually performing the work, or in directing the time, place and manner of doing it, but instead delegates his authority to others, or intrusts them with it.[2]

The individuals to whom such authority is intrusted are sometimes called foreman, boss, superintendent, overseer and the like; but these, under all circumstances, will necessarily be a vice-principal. Nor does it destroy the character which one occupies as a vice-principal that he may labor occasionally or habitually with the servant. But such an employee may be a vice-principal as to one act or service, and a mere servant as to another service, and so possess two characters, according to the nature of the act, at a given time.

A vice-principal is one who exercises some one or more of those special duties above enumerated.[3]

Whether one is a vice-principal or merely a fellow-servant, in relation to a matter in controversy,[4] does not depend upon the title, such as "boss," "foreman," etc., but upon the character of the power delegated, the duty imposed and the act performed.[5]

tained by one resulting from the negligence of the other, shall be directly co-operating with each other in a particular business—*i. e.*, the same line of employment—or that their usual duties shall bring them into habitual association, so that they may exercise a mutual influence upon each other promotive of proper caution. Approved in C. & A. Ry. Co. v. Hoyt, 122 Ill. 374.

[1] C. & A. Ry. Co. v. Hoyt, 122 Ill. 369; Railway Co. v. Keary, 3 Ohio St. 202; Railway Co. v. Lewis, 33 id. 196; Berea Stone Co. v. Krafts, 31 id. 292; N. P. Ry. Co. v. Hambly, 154 U. S. 349.

[2] Persons hired by a *foreman* acting under authority from the *manager*, authorized by the *owner* to hire employees, are the owner's servants. Smaltz v. Boyce, 109 Mich. 382.

[3] *Ante*, p. 848. It is not the difference in rank, but the character of the acts in question, which determines whether one employee is a fellow-servant of another. Ell v. N. P. Ry. Co., 1 N. Dak. 336.

[4] The inquiry should always be confined to the specific point in the *res gestæ* upon which the case rests.

[5] Cole Bros. v. Wood, 11 Ind. App. 37. The foreman of a gang of men employed by a railroad company,

There is a distinction between the ordinary detail labor which a foreman does, and his duty of oversight or supervision, and his duty of care and protection of those under him.[1]

If a person is clothed with control over a business, or a department of business, as distinguished from a piece of work, he is a foreman and vice-principal, and not a fellow-servant of the employees. In this position the federal courts agree with all the states.[2]

Various tests have been suggested as to what will constitute a vice-principal.[3]

The question arises in its difficult form when the person who is claimed to be a vice-principal labors with the ordinary laborers, and is in the habit of directing them in the manner of doing their work.[4]

But the power to give instructions as to how to do work, or when to do it, is not conclusive.[5]

If the act in question, whether it be an order or an actual act of the alleged vice-principal, pertains to those duties which cannot be delegated, and naturally in some manner involves the element of care for the safety of the servants, such an act

and engaged in quarrying rock and transporting it over the company's road for its use, who has full power to employ, discharge and control such men, is not a fellow-servant of such employees, though such foreman is under the direction of the road-master. McDonough v. Great Northern Ry. Co. (Wash.), 46 Pac. Rep. 334.

[1] Blomquist v. C. & St. P. R. Co., 60 Minn. 437; Brown v. Maxwell, 6 Hill, 592; Berea Stone Co. v. Krafts, 31 Ohio St. 292; C. & A. Ry. Co. v. May, 108 Ill. 288.

[2] North. Pac. Ry. Co. v. Peterson, 16 Sup. Ct. Rep. 843; Railway Co. v. Baugh, 149 U. S. 368; N. P. R. R. Co. v. Hambly, 154 U. S. 349; N. P. R. R. Co. v. Keegan, 160 U. S. 259.

[3] A servant directed to take others, selected by himself, and unload machinery, is a vice-principal. Fraser v. Schroeder, 163 Ill. 459; Wenona, etc. Co. v. Holmquist, 152 Ill. 581.

[4] In the following cases the foreman was working with the laborers when the injury took place, which was held to result partly from the giving of a negligent order as to how the work should be done, and in each the master was held liable: Berea Stone Co. v. Kraft, 31 Ohio St. 289; C. & A. Ry. Co. v. May, 108 Ill. 300; Canning v. McMillan, 55 Ill. App. 235. When a foreman assisting is a fellow-servant, see Hartford v. N. Pac. Ry. Co., 91 Wis. 374; B. & O. Ry. Co. v. Baugh, 149 U. S. 368; Hanna v. Granger, 18 R. I. 507; N. P. Ry. Co. v. Hambly, 154 U. S. 349; Hastings v. Montana U. Ry. Co. (Mont.), 46 Pac. Rep. 264. "If the act of the foreman or boss in picking at the pile had the effect of weakening the support of the upper part of it, his conduct must be regarded as the conduct of the appellant, the master." Illinois Steel Co. v. Schymanowski, 162 Ill. 455.

[5] C. & A. Ry. Co. v. May. *supra.*

is the act of a vice-principal; if, on the other hand, the act pertains to an act of a mere operative, it is the act of a servant.[1]

Scope of the Servant's Assumption of Risk.— The servant assumes the ordinary risks incident to his employment, but this does not extend to the assumption of all risks in the service which he may legitimately perform for his master.[2]

The first limitation upon the scope of his risk is that he only impliedly engages to assume those risks within the scope of the services contemplated by his contract and incident to the lines of employment in which he habitually engages.[3]

These, whether they arise on account of the acts of the fellow-servants, or the ordinary dangers which attend the employment, he assumes; but the exemption of the master, which arose upon the reasoning of *Priestly v. Fowler*[4] and *Farwell v. Boston, etc. Ry. Co.*,[5] does not extend beyond this.

Mr. Justice Breese, in a case universally approved, said that where a servant is ordered by the master to do work outside of his regular employment, and which is different in character from that embraced in his regular contract of hiring and brings him into association with a different class of employees, he does not, in obeying such an order, necessarily assume the risks or hazards incident to the new work.[6]

[1] Crispin v. Babbitt, 81 N. Y. 516; Railroad Co. v. Lahr, 86 Tenn. 341; McElligott v. Randolph, 61 Conn. 157; Dube v. Lewiston, 83 Me. 211; C. & A. Ry. Co. v. May, 108 Ill. 288.

[2] A servant's implied assumption of risks does not extend to more hazardous work outside of his contract of hiring; and where he is required to do the more hazardous work, and is injured while using defective tools furnished by the master, he will be entitled to recover, although the defects were such that an experienced person would have discovered them by using care. Indiana Natural & Illuminating Gas Co. v. Marshall (Ind.), 52 N. E. Rep. 232.

[3] C. & A. Ry. Co. v. Hoyt, 122 Ill. 374.

[4] *Supra;* Rolling Mill Co. v. Johnson, 114 Ill. 57.

[5] *Supra.* If, therefore, a common laborer who attempts to perform a hazardous service temporarily, outside of his employment, upon request of the master, though not objecting, is injured while performing such duty, his apparent consent alone will not defeat his right of recovery, though the danger is apparent to a person possessed of skill, but not to a common laborer. See also Railway Co. v. Adams, 105 Ind. 165; Ferren v. Railroad Co., 143 Mass. 197; Kain v. Smith, 89 N. Y. 375; Mann v. Print Works, 11 R. I. 152; Paule v. Mining Co., 80 Wis. 356.

[6] Lalor v. C., B. & Q. Ry. Co., 52 Ill. 401. In such cases it is not necessary that the order to engage in outside service be given by the *alter ego* of the defendant. It is enough if the superior servant have in this respect

It has often been urged that the servant should in such cases refuse to go outside of his regular employment, or he should refuse absolutely to perform a service which he himself can recognize to be dangerous; but as is well stated by Judge Cooley, the servant may reasonably assume that the master, whose duty it was not to send him into danger, knew when he gave the command that the dangers were not so great as the servant had apprehended.[1]

Where the master directs a mode of performance which the servant may deem hazardous, the latter has the right to assume that the former will not expose him to unnecessary peril, and a right to rest upon the assurance that there is no danger *which is implied by the order*.[2]

If, on the other hand, the servant voluntarily and of his own choice performs the work in a difficult and hazardous manner, or in the ordinary manner, the risks are his own.[3]

There may be services which are casual and seldom required, but which are nevertheless within the hiring.[4]

Separate Departments of Service.— The true reason for the exemption of the master from liability in cases of injury resulting from the negligent acts of fellow-servants is said by some courts to be that the servant takes the risk into account when he makes his contract of hiring, and must be presumed to have fixed the wages with a view to such risks. Therefore, it is said

controlling authority. Chi. & N. W. Ry. Co. v. Bayfield, 37 Mich. 212; Jones v. Railway Co., 49 id. 573; Walker v. Lake Shore & M. S. Ry. Co., 104 id. 606.

[1] Cooley's Elem. of Torts, 227.

[2] Ill. Steel Co. v. Schymanowski, 162 Ill. 460. The Illinois supreme court recently promulgated a rule curious alike for its logic and its novelty. In a case where the servant obeyed an order to perform an act confessedly beyond the scope of his hiring and beyond the usual occupation, it is said: "The plaintiff's ordinary work in the factory was making sausage casings, and when called upon to unload salt he *voluntarily*, without any objection whatever, undertook the performance of that labor, and such labor may *therefore* be regarded within the scope of his employment." Gall v. Beckstein, 173 Ill. 187. Obviously the willingness or reluctance does not change the *fact* of the scope of employment which is fixed by the contract or the usual occupation. What is meant in the authorities by *going voluntarily* is going of one's own motion, instead of in obedience to the direction or command of the master. Mechem on Agency, sec. 663.

[3] Karr Supply Co. v. Krœnig, 167 Ill. 560; Brown v. Oreg. L. Co., 24 Oreg. 315; Wilson v. T. & S. Mills, 159 Mass. 154.

[4] Abend v. T. H. & I. Ry. Co., 111 Ill. 202.

that men are fellow-servants when each of them is occupied in service of such a kind that all the others, in the exercise of ordinary sagacity, ought to be able to foresee, when accepting employment, that it may probably expose them to injury in case he is negligent.[1]

All courts agree that the employees of a common master may be engaged in departments of service so distinct that they are not to be regarded as fellow-servants, and if the department is separate they are not fellow-servants.[2]

The conflict in authority is in regard to different lines of employment in the same department or same general service.

Different Lines of Service in the Same Department or Same General Service.— Where servants are engaged in a general line of service, all co-operating for a common purpose, it is held by some courts that even though the ordinary character of their duties is quite different, they are still fellow-servants, and it is said to be sufficient that the servant injured and the one through whose negligence he is injured are engaged in the same general business, working toward the same general purpose.[3]

Other courts hold that such servants are not within the reason of the rule and ought not to be considered as engaged in a common employment.[4] In practice, court and counsel must

[1] Ewan v. Lippincott, 47 N. J. L. 192; Railroad Co. v. Triplett, 54 Ark. 289; Baird v. Pettitt, 70 Pa. St. 477; Coal Co. v. McGuire, 3 Macq. 307.

[2] N. P. Ry. Co. v. Peterson, 162 U. S. 346.

[3] Farwell v. Boston & A. Ry. Co., 4 Met. 49; Holden v. Railroad Co., 129 Mass. 269; Brodeur v. Valley Falls Co., 16 R. I. 448. A car-inspector is a fellow-servant of the train-men. Dewey v. Detroit & Gill Ry. Co., 97 Mich. 329. Brakemen on a regular and conductor on a wild train are fellow-servants. N. P. R. Co. v. Poirier, 167 U. S. 48.

[4] Ryan v. Chicago, etc. Ry. Co., 60 Ill. 171; 14 Am. Rep. 32; Consolidated Coal Co. v. Haenni, 146 Ill. 622. But this view seems to be contrary to the weight of authority. See cases cited in Northern Pac. Ry. Co. v. Smith, 8 C. C. A. 663, and note; Little Rock & M. R. Co. v. Barry, 58 Ark. 198; 25 L. R. A. 386, and note. "It seems clear the duties of the engine-driver in connection with the train ceased at or before the time it was plaintiff's duty to go upon it to begin his work of inspection. On that hypothesis, how is it possible the engine-driver and plaintiff could be fellow-servants engaged in a common service? Inspecting cars after they are delivered in the yards can have no relation or connection with the running of trains to distant points. It is not the same service at all. A car-inspector, under such circumstances, is no more a fellow-servant with an engine-driver than any workman in the shops who may have assisted, in the first in-

determine which view obtains, according to the law of the place of trial or locality where the *res gestæ* arose.

Contributory Negligence.— The general rule under which the master is liable for injuries suffered by an employee while engaged in and about the business is subject to this further qualification: that for an injury claimed to have been occasioned by the master's negligence the servant cannot recover, if his own negligence contributed with that of the master to produce the injury.[1]

"Where the servant claims to recover on the ground of the master's negligence, the burden of proof will be upon him, not only because, as a plaintiff, he must make out his case, but also because all presumptions will favor the proper performance of duty."[2]

This is based upon the ground that it is the duty of every one to use ordinary care and diligence for his own safety. One cannot recover for an injury if his own negligence contributes thereto.

Degrees of Negligence.— Degrees of negligence seem to have been first thoroughly discussed and well established in the great English case upon the law of bailments,[3] but they pervade every branch of the law.[4]

The Remedies of a Servant Against the Master. —For unlawful acts of violence committed by the master, or by another at his direction or command, the form of action would be trespass. For negligent acts, such as have been under discussion, the usual action is trespass on the case, negligence being the gist of the action.

Suits for Wages.— The right of the servant to recover wages when the contract of service is only partly performed was dealt with in a previous section, where the question of entire and divisible contracts was discussed.[5]

stance, in making the car." C. & A. R. R. Co. v. Hoyt, 122 Ill. 374.

[1] West, etc. Co. v. Adams, 55 Ga. 279; Cooper v. Butler, 103 Pa. St. 412. Disobedience of rules provided to insure the safety of employees is such negligence. Ford v. C., R. I. & P. R. R. Co. (Iowa), 24 L. R. A. 657, and cases cited in note. See also Fritz v. Mo., K. & T. R. Co. (Tex. Civ. App.), 30 S. W. Rep. 85.

[2] Cooley's Elem. of Torts, 230.

[3] Coggs v. Bernard, Ld. Raym. 909; 1 Sm. L. Cas. 369.

[4] Negligence being one of the great elements in many species of the action on the case, it will be treated in connection with that subject.

[5] *Ante*, pp. 759, 760.

For a breach or failure to perform the terms of the contract by the master several courses are open.

Where the contract provides for the payment of wages by instalments, and the servant continues in the service, he may sue for the instalments as they fall due.[1]

As we have seen, a failure to pay does not constitute a dissolution of an entire contract.

For a wrongful act of the master which constitutes such a breach as permits the servant to treat the contract as abandoned, he has an election or choice of two remedies:

First. It is said he may treat the contract of hiring as broken and recover damages for its breach; but in such cases he treats the contract as broken and sues for the damages, not for the amount earned *pro rata* according to the price agreed upon.[2]

Second. He may treat the contract as rescinded on his part, and sue on a *quantum meruit* for the value of services actually rendered.[3]

Constructive Service.— Some courts have adopted a doctrine known as constructive service, by which, if the servant holds himself ready to perform and treats the contract as in full force, he may wait until the end of the contract period and recover the whole amount of the wages unpaid.

The doctrine seems to have been first promulgated in *Gandell v. Pontigny*,[4] and has obtained in several of the states.[5]

The action proceeds upon the theory of a constructive performance, and consequently is limited in the amount of damages to the wages due, less what the plaintiff might have earned during the time when he was out of employment.

The doctrine is discountenanced in later English cases,[6] and has been disapproved by the weight of authority in this country.[7]

[1] White v. Atkins, 8 Cush. 367. The right to require the sum earned is not waived by neglecting to demand it each month.

[2] *Ante*, p. 760; Howard v. Daly, 61 N. Y. 362; Jones v. Dunton, 7 Ill. App. 580; Chamberlain v. McAllister, 6 Dana, 352.

[3] Id.

[4] 4 Campb. 375.

[5] Arnfield v. Nash, 31 Miss. 361; Gordon v. Brewster, 7 Wis. 355; Booge v. Pac. R. R. Co., 33 Mo. 212; Fowler v. Armour, 24 Ala. 194.

[6] Orchard v. Horner, 3 C. & P. 349; Smith v. Hayman, 7 Ad. & El. 544.

[7] Jones v. Dunton, *supra;* Howard v. Daley, *supra;* James v. Allen Co., 44 Ohio St. 226; Mitchell v. Scott, 41 Mich. 108. "If a person discharged

Anticipatory Breach.—By the case of *Hochster v. De La Tour*,[1] it was decided that where there is a contract for service to commence at a future day, and before the day arrives the contract is repudiated by the principal, the other party may at once bring action.

In a recent case in the federal court the rule was said to be settled by an overwhelming preponderance of authority in accordance with the rule of the leading English case just referred to.[2]

The master's liability to third persons for the acts of his servants is comparatively simple, and is limited to such acts as the servant performs while acting within the scope of his employment;[3] but within this scope he[4] may be liable for frauds and torts,[5] even such as are committed wilfully and with malice.[6]

If he intrusts to a servant an agency or instrument dangerous in its nature, he runs all the risks, irrespective of scope of business.[7]

from service may recover wages, or treat the contract as still subsisting, then he must remain idle in order to be always ready to perform the service. How absurd it would be that one rule of law should call upon him to accept other employment, while another rule required him to remain idle in order that he may recover full wages. The doctrine of 'constructive service' is not only at war with principle, but with the rules of political economy, as it encourages idleness, and gives compensation to men who fold their arms and decline service equal to those who perform with willing hand their stipulated amount of labor. Though the master has committed a wrong, the servant is not for one moment released from the rule that he should labor; and no rule can be sound which gives him full wages while living in voluntary idleness." Howard v. Daly, 61 N. Y. 362–72.

[1] 2 El. & B. 678.

[2] Marks v. Van Eeghan, 85 Fed. Rep. 853. See further, Kalkhoff v. Nelson, 60 Minn. 284; Davis v. Furniture Co., 41 W. Va. 717. *Contra*, Daniels v. Newton, 114 Mass. 530.

[3] McClung v. Dearborne, 134 Pa. St. 396; 8 L. R. A. 204; Lafitte v. N. O., C. & L. R. Co., 43 La. Ann. 34; 12 L. R. A. 337. "If the servant wholly for a purpose of his own, disregarding the objects for which he was employed, and not intending by his act to execute it, does an injury to another not within the scope of his employment, the master is not liable." Howe v. Newmarch, 12 Allen, 49.

[4] Corporations are equally within the rule.

[5] See Cooley, Elem. Torts, p. 319.

[6] Chicago, etc. Ry. v. West, 125 Ill. 320; East Counties R. Co. v. Brown, 6 Exch. 314; Goddard v. G. T. Ry. Co., 57 Me. 202; 2 Am. Rep. 39; Stranahan B. Co. v. Coit, 37 Ohio Law J. 3 (Dec., 1896).

[7] P. C. & St. L. Ry. Co. v. Shields, 47 Ohio St. 387; 8 L. R. A. 464.

Sec. 617. *Sales of Chattels.*— We have seen that an essential attribute of property in things is the right to transfer and dispose of them. One cannot have the perfect and complete title unless he has this right.[1]

The various usual and common methods of transferring property or interests therein give rise to names suited to indicate the manner of transfer.

When a chose in action is disposed of, the method of disposition is called an assignment.

Chattels are transferred by descent or purchase, and the familiar modes of purchase recognized are sales and gifts, barter and exchange; and as it is allowable to transfer special interests in chattel property without entirely extinguishing the rights of the owner, so various names are assigned to these common modes of transferring such interests, as mortgages and bailments.

One may agree to furnish and deliver an article or commodity at a future date, and such contracts are sometimes called sales, but improperly so, being but a contract to furnish and deliver an article of a specific kind and quality.[2] Title does not pass in such cases until the implied or express conditions are complied with.[3]

The presence or absence of a consideration distinguishes a sale from a gift or donation.

A Sale Defined.— Properly speaking, a sale is an absolute transfer of the ownership of an existing tangible thing for money.[4]

Elements of a sale as between the parties to the contract.

The contract of sale must have all the elements of contracts in general, and likewise its own peculiar features. The essential elements of a bargain and sale[5] are: 1. Parties. 2. Mutual assent. 3. The subject-matter: a thing, the absolute or general property in which is transferred from the seller to the buyer. 4. Consideration: a price in money paid or promised.[6]

[1] Wyneheimer v. People, 13 N. Y. 278.

[2] Butler v. Butler, 77 N. Y. 472.

[3] De La Vergne Ref. Co. v. N. O. & W. R. Co. (La. Ann.), 26 S. Rep. 455.

[4] Williamson v. Berry, 8 How. 544; Benj. on Sales, sec. 1. For distinction between a sale and a bailment, see Austin v. Seligman, 18 Fed. Rep. 520.

[5] "By the common law a sale of personal property is termed a 'bargain and sale of goods.'" Benj. on Sales, sec. 1, note.

[6] Gardner v. Lane, 12 Allen, 39.

Only the features peculiar to sales need be noticed.

The Subject of Sale.— In order to constitute a sale there must be a thing which is the subject of the sale in potential or actual existence (otherwise it is in the nature of an executory contract).[1]

When it is found that the thing sold has ceased to exist, either at the time the contract was made,[2] or before the time when it was to be executed,[3] or has not existed, the sale will be regarded as a nullity.

Where a thing does not yet exist, or is not yet acquired by the vendor, it may be the subject of an executory contract of sale only. No title passes in such a case unless the contract of sale becomes executed before the rights of third persons have intervened.[4]

Things having a potential existence may be the subject of sale and the title will pass immediately; that is, things which in the ordinary course of nature will arise out of a thing in existence, such as natural products of the soil, or expected increase of animals, the property of which is in the vendor.[5]

For instance, a man may sell the yield of his orchard, a growing crop,[6] or a crop before planting,[7] but he can make only a valid agreement to sell where the property is to be afterward acquired, as in case he agreed to sell the wool of sheep which he may buy within the year. The difference in these cases is important; for in the former case the risk of loss is with the vendee, in the latter it is with the vendor.[8] For example, if one sell all the ice which shall form on his pond, and no ice forms, there is no failure of consideration.[9]

[1] Thompson v. Gould, 20 Pick. 139; Allen v. Hammond, 11 Pet. 63. The thing sold must exist and the seller must have it. Thompson v. Gould, 20 Pick. 139; Benj. on Sales, sec. 78.

[2] Strickland v. Turner, 7 Exch. 208; Barr v. Gibson, 3 M. & W. 390; Allen v. Hammond, 11 Pet. 63.

[3] Dexter v. Norton, 47 N. Y. 62; Carpenter v. Stevens, 12 Wend. 589.

[4] Cook v. Corthell, 11 R. I. 482; Rowan v. Sharps' Rifle Co., 29 Conn. 283; Chynoweth v. Tenney, 10 Wis. 397; Chase v. Denny, 130 Mass. 566.

[5] Cotten v. Willoughby, 83 N. C. 75; Stephens v. Tucker, 55 Ga. 543; Lewis v. Lyman, 22 Pick. 437, 442, 443; Heald v. Builders' Ins. Co., 111 Mass. 38; Sanborn v. Benedict, 78 Ill. 309.

[6] Sanborn v. Benedict, *supra*.

[7] Rawlings v. Hunt, 90 N. C. 270.

[8] Benj. on Sales, sec. 78; Allen v. Hammond, 11 Pet. 63; Thompson v. Gould, 20 Pick. 139; Heald v. Builders' Ins. Co., 111 Mass. 38.

[9] *Ante*, p. 745, note 8.

The Title of the Vendor.— The vendor must be the owner of the thing sold. The general rule is that he can pass no greater title than he has.[1]

If he has a title, even though he obtained it in such a fraudulent manner that the contract might be rescinded by the person from whom he obtained the goods, he may, nevertheless, pass a good title to an innocent third person;[2] but mere possession is not sufficient in itself to constitute a title which will protect even an innocent and *bona fide* purchaser as against the real owner, who has been guilty of no wrong or negligent conduct amounting to an estoppel.[3]

The owner has a right, for many purposes, to trust the possession of his property to third persons, and he does not risk his title unless he in some manner either actually vests the title or so acts that a third person would reasonably believe that he had.[4]

The purchaser must satisfy himself as to the title. *Caveat emptor* (let the purchaser beware) is a rule of title as well as of quality.[5] On the other hand, it is the general rule that a warranty of the title is implied by the sale.[6]

The Identity of the Subject of Sale.— The specific thing which is the subject of transfer must be agreed upon and identified, although the selection may be left to either of the parties or to a third person.

If it consists of a portion out of a larger mass, it is essential to complete transfer of title, even as between the parties, that the specific articles be segregated and in some manner distinguished from the mass.[7]

For example, if an agreement had been consummated to sell

[1] Deshon v. Bigelow, 8 Gray, 159. *Cf.* Brundage v. Camp, 21 Ill. 330.

[2] Fawsett v. Osborn, 32 Ill. 411; M. C. Ry. Co. v. Phillips, 60 Ill. 190.

[3] 22 Am. Dec. 220. For a sister to allow a brother to use her horse and wagon in his business, and even paint his name and business on the wagon, is not such negligence or misconduct as will estop her. Larkin v. Parmalee, 69 Conn. 79.

[4] *Title through an agent,* or one employed to sell on commission, can only be obtained by a *bona fide* purchase in the ordinary course of the agent's employment or customary dealing known to the principal. Warner v. Martin, 11 How. 209; Conable v. Lynch, 45 Iowa, 84; Parsons v. Webb, 8 Greenlf. 38; 22 Am. Dec. 220.

[5] Coggill v. H. & N. H. Ry. Co., 3 Gray, 545; Sanders v. Keber, 28 Ohio St. 640.

[6] Cogar v. Burns Lumber Co. (W. Va.), 33 S. E. Rep. 219.

[7] Warren v. Buckminster, 24 N. H. 336; Smyth v. Ward, 46 Iowa, 339; M. C. Ry. Co. v. Phillips, 60 Ill. 190;

fifty sheep out of a flock of one hundred, an action would lie for a breach; but until the particular animals had been selected there could be no sale so that title became vested in the vendee.

Assent — Offer and Acceptance.— There must be a definite offer and acceptance relating to some particular article or commodity.[1] Nothing may be left open for further negotiation.[2]

An acceptance of an unconditional order for goods completes the sale. If the acceptance be of an order at a specified price, and for delivery at a certain time, but without naming the quantity, there is a contract for such an amount as is reasonably necessary.[3]

Mere advertising of property for sale does not constitute such an offer as may be accepted without any preliminary negotiations. Such an advertisement is merely an invitation to negotiate and purchase.[4]

Consideration — Price.— We have seen that, in order to constitute a sale, the consideration for the transfer must be money.[5]

When the transfer of property is questioned by third persons who stand in the relation of creditors or purchasers of the same

King v. City of Rochester, 39 Atl. Rep. 256. Weighing or measuring the subject of sale is not essential except when necessary to determine the subject-matter. Nash v. Brewster, 39 Minn. 530. So long as anything remains to be done to separate and identify the goods, title does not pass. Andrews v. Deiterich, 14 Wend. 32; Scudder v. Worster, 11 Cush. 573; Warten v. Strane, 82 Ala. 311; Com. v. Hess, 148 Pa. St. 98; 17 L. R. A. 176. It is indifferent whether the thing is to be done by the vendor or vendee. Fuller v. Bean, 34 N. H. 300; Gibbs v. Benjamin, 45 Vt. 124; Sanger v. Thomasson, 44 S. W. Rep. 408; Merch. Nat. Bank v. Bangs, 102 Mass. 295.

[1] Rohrbough v. Leopold, 68 Tex. 252; *ante*, pp. 717, 718. *E. g.:* S. wrote to G., "How many rags have you on hand, and your price for them?" G. replied, "We have about a ton. Our price is three and one-half cents." S. answered, "We will take the rags at the price you named." It was held that there was no sale because there had been no specific offer. Tiedeman on Sales, 36; Smith v. Gowdy, 8 Allen, 566; Moulton v. Kershaw, 59 Wis. 316; Johnson v. Filkington, 39 Wis. 62. Assent may be inferred. Ketchum v. Duncan, 96 U. S. 659. Where a worthless article was sold as indigo, it was held there was a mutual mistake and no sale. Welsh v. Carter, 1 Wend. 186.

[2] In Simpson v. State Bank of Cresco (Iowa), 75 N. W. Rep. 554, a buyer agreed to take certain goods, and selected and packed them in boxes and put them in a separate room with the understanding that he would return at a future time and take the goods *after satisfying the sellers as to certain facts* concerning the property to be given for the goods. It was held there was no sale.

[3] Wells v. Alexandre, 130 N. Y. 642; 15 L. R. A. 219.

[4] *Ante*, pp. 717–18.

[5] We are not treating gifts or forms of transfer other than sales.

property, it is essential that the consideration be valuable. Impliedly the consideration is cash on delivery.[1]

A mere sale on credit by one in failing condition to one who knows his condition is not fraudulent.[2]

Voluntary conveyances, while good between the parties, are invalid as against creditors. By a voluntary conveyance is meant one without a consideration; and where one is not indebted or in embarrassed circumstances, he has a right to give his property away.[3]

Pre-existing Debt as a Consideration — Conflict of Authority. There is a direct, irreconcilable conflict of authority upon the question as to whether a pre-existing debt is a valuable consideration for the transfer of chattels. It is based upon a difference of opinion as to what is public policy.

The same conflict extends to negotiable securities.[4]

The reasoning upon the one side which denies that the pre-existing debt is a good consideration is that the creditor parts with nothing for the transfer which should entitle him to a preference over other creditors, and when it is applied to the appropriation of the debtor's goods by a preferred creditor it invokes the equitable principle that creditors should share ratably in the assets of a failing debtor.

But preferences are not generally entirely forbidden unless it be by a sale which exhausts the bulk of the property for the benefit of a favored few.

In those states where a pre-existing debt is a valuable consideration,[5] an insolvent debtor may prefer one creditor to the exclusion of others; and a creditor who takes goods in satisfaction of his debt obtains a good title if he obtains possession before the lien of any other debtor attaches.[6]

Other jurisdictions, upon the reasoning above stated, refuse to recognize a pre-existing debt as a valid consideration for such a sale.[7]

[1] M. C. Ry. Co. v. Phillips, 60 Ill. 190.

[2] Loeschigk v. Bridge, 42 N. Y. 44; Ruhl v. Phillips, 48 N. Y. 128; Baughman v. Penn, 33 Kan. 507.

[3] See Story, Eq. Jur., 351–53 et seq.

[4] Coddington v. Bay, 20 Johns. 637; Swift v. Tyson, 16 Pet. 1.

[5] Gray v. St. John, 25 Ill. 232; Seymour v. Wilson, 19 N. Y. 417.

[6] Thornton v. Davenport, 1 Scam. 296.

[7] The case of Schloss v. Feltus, 96 Mich. 619; 103 Mich. 525; 36 L. R. A. 161. with the notes, shows the reasoning and cases *pro* and *contra* the rule.

Secret Trusts Are Void.— It is not allowable anywhere that a debtor should transfer to a creditor a portion or all of his property with the understanding that the creditor shall sell the property, retain out of the proceeds sufficient to pay his debts, and pay the surplus over to the debtor. Such a contract is fraudulent and void as to the other creditors, irrespective of the intention.[1]

Any arrangement by which the debtor retains a secret interest in any part of the property or its proceeds is void as to creditors existing or subsequent.[2]

In controversies with innocent purchaser and creditors, the form of the conveyance must agree with its substance. An absolute conveyance with a parol agreement that the transfer is a mortgage is not good against third persons.[3]

Delivery is not essential as between the parties.[4] As between themselves the title may pass and the goods remain in the hands of the vendor.[5] In most cases, however, the sale is not complete without delivery, unless there is an agreement to that effect. It is the exception that persons purchase articles and leave them in the possession of the vendor.[6]

Time When Change of Possession Must Take Place.— As to creditors and subsequent purchasers it is a suspicious circumstance requiring proof of *bona fides* that the possession be allowed to remain for any time with the vendor;[7] but in most

[1] Bump on Fraud. Convey. 213, 214; Phillips v. Curts, 80 Ill. 112; Goodrich v. Downs, 6 Hill, 439; Hanchett v. Kimbark, 118 Ill. 121; Moore v. Wood, 100 Ill. 451; Guffin v. National Bank, 74 Ill. 256.

[2] Selz v. Evans, 6 Bradw. 466; Coburn v. Pickering, 3 N. H. 415; 14 Am. Dec. 375; Hanchett v. Kimbark, 118 Ill. 121.

[3] See next section.

[4] The parties may dispense with it. Willingham v. Veal, 74 Ga. 756; Lord v. Edwards, 148 Mass. 476; 2 L. R. A. 519.

[5] When the terms are agreed on, the bargain struck, and everything the seller has to do is done, the contract is absolute, without payment or delivery. Leonard v. Davis, 66 U. S. 476; Warner v. Martin, 11 How. 201; Burton v. Curyea, 40 Ill. 320. See Scudder v. Worster, 11 Cush. 573.

[6] Hundley v. Webb, 3 J. J. Marsh. 641; 20 Am. Dec. 189. A telephone order by a hotel-keeper for meat, which is filled by bringing the meat in a wagon and delivering it at the hotel, is held in State v. Wernwag, 116 N. C. 1061; 28 L. R. A. 297, to be a sale at that place, within the meaning of a requirement of a license, although the place to which the order was sent and from which the meat was brought was outside the district for which a license was required.

[7] Kenton v. Ratcliff (Ky.), 49 S. W. Rep. 14; Second Nat. Bank v. Gilbert, 174 Ill. 485.

cases, if the transaction is otherwise free from fraud, the purchaser gets a good title if he obtains possession before the lien of a creditor attaches, or any other purchaser gains possession.[1]

It is a rule of the common law that possession shall accompany and follow the agreement.[2] While conditional sales are not condemned, and as to them delivery may await performance of the condition, where the sale is absolute, it is not admissible to allow possession to remain with the vendor.

The only difference in the rule applied in such cases is as to whether the sale is absolutely void or voidable.[3]

The change of possession must be of an unequivocal character, accompanied by outward, open and visible signs, plainly indicative of the change of ownership.[4] If the goods are easily capable of delivery they should be removed. If they are in use in business or the article is cumbersome, outward symbols or signs should be displayed. Everything which is in the nature of the case practicable should be done to give notice of the change.

Keeping the vendor in charge as custodian, while a suspicious circumstance, is not of itself sufficient to render the sale void,

[1] Cruikshank v. Cogswell, 26 Ill. 366.

[2] Edwards v. Harben, 2 T. R. 587.

[3] Edwards v. Harben, 2 T. R. 587; Hundley v. Webb, 3 J. J. Marsh. 641; 20 Am. Dec. 189. As to the conflict in opinion whether allowing the possession to remain in the vendor renders the sale void or voidable only, see Thornton v. Davenport, 1 Scam. 296; Dunning v. Mead, 90 Ill. 376; Crawford v. Davis, 99 Pa. St. 576; Dooley v. Pease, 88 Fed. Rep. 446, holding such sale void. *Contra*, Dempsey v. Gardner, 127 Mass. 381; Miller v. Pancoast, 29 N. J. L. 250; Carpenter v. Graham, 42 Mich. 191. See Benj. on Sales, Corbin's note, p. 641. When the sale is conditional this rule does not apply. Hundley v. Webb, *supra*. Mr. Tiedeman points out which policy is adopted in the various cases. Tiedeman on Sales, sec. 84*a*.

[4] Fraud in such cases is an inference of law, deduced from the nature of the transaction itself, without regard to the motives or actual intentions of the contracting parties, for the parties may have acted in the utmost good faith. Lawson v. Funk, 108 Ill. 502; Lukins v. Aird, 6 Wall. 78. The reason of the rule applies most strongly to transfers of property between husband and wife (Wheeler v. Selden (Vt.), 12 L. R. A. 600; McAfee v. Busby, 69 Iowa, 328; Butler v. Ives, 139 Mass. 202), or near relatives. Lawson v. Funk, 108 Ill. 502. Where there is a joint possession by the vendor and vendee, the property is liable to an attachment for the vendor's debts, if a candid observer would not know who had the chief control and possession. Flanagan v. Wood, 33 Vt. 332. See Dooley v. Pease, *supra;* Stratton v. Burr (Cal.), 54 Pac. Rep. 735; Friedman v. Holberg, 74 Mo. App. 26. After the property has been in hands of the sheriff the rule does not apply. Lillienthal v. Ballou (Cal.), 55 Pac. Rep. 251.

provided such notice is given of the change as the circumstances will admit.[1]

Conditional Sales.— When questioned by third parties who have extended credit upon the strength of the apparent title, alleged sales stand upon a different basis than when the contest is between only those who are parties to the original agreement. Such sales were allowed at common law.[2]

In some of the states it is held that where property is delivered to one under agreement that he shall pay for the same, but that in the meantime the property shall remain in the original owner, the holder making partial payment as rent, or otherwise, the title of the property as to third persons vests in him who has the possession, and the original owner's interest is rather in the nature of a lien.[3]

On the other hand, it is quite generally held that the transaction is not a complete sale, but a contract for a sale, and that the vendor's title is still subject to execution,[4] and is not seizable under distress for rent by the landlord of the vendee.[5]

Delivery to a carrier for the purpose of conveying the property from their place of deposit in vendor's control to the place designated by the purchaser is a common mode of delivery;[6] and unless there is something controlling in the terms

[1] McTeer v. Huntsman (Tenn.), 49 S. W. Rep. 57; Billingsley v. White, 59 Pa. St. 464; Blumenthal v. Michel, 54 N. Y. S. 81.

[2] *Infra*, p. 871, note 6.

[3] Van Duzor v. Allen, 90 Ill. 499. Lucas v. Campbell, 88 Ill. 447.

[4] Everett v. Hall, 67 Me. 497.

[5] Bean v. Edge, 84 N. Y. 510. Under an agreement for the lease of certain furniture providing for the payment of certain sums as hire therefor, and that no equity or title should vest in the lessee until full compliance by him with the covenants of the lease, and upon such compliance the lessor should sell the property to the lessee for one dollar, providing also that in case of default in payment, or of removal of the property from a place named, or of failure to redeliver at the expiration of the term of hiring, the lessor might, without demand or notice, repossess himself of the property, held, no title passed. Wall v. De Mitkiewicz et al., 9 Ct. Ap. D. C. 109, following Harkness v. Russell, 118 U. S. 663.

[6] See Butter v. Lawshe, 74 Ga. 352. *E. g.:* The seventeenth section of the Statute of Frauds requires that executory contracts for the purchase of goods of above the value of £50 shall be in writing, unless certain other conditions exist. This section substantially is in force in Michigan, but not in Illinois. One can readily see, in a contract between residents of these states respectively, how important the time when and place where the title passes may become. See Kuppenheimer v. Wortheimer, 107 Mich. 77. See, as to place of contract, Tegler v. Shipman, 33 Iowa,

of the contract, a delivery to a carrier is a delivery to the vendee,[1] subject to his right to inspect, and subject to the right of stoppage *in transitu*.[2]

Place of Sale.— It frequently becomes important to determine whether the title passes upon the delivery to the carrier or at the place of destination, and where the title becomes complete when the sale is conditioned upon inspection or tests.[3]

The general rule may be said to be, that title passes upon delivery to the carrier designated by the purchaser; or, where it is the custom of the business so to deliver,[4] subject to the right of the purchaser to inspect.[5]

The Right to Inspection.— It will not do to say that in all cases the title passes upon delivery, because the course of dealing between the parties, or the contract itself, as in the case of a sale by sample or of a specific grade, may indicate that it was not the intention of the parties that title should pass before inspection, and in such cases there is no assent until after

194; 11 Am. Rep. 120; Boothby v. Plaisted, 51 N. H. 436; 12 Am. Rep. 140; De La Vergne Ref. Co. v. N. O. & W. R. Co., 51 La. Ann. —; 26 S. Rep. 455.

[1] And the latter takes the risk of loss or damage in transit. Baldwin v. Doubleday, 59 Vt. 7; Mee v. McNider, 109 N. Y. 500.

[2] Kelsea v. Ramsey, etc. Mfg. Co., 55 N. J. L. 320; 22 L. R. A. 415. The right of *stoppage in transitu* merely affects the right of the vendor to protection against insolvency or fraud of vendee.

[3] This is generally a question of intention. Almost always the presumption arising from conduct will give way to intention, if that can be ascertained. The question is one of fact if the evidence leaves it at all doubtful. Ala. G. S. R. Co. v. Mt. Vernon Co., 84 Ala. 173; Emery's Sons v. Irving Nat. Bank, 25 Ohio St. 360; 18 Am. Rep. 299; Kelsea v. Ramsey, etc. Co., *supra*, and note. But where the quality is made a condition precedent or suspensory condition, title does not pass until that is complied with. De La Vergne Co. v. N. O. & W. R. Co., 51 La. Ann. —; 26 S. Rep. 455.

[4] Watkins v. Paine, 57 Ga. 50.

[5] Falvez v. Richmond, 87 Ga. 99; Kuppenheimer v. Wortheimer, 107 Mich. 77; Farmers' Phosphate Co. v. Gill, 69 Md. 537; 1 L. R. A. 767; Lord v. Edwards, 148 Mass. 476; 2 L. R. A. 519. A purchaser cannot select such goods as suit and reject others out of the bulk sold. Williams, Brown & Co. v. Leslie, 66 Ill. App. 246; Converse v. Harzfeldt, 11 Bradw. 173. Where one purchases goods on approval, he must ordinarily return the goods next day, the distance being only three miles. Young v. Argo, 40 Atl. Rep. 719. Where the testing requires a breaking of the package and using of some portion, such breaking and using do not constitute an acceptance. Gurney v. Atlanta G. W. Ry. Co., 58 N. Y. 363; Benj. on Sales, §§ 141, 484, 896; Wolf v. Dietzsch, 75 Ill. 210.

a reasonable time to inspect.[1] This is a rule which may operate to the advantage of the vendor, and save his title even after the right of stoppage has been lost.[2]

Warranty.— Very frequently complicated with the right to inspect, which always exists, is the condition which may or may not accompany a sale, namely, a contract by the vendor that the goods shall be of a specific grade or quality. This is called a warranty, or not, according to the circumstances under which it is given.

If the goods are in existence and the sale is consummated at the time of the promise, it is plain that such a stipulation is a warranty;[3] but if the agreement is to deliver an article of a specific quality, and the articles when produced are not of the quality or kind contemplated, the failure is not so much a breach of the warranty as non-compliance with the contract.[4]

An agreement to return articles found not to be up to the required standard is inconsistent with the idea of a warranty.[5]

[1] Hargous v. Stone, 5 N. Y. 86; Diversey v. Kellogg, 44 Ill. 114; Wolf v. Dietzsch, 75 Ill. 205; Mann v. Everston, 32 Ind. 355.

[2] Schloss v. Feltus, 96 Mich. 619; 103 Mich. 525; 36 L. R. A. 161, and note.

[3] A warranty must be contemporaneous with the sale, or it must have some new consideration. Hopkins v. Tanqueray, 15 C. B. 130. A general warranty usually does not extend to patent defects, but it may be so expressed as to protect the buyer as to them. Liddard v. Kain, 2 Bing. 183. In case of written sale, parol evidence cannot be offered to prove warranty. One may warrant a future event, although the old rule was otherwise. Upton v. Suffolk Co. Mills, 11 Cush. 586; Pike v. Fay, 101 Mass. 134.

[4] Reed v. Randall, 29 N. Y. 358; Gaylord Mfg. Co. v. Allen, 53 N. Y. 519; Wolf v. Dietzsch, 75 Ill. 205; Head v. Tattersall, L. R. 7 Exch. 7.

[5] Nichols v. Guibor, 20 Ill. 285; Osborn v. Stanley, 35 Ill. 103. Where plaintiff bought a horse of defendant warranted to have hunted with the Bicester hounds, with privilege of returning within specified time if horse did not answer description, and where horse was injured without the negligence of the purchaser, and although the plaintiff took the horse away after having been told that it had not in fact hunted with the Bicester hounds, neverthless, after return of the horse, and upon suit brought for the recovery of the purchase price, it was held that the vendor was liable. Head v. Tattersall, L. R. 7 Exch. 7; 1 Moak's Ed. 140; Hunt v. Wyman, 100 Mass. 198. There is a distinction in this respect between an executed sale and an executory contract for a sale. In the latter case the goods may generally be returned as soon as they are found not to satisfy the contract. Doan v. Dunham, 65 Ill. 512. So also where a vendee purchases an article for a certain purpose which is known to the vendor, there is a warranty that it is reasonably suited to the

Under such a contract, a right to return the articles is the only remedy which the vendee has, and it must be exercised within a reasonable time.[1]

An agreement that certain articles shall be equal to a sample, or shall be a specified quantity and to be delivered at a future date, will not carry the obligation of warranty beyond a reasonable opportunity for examination, and the examination and acceptance is a waiver of defects.[2]

If, however, the stipulation takes the form of an express warranty, it may survive inspection and acceptance.[3]

Where the inspection or trial necessarily consumes some of the articles; receiving the packages, opening them and consuming a reasonable amount will not constitute an acceptance. The question of reasonableness is for the jury to determine.[4]

If, after opening and testing, the vendee's offer to return is refused, he has a right to sell the goods for the best price he can obtain, and is not liable to the vendor for any more than he receives.[5]

Conditional Sales — Validity Between Vendor and Vendee.— Not infrequently the owner of chattel property delivers the same to another person under an agreement to pay for it at a future time,[6] either in instalments or otherwise, and that as

purpose. Van Wyck v. Allen, 69 N. Y. 61.

[1] Horner v. Fellows, 1 Doug. (Mich.) 54; Osborn v. Stalnley, *supra;* Hull v. Belknap, 37 Mich. 179; Lewis v. Hubbard, 1 Lea, 436; 27 Am. Rep. 775.

[2] Doan v. Dunham, 65 Ill. 513; Dutchess Co. v. Harding, 49 N. Y. 322; Locke v. Williamson, 40 Wis. 377. The nature of the article may be such that inspection requires damaging, and in such case, if most of the goods are defective, while a few submitted are perfect, the warranty survives. Heilbutt v. Hickson, L. R. 7 C. P. 449; 3 Moak's Ed. 328.

[3] Dounce v. Dow, 64 N. Y. 411.

[4] Benj. on Sales, 484; Gurney v. Atlan, 58 N. Y. 363; Henkle v. Welsh, 41 Mich. 664.

[5] Chesterman v. Lamb, 2 Ad. & El. 129; Messerman v. New York Shot Co., 40 N. Y. 422. If he has sold a part before discovering the breach, he may still rescind and return the residue, and is liable for the market value of the amount consumed. Shields v. Pettie, 4 N. Y. 122. Question of reasonable time is sometimes said to be controlled by printed or written statements on the bills sent with the goods, such as "that all claims must be made within five days," etc. Such statements, not having had the assent of the vendee before or at the time of the sale, are of no effect. Morehouse v. Comstock, 42 Wis. 626.

[6] *Where the chattels are not delivered* there may be a conditional contract of sale, and such condition may be either precedent or subsequent. For example of a condition precedent,

between the parties themselves the title shall remain in the original owner until payment is made; and the validity of such contracts, or rather their equity as to preserving the title, very frequently arises between the original parties and third persons as well as between the parties themselves. The latter only is here contemplated.

The weight of authority upholds the validity of such contracts and preserves to the vendor his title,[1] but some courts recognize that these contracts are in substance nothing more than a sale of the property, with attempt to preserve a lien upon them to secure the payment of the purchase price, and consequently hold them to be within the chattel-mortgage law, which requires written evidence of such contract to be recorded.[2]

These courts look to the tendency of the transaction rather than to its terms, and hold that it is against the policy of the law that one should be clothed with the *indicia* of property which he does not own.[3]

see De La Vergne Ref. Co. v. N. O. & W. R. Co., 51 La. Ann. —, 26 S. Rep. 455. "The doctrine as laid down in Sheppard's Touchstone, 118, 119 and 120, is that 'It is a general rule that, when a man hath a thing, he may condition with it as he will. A contract or sale of a chattel personal, as an ox or the like, may be upon condition, and the condition doth always attend and wait upon the estate or thing whereunto it is annexed; so that although the same do pass through the hands of an hundred men, yet it is subject to the condition still.' In Patton v. McCane, 15 B. Mon. 555, the court say that a sale with delivery of a chattel at a fixed price, to be paid at a future day, but, until paid for, the title to remain in the vendor, does not vest the property in the vendee as to creditors or third persons; . . . that the payment of the money is, by such contract, a condition precedent that must be complied with before the title passes; and reference is made to Barrett v. Pritchard, 2 Pick. 512; Long on Sales, 109; 3 Campb. 92; Chisk v. Wood, Hard. 532." Brundage v. Camp, 21 Ill. 329. Whether by delivery the condition is waived is a question of intention, to be decided in view of all the circumstances, including previous dealings. Adams v. Roscoe Lumber Co., 159 N. Y. 176.

[1] Harkness v. Russell, 118 U. S. 663; Segrist v. Crabtree, 131 U. S. 287. Such sales were valid at common law. Edwards v. Harber, 2 T. R. 587. See *ante*, p. 868, and note 5. The vendor, where there has been such a sale, may, on failure of payment by the vendee, treat the sale as absolute and sue for the price or retake the property. Smith v. Barber (Ind.), 53 N. E. Rep. 1014; Redewill v. Gillen, 4 N. M. 78.

[2] Hervey v. Rhode Island Loc. Works, 93 U. S. 664; Everett v. Hall, 67 Me. 497; Bean v. Edge, 84 N. Y. 510; Tufts v. Brace (Wis.), 79 N. W. Rep. 114.

[3] See "Validity as between third parties," *ante*, p. 868.

Fraud in the Purchase.— The rule that fraud vitiates and renders void or voidable everything into which it enters applies to the contract of sale, and if a vendee obtains the assent of the vendor by fraud, the vendor may rescind the sale and recover his property, unless it has passed into the hands of an innocent purchaser.[1]

The only difficulty in such cases is to determine what constitutes fraud, and of course the question as to the matter of title only arises where the sale is upon credit.

Where a purchaser who is insolvent fraudulently conceals his condition or misrepresents it,[2] and intends not to pay for the goods, the cases seem to be unanimous that such a purchase is fraudulent; but the rule does not extend so as to render fraudulent all purchases after the party is insolvent, if he has a *bona fide* intention to pay, and is not guilty of any fraudulent concealment or misrepresentation.[3]

Validity as to Third Parties.— One who is engaged in business, although he may be said to have the absolute right to property in the things he possesses, is not entirely untrammeled in his rights of disposition.[4]

The law recognizes that men obtain credit on the strength of what they possess, and there is an implied obligation, enforceable by the processes of the courts, to devote one's property to

[1] Schloss v. Feltus, 96 Mich. 619; 103 id. 525; 36 L. R. A. 161, note.

[2] Representations as to credit given to mercantile agencies are recognized as representations to all who deal on the strength of them. Eaton, Cole & B. Co. v. Avery, 83 N. Y. 31; Hinchman v. Weeks, 85 Mich. 535. If a considerable time elapses after a merchant has made a truthful representation of his standing to a commercial agency, and no new representations are made, he is not guilty of actual fraud unless he knows, or circumstances are such that he should know, that the credit he obtained is extended on the strength of the rating of the commercial agency. Strickland v. Willis, 43 S. W. Rep. 602. The question is one largely of intention. Talcott v. Henderson, 31 Ohio St. 162. An intention is ordinarily to be inferred from conduct and circumstances. But to constitute a fraud which will avoid the contract there must be a definite, conscious intent not to pay. Watson v. Silsby, 166 Mass. 57, quoted approvingly in Syracuse Knitting Co. v. Blanchard, 43 Atl. Rep. 637; Schloss v. Feltus, *supra*. The jury may infer an intention not to pay from the circumstances and conduct of the purchaser in respect to the sale in question and other transactions of the same time. Miller v. White (W. Va.), 33 S. E. Rep. 332.

[3] Schloss v. Feltus, *supra;* Hall v. Naylor, 18 N. Y. 588; Donaldson v. Farwell, 93 U. S. 631; Merwin's Equity, sec. 507; Leon v. Goldschmidt, 69 Ill. App. 22.

[4] Seymour v. Wilson, 19 N. Y. 417.

the payment of his just debts; and under many circumstances a sale of one's property is regarded as fraudulent in law and as against the rights of creditors.[1]

All sales must be *bona fide and for value.* The statutes of most of the states provide that every sale made with the intent to hinder, delay and defraud creditors is void; and this statute may be violated by a sale to a third person for full consideration if the intention is, on the part of both purchaser and vendor, to delay or defraud creditors.[2]

There must be more on the part of the buyer than mere knowledge that the sale will delay creditors. He must participate in the design. The owner has the right to sell and a stranger to buy, even after known insolvency.[3]

Formalities of a Sale.— In the law of real property, it will be said that estates in land lie in grant or in livery, meaning thereby that certain formalities must accompany the transfer.

Chattel property, however, is not regarded of so permanent and important a nature as to require any special formality in its transfer, and consequently there is no technical form of deed recognized as a muniment of title to chattels, excepting in case of interests in chattels which are held by those persons not in possession; that is, chattel mortgages.

It follows that a bill of sale of chattels is not necessary, and generally is not recognized as a document which may be regarded, or which amounts to proof of the transfer of title of any higher degree than the agreement of the parties.

The ownership of chattels is transferred by the agreement of the parties.

The Statute of Frauds.— It is true that for the protection of third persons it has been deemed necessary, where possession does not accompany the transfer, to require some formalities; so the seventeenth section of the English Statute of Frauds provides that no sale of chattels of the value of £10 or more shall be good, except the buyer accept a part of the goods so sold,

[1] Seymour v. Wilson, 19 N. Y. 417.

[2] Cadogan v. Kennett, Cowp. 432; Randall v. Vroom, 30 N. J. Eq. 353; Story, Eq. Jur., sec. 353; Bump on Fraud. Convey., sec. 198. These statutes are in the most part but declaratory of what was the common law. Per Lord Mansfield, Cadogan v. Kennett, *supra;* Story, Eq. Jur., sec. 352.

[3] Loeschigk v. Bridge, 42 N. Y. 421; Ruhl v. Phillips, 48 N. Y. 128; Baughman v. Penn, 33 Kan. 507.

and actually receive the same,[1] or give something in earnest[2] to bind the bargain, or in part payment, or that some note or memorandum accompany the sale, precisely as is required in the fourth section.[3]

In those states which date their common law from the fourth year of King James IV this statute is not in force.

Certain portions of the statute have been adopted; but this section is not so universally adopted as is the fourth section.[4]

In other states, dating their common law from a later period (generally some point of time during the Revolution), the statute is the law except as repealed.[5]

The receipt and acceptance or delivery of part of the goods completes a sale even in those states where by the statute such executory contract of sale must be in writing.[6] But if anything remains to be done to complete the sale in such cases, a delivery for transportation, inspection, etc., is not sufficient.[7]

Stoppage in transitu is the right which the vendor of goods has to resume possession of such goods at any time before actual or constructive delivery to the vendee, or his agent, and to hold the same until the purchase price is paid.[8]

[1] Acceptance and actual receipt of part of the goods, however small, is sufficient. Garfield v. Paris, 96 U. S. 557. Receipt of the goods by a carrier is not sufficient to take the case out of the statute (Caulkins v. Hellman, 47 N. Y. 449; 7 Am. Rep. 461; Hausman v. Nye, 62 Ind. 460; 30 Am. Rep. 199), unless the carrier is especially designated by the buyer, or the latter receiver the goods and treats them as his own. Spencer v. Hale, 30 Vt. 314; 73 Am. Dec. 309; Morton v. Tibbett, 15 Q. B. 428, and cases cited in note to Kelsea v. Ramsey & Gore Co., 55 N. J. L. 320; 22 L. R. A. 426, 427.

[2] Earnest money is little regarded at the present time. Cotton Cases, 22 Wall. 195.

[3] Where work and labor has to be done on an article before it will be accepted, the contract is not regarded as a sale and consequently not within the statute. Finney v. Apgar, 15 N. J. L. 270; Goddard v. Binney, 115 Mass. 454; 15 Am. Rep. 112. Some courts make a distinction in this respect between goods in existence and goods to be manufactured. Deal v. Maxwell, 51 N. Y. 652; Cooke v. Millard, 65 N. Y. 352.

[4] It was never adopted in Illinois. See Starr & Curtiss' Statutes, ch. 59; Rhea v. Riner, 21 Ill. 526.

[5] Huntley v. Huntley, 114 U. S. 394.

[6] Joseph v. Struller, 54 N. Y. S. 162.

[7] Nugent v. Beakes, 54 N. Y. S. 486; Butler v. Butler, 77 N. Y. 472.

[8] The earliest reported case where the right is recognized is Wiseman v. Vandeputt, 2 Vern. 202, in chancery, 1690. For a history of its origin, see Gibson v. Carruthers, 8 M. & W. 321; 11 L. J. Ex. 145; Blackburn, Cont. of Sales, 228. The great ruling case is Lickbarrow v. Mason, 2 Term, 63 (1787). See Turner v. Trustees, 6 Exch. 543; 4 Eng. Rul. Cas. 725, notes.

The privilege is a practical application of that rule of contract by which either party may withhold performance on the other becoming unable to perform his part.[1]

It has been said that it is the enforcement of a lien which the vendor has upon the goods for the unpaid purchase-money, and this is accurate in that there is no rescission of the original sale.[2]

It had its origin in equity, but was subsequently adopted by the common law.[3]

Three things are necessary in order that the right of stoppage *in transitu* may be exercised: 1st. The buyer must be insolvent. 2d. The goods must have been bought on credit; and 3d. The goods must not have reached the possession, either actual or constructive, of the buyer.

Knowledge of the insolvency of the purchaser must come to the vendor after the goods have been shipped.[4] It is not required, however, that the insolvency should have taken place after the sale, nor is it necessary to show a technical insolvency.[5] It is sufficient that the vendee is unable to meet his obligations.

The Goods Must Have Been Sold on Credit.—If a part only of the purchase price has been paid,[6] or if notes or bills have been given in satisfaction of the price, unless the latter have by agreement of the parties been given and received in absolute payment for the goods, the right of stoppage *in transitu* is not affected.[7]

The Goods Must be in Transit.—Detention of the goods before shipment is not a stoppage *in transitu*, but a refusal to deliver; and if they have reached the possession, either actual or constructive, of the vendee or his agent, the right is lost.[8]

[1] Benedict v. Schawettle, 12 Ohio St. 515; Gibson v. Carruthers, 8 M. & W. 337.

[2] Rowley v. Bigelow, 12 Pick. 312.

[3] Smith's Mer. Law, 279, note.

[4] Buckley v. Stickney & Furniss, 15 Wend. 137; Fenkhausen v. Fellows, 29 Nev. 312; 4 L. R. A. 732; Farrell v. Richmond & D. R. Co., 102 N. C. 390; 3 L. R. A. 647.

[5] Tiedeman on Sales, 135.

[6] Jordan v. James, 5 Ohio, 88.

[7] Newhall v. Vargas, 13 Me. 103; Clapp v. Sohmer, 55 Iowa, 273. Where the consignor is indebted to the consignee in a sum exceeding the value of the goods, the right does not arise. Clark v. Maurin, 3 Paige, 373–76.

[8] Lickbarrow v. Mason, 2 T. R. 63; Farrell v. Richmond & D. R. Co., *supra;* Hall v. Dimond, 63 N. H. 565. Where goods on reaching the place of destination come into the possession of mortgagees, who are in possession of consignee's store, this is not a delivery to the consignee, and

The transit begins when the goods are delivered to a common carrier for the purpose of transportation to their destination, and ends when the carrier parts with the possession and control of the goods to the vendee or his agent. In other words, the goods are in transit so long as they remain in the hands of the persons concerned in their transportation.[1]

The arrival of the goods at the place of destination does not put an end to the right while they remain in the custody of the carrier or warehouseman.[2]

The right ends, however, when the goods come under the direction and control of the vendee or his agent, even though it be an intermediate place of deposit, where they are to remain until given some new direction or impulse by the vendee.[3]

A delivery of a part of the goods does not cut off the right as to a residue[4] unless the circumstances show that such delivery was intended to operate as a delivery of the whole.[5]

But where the buyer intercepts and takes possession of the goods or sells and delivers them to another party, the right is cut off;[6] but to defeat the right the purchase must be for value and without fraud.[7]

Who is Entitled to Exercise This Right.— The right may be exercised by the vendor or his agent,[8] or factor or purchasing agent who buys and sells goods on his own credit for his principal.[9]

It has been held that the right may be exercised by one advancing money to the owner of goods and receiving from him an assignment of the bill of lading as security for his loan.[10]

the right is not lost. Kingman & Co. v. Denison, 84 Mich. 608; 11 L. R. A. 347.

[1] Harris v. Pratt, 17 N. Y. 249.

[2] Kitchen v. Spear, 30 Vt. 545. Where goods are imported from abroad, the right ends as soon as the goods are entered at the custom-house and deposited in a public house, the purchaser taking the usual receipt. Mottram v. Heyer, 1 Den. 483; Id., 5 Den. 629.

[3] Guilford v. Smith, 30 Vt. 49; Whitehead v. Anderson, 9 M. & W. 518.

[4] Buckley v. Stickney & Furniss, 15 Wend. 504.

[5] Jeffries v. Fitchburg R. Co., 93 Wis. 250; 33 L. R. A. 351.

[6] Walter v. Ross, 2 Wash. C. C. 287. And see Southern Ex. Co. v. Dickson, 94 U. S. 552; Lee v. Kimball, 45 Me. 172.

[7] Harrison v. Pratt, 17 N. Y. 249.

[8] Benj. on Sales, secs. 833, 834 et seq.

[9] Newhall v. Vargas, 13 Me. 103; 29 Am. Dec. 489.

[10] Gossler v. Shepler, 5 Daly (N. Y.), 476.

A mere surety for the purchase price, however, cannot exercise the right, even though he may be entitled to a commission.[1]

How Exercised.— Notice of such stoppage must be served on the carrier having custody of the goods.

The effect of stoppage in transitu is to put the vendor and vendee in the same position as before the goods were shipped. The vendee may demand the goods, and, on payment of the purchase price, receive them.[2]

The carrier's lien for charges is superior to the vendor's right of possession.[3]

How Defeated.— Only a *bona fide* assignment of the bill of lading for value will defeat the vendor's right of stoppage.[4] A seizure on process by a creditor will not have that effect. A mere sale of the goods transfers no better title than the seller has, and does not defeat the right.[5]

Sec. 618. *Mortgage of Chattels.*[6] — The right of the owner to dispose of his property absolutely includes the right to make a disposition of any interest in it for any special purpose which may suit his interest or convenience, subject to the paramount right of the state to regulate the mode of holding and transfer of property.[7]

[1] Sifken v. Wray, 6 East, 371.

[2] Newhall v. Vargas, 13 Me. 93; Rucker v. Donovan, 13 Kan. 251.

[3] Potts v. N. Y. etc. R. R. Co., 131 Mass. 455.

[4] Lickbarrow v. Mason, 2 T. R. 63; 4 Eng. Rul. Cas. 756; Newhall v. Cent. Pac. R. Co., 51 Cal. 345; 21 Am. Rep. 713; Dows v. Perrin, 16 N. Y. 325; Emery v. Irving Nat. Bank, 25 Ohio St. 360; 18 Am. Rep. 290; Scharff v. Meyer, 133 Mo. 428. The consideration which will support the transfer may be a pre-existing debt due by the transferrer to the transferee, or a pre-existing obligation by the former to the latter to transfer it, and need not be a new consideration. 4 Eng. Rul. Cas. 190; Leask v. Scott, 2 Q. B. D. 376; Lee v. Kimball, 45 Me. 172.

[5] A transfer of the bill of lading obtained by fraudulent purchase of the bill does not defeat the right. Decan v. Shipper, 35 Pa. St. 239; 78 Am. Dec. 334; Pollard v. Vinton, 105 U. S. 7.

[6] Modern statutory law has almost entirely superseded the ancient common law, as modified by the statute of frauds, and the law of chattel mortgages must be sought in the statutes of the states and decisions construing them. See, for example, a most learned and instructive case on the law of mortgages as modified by an early statute. White v. Cole, 24 Wend. 116.

[7] Hervey v. Rhode Island Loc. Works, 93 U. S. 664. The registration acts are based upon the broad grounds of public policy. They are said to be a police regulation. Pyeatt v. Powell, 51 Fed. Rep. 551.

Parsons speaks of such a transaction as "*sales of chattels by way of mortgage.*"[1]

The rule of the common law which sanctions a conditional sale with or without a transfer of possession applies to mortgages, which are but another form of conditional sale, the condition being to secure the performance of an obligation by the vendor.[2]

A chattel mortgage without possession was at common law *prima facie* void, but not absolutely so, and unless shown to be *bona fide* would not defeat the rights of creditors and subsequent purchasers,[3] *except they had notice of its existence*,[4] either by an actual transfer of the possession, or actual knowledge or constructive notice as provided for by statute in most of the states; but such a contract, not being illegal or absolutely void, is good against all having notice except in so far as the rule is changed by statute, as is the case in some of the states.[5]

Definition.— A chattel mortgage is *in form* a transfer of title with a defeasance clause, *i. e.*, a clause providing that if the mortgagor performs his covenant the mortgage shall be void; or a conveyance of title, expressed to be for the purpose of securing the performance of a covenant made by the owner, with a condition that the mortgagee's title shall become absolute upon non-performance of the covenant.[6]

[1] 1 Parsons on Cont. (6th ed.), 569.

[2] *Distinction between a conditional sale and a mortgage.— First.* The *object* of the transaction, in the case of a conditional sale, is to *transfer title* simply, while in the case of a mortgage the object is to pass title as *security*. *Second.* In the case of a conditional sale the *purchaser* is to perform a condition, either precedent or subsequent, or the title will not vest. In the case of a mortgage the *owner* vests the title to secure the performance of a covenant or obligation on *his* part, the failure in which extinguishes altogether *his* legal right in the chattel.

[3] A subsequent mortgagee is on the same footing in this respect as a subsequent purchaser. Stewart v. Platt, 101 U. S. 731.

[4] There is some difference of opinion on this point. All agree that the presumption was against the fairness where possession remained with the mortgagor. Some courts held that it might be explained, others the contrary. The question is now rather a matter of curiosity than a practical question, but the principle involved must always have its weight in questions of sales and mortgages. Pyeatt v. Powell, 51 Fed. Rep. 551. See next citation.

[5] See Hervey v. Rhode Island Loc. Works, 93 U. S. 664.

[6] Bragelman v. Dana, 69 N. Y. 69; Pyeatt v. Powell, 51 Fed. Rep. 557.

The former is the appropriate form when the possession remains with the mortgagor; the latter when the mortgagee is given possession.[1]

A parol chattel mortgage is valid if accompanied with delivery, otherwise it is *prima facie* invalid as against third parties,[2] although it is binding *inter partes*.[3]

Mortgage and Pledge Distinguished.— The transaction which most nearly resembles a mortgage, with possession transferred to the mortgagee, is a pledge.[4]

A pledge is a species of bailment where the goods are deposited as security for a loan, but it bears a close affinity to a mortgage.

The possession is always transferred in case of a pledge; it may or may not be in case of a mortgage.[5]

The legal title to the goods does not pass to the pledgee, nor will the pledgor's title be divested until sold under the proper formalities. A mere default in payment does not have that effect.[6]

There can be no sale except on notice, and the rights of the pledgor, until extinguished, survive his death.[7]

In case of a mortgage the legal title is in theory in the mortgagee.

If the condition of the mortgage, in reference to the performance of the covenant, is not complied with, the mortgagee's title becomes absolute,[8] although the equitable doctrine of redemption against forfeitures has had the effect of bringing about a right of redemption, either statutory or through the intervention of a court of equity.[9]

Parol Evidence to Show a Mortgage.— An instrument in the form of an absolute bill of sale may have been intended to operate merely as a mortgage, and will be given such an effect as between the parties if the intention is made clearly to ap-

[1] Porter v. Parmley, 52 N. Y. 185.

[2] Ackley v. Finch, 7 Cow. 290; Day v. Swift, 48 Me. 368.

[3] Brooks v. Ruff, 37 Ala. 371; Reynolds v. Fitzpatrick (Mont.), 57 Pac. Rep. 452; McCoy v. Lassiter, 95 N. C. 880.

[4] Jones on Chat. Mort., secs. 3 and 4; Story, Eq. Jur., sec. 1030.

[5] Story, Eq. Jur., sec. 1030.

[6] Cortelyou v. Lansing, 2 Caines' Cas. 200. In this case Kent, as justice of the court of errors, gives a learned exposition of the rights of the pledgor after default.

[7] Id.

[8] Ackley v. Finch, 7 Cow. 290; Pyeatt v. Powell, 51 Fed. Rep. 551.

[9] Story, Eq. Jur., sec. 1031; Jones, Chat. Mort., sec. 681 et seq.

pear.[1] Parol evidence will be received to show that a sale absolute on its face was intended as a mortgage upon the ground of establishing a trust.[2]

What May be Mortgaged.— While an equitable lien may be created on property to be brought into existence or to be thereafter acquired by the mortgagor, binding upon him and all claiming under him, and an action to foreclose may be maintained,[3] the legal title to property not in existence actually or potentially can be transferred neither by way of sale or mortgage. Thus, a mortgage on machinery to be manufactured does not confer a title which will support conversion.[4] But as in the case of sales, things potentially in being, such as future crops of land in which the mortgagor has an interest, the increase of animals, etc., may be mortgaged.[5]

The identity of the chattels must be so certain that there can be no real occasion for confusion. It is not allowable as against third persons to mortgage a portion out of a herd of cattle[6] or a stock of goods which is changing, permitting the owner to introduce new goods and sell out others.[7]

[1] Boh v. Irwin (Ky.), 51 S. W. Rep. 444. Thus, if in a bill of sale the right is reserved to the vendor to retake the property upon default in payments, this will be construed to be a chattel mortgage. Baldwin v. Owens (Ky.), 51 S. W. Rep. 438; Morgan's, etc. Co. v. Shinn, 15 Wall. 105; Hamilton v. Russell, 1 Cranch, 310.

[2] Newton v. Fay, 10 Allen, 505; Russell v. Southard, 12 How. 139.

[3] Holroyd v. Marshall, 10 H. L. Cas. 191; Mitchell v. Winslow, 2 Story, 647; Ludlum v. Rothschild, 41 Minn. 222. Equity treats such a mortgage as binding on the conscience of the mortgagor to execute a mortgage as soon as the property comes into being or is acquired. Little Rock & Ft. S. R. Co. v. Page, 35 Ark. 304.

[4] Deeley v. Dwight, 132 N. Y. 59; 18 L. R. A. 298 and note. "Invalidity at law imports nothing more than that a mortgage of property thereafter to be acquired is ineffectual *as a grant* to pass the legal title. A court of equity in giving effect to such a provision does not put itself in conflict with that principle. It does not hold that a conveyance of that which does not exist operates as a present transfer in equity, any more than it does in law. But it construes the instrument as operating by way of present contract, to give a lien which, as between the parties, takes effect and attaches to the subject of it as soon as it comes into the ownership of the party" (Kribbs v. Alford, 120 N. Y. 524), and may be specifically enforced.

[5] Northwestern Bank v. Freeman, 171 U. S. 620; Pyeatt v. Powell, 51 Fed. Rep. 551; Borden v. Croak, 131 Ill. 68; 19 Am. St. Rep. 23.

[6] But persons who have notice or knowledge of such a mortgage must respect the rights of the mortgagee. Northwestern Bank v. Freeman, 171 U. S. 620.

[7] Hangen v. Hachmeister, 114 N. Y. 566; 5 L. R. A. 137; Johnson v. Gri-

The description must be so certain as to enable third parties to identify the articles and fix the quantity with the aid of extrinsic evidence.

Delivery and acceptance of the deed are necessary to constitute a valid mortgage. A writing signed, sealed and acknowledged, but never delivered, does not become operative as a mortgage.[1]

Delivery of the Chattel.— The change of possession, where the mortgage is not recorded, must be open, actual, public and continued,[2] precisely as in the case of a sale.[3]

Recording.— Statutes in most, if not all, of the states provide for the recording of these chattel mortgages;[4] and in this manner the rights of all the parties concerned are fixed and

sard, 51 Ark. 410; 3 L. R. A. 795; Hayes v. Westcott, 91 Ala. 147; 11 L. R. A. 488; Brasher v. Christophe, 10 Colo. 284; New v. Sailors, 114 Ind. 407; Barnett v. Fergus, 51 Ill. 352; Parker v. Chase, 62 Vt. 206; 22 Am. St. Rep. 99.

[1] Delivery takes place by words or acts and intention. It is a question of both law and fact, and from the facts and circumstances is to be determined whether a legal delivery and acceptance has been accomplished. Shults v. Shults, 159 Ill. 654; Fletcher v. Martin, 126 Ind. 55. The mere recording by the mortgagor does not constitute a delivery. Oxnard v. Blake, 45 Me. 602. See also Com. v. Cutler, 153 Mass. 252; Berlin Mach. Works v. Security Trust Co., 60 Minn. 161.

[2] Siedenbach v. Riley, 111 N. Y. 560; Herr v. Denver, etc. Co., 13 Colo. 406; 6 L. R. A. 641.

[3] Smith v. Moore, 11 N. H. 55; Parson on Cont. 453–54. Parsons says: "The necessity of delivery to the mortgagee, or of a record, is wholly the effect of statutory provisions, and at common law a mortgage of personal property *might* be valid in the absence of fraud, even against subsequent *bona fide* purchasers and attaching creditors, although the mortgagor remained in possession, and although no record of the mortgage existed. Holbrook v. Baker, 5 Greenl. 309; Bissell v. Hopkins, 3 Cow. 166; Bucklin v. Thompson, 1 J. J. Marsh. 223; Letcher v. Norton, 4 Scam. 575; Ash v. Savage, 5 N. H. 545; Homes v. Crane, 2 Pick. 610. Such continued possession by the mortgagor might be sufficient evidence of fraud, but alone it would not be in most states conclusive. Ibid. In Vermont it would be. Russell v. Fillmore, 15 Vt. 130. Although the mortgagor remain in possession and without any record of the mortgage, it seems that a subsequent purchaser or attaching creditor, *having actual notice* of the existence of the mortgage, acquires no rights against the mortgagee, the latter being guilty of no fraud. Sanger v. Eastwood, 19 Wend. 514; Stowe v. Meserve, 13 N. H. 46; Gregory v. Thomas, 20 Wend. 17. The contrary has been held in Massachusetts. Travis v. Bishop, 13 Met. 304. And see Denny v. Lincoln, id. 200." Northwestern Bank v. Freeman, 171 U. S. 620.

[4] A very interesting case, involving property located in the Indian Territory, where there were no statutory provisions in force, is Pyeatt v. Powell, 51 Fed. Rep. 551.

protected.[1] A partnership mortgage, for example, may require recording in several places in order fully to give the notice intended.[2]

A chattel mortgage recorded in the county where executed will protect the mortgagee though the property be removed into another county or over into another state, on the ground of comity. The recording need not be repeated in the state to which the property is removed. It will operate as constructive notice, and the rule of *caveat emptor* will apply.[3]

Mortgagee as Owner.— Mortgaging of chattels being regarded as a valid transaction, it follows that the mortgagee's title can be defeated only by some act or omission of his own, or divested only by process against him.[4]

An agister cannot, by a contract with the mortgagor, acquire a lien for the keeping of live animals,[5] nor a warehouseman for the storing of goods.[6] Creditors of the mortgagor cannot seize and sell the property.[7]

In short, the mortgagee is the legal owner, and may protect and preserve the property by all proper modes open to an owner.

Mortgagor's equity of redemption is not, except by statute, a legal right; nor is it yet one which must be allowed in a court of equity as a matter of course.[8]

[1] Unless a statutory inhibition exists, the recording adds nothing as between the parties. Beeman v. Lawton, 37 Me. 543; Fuller v. Page, 26 Ill. 358. Generally, under the statutes, registration is equivalent to a delivery of the property. Under these acts omission to record does not render the mortgage void as to all persons, but only as to judgment creditors and subsequent purchasers in good faith. Steele v. Benham, 84 N. Y. 634; Kohl v. Lynn, 34 Mich. 360. And actual notice dispenses with the necessity of filing. Dempsey v. Pforzheimer, 86 Mich. 652; 13 L. R. A. 388 and note.

[2] Stewart v. Platt, 101 U. S. 731.

[3] Ord Nat. Bank v. Massey, 48 Kan. 762; 17 L. R. A. 127 and note.

[4] But the mortgagor has such an interest as prevents the seizure and sale of the property on process against the mortgagee until condition broken. Jones on Chat. Mort., sec. 566. See Herman on Ex., sec. 121. Without a foreclosure after condition broken, the chattels may be seized on execution against the mortgagee. Ferguson v. Lee, 9 Wend. 258. Under the statutes generally the legal title remains in the mortgagor till foreclosure. Drummond Carriage Co. v. Mills (Neb.), 40 L. R. A. 762.

[5] Bissell v. Pierce, 28 N. Y. 252; Jones on Chat. Mort., sec. 472.

[6] Storms v. Smith, 137 Mass. 201; Jones on Chat. Mort., sec. 472.

[7] Note 4, *supra;* Pyeatt v. Powell, 51 Fed. Rep. 551.

[8] By the old common law a mortgage of personal property gave an absolute title to the mortgagee on

It is based upon the idea that, although the form of a mortgage is that of a sale, in substance it is a mere security, and the default works a forfeiture.[1] Ordinarily, within a reasonable time after condition broken and a sale of the property, courts of equity are liberal in allowing a redemption to prevent a forfeiture.[2]

Sec. 619. *Bailments.*— This generic term[3] embraces several contracts, apparently so diverse in their objects that the uninitiated would not suspect that there was any common feature which classes them as members of one family; *e. g.*, there is little apparent similarity between the loan of a horse, the pledging of a jewel to a pawnbroker, the hiring of the cleaning of a watch by the jeweler, the tailoring of cloth into a suit, the deposit of money or any article for safe-keeping,[4] and the carrying of goods from one place to another; yet these

breach of condition. No process of foreclosure was necessary, and there was no right of redemption. Jones on Chat. Mort., sec. 681; Taber v. Hamlin, 97 Mass. 489; Burtis v. Bradford, 122 Mass. 129; Frankenthal v. Meyer, 55 Ill. App. 405.

[1] Adams' Eq., pp. 110, 111.

[2] Jones on Chat. Mort., sec. 881 et seq.; Ackley v. Finch, 7 Cow. 290; Blanchard v. Kenton, 4 Bibb, 451; Jackson v. Cunningham, 28 Mo. App. 354; Freeman v. Freeman, 17 N. J. Eq. 44.

[3] Most text-writers and legal lexicographers seem content to give the derivation of bailment as from the French *bailler*, to deliver, but it is obvious from the fact that the law of bailments is taken bodily from the civil law that this is not the root word. In the old Law Latin and Law French Dictionary, to which occasional reference has been made, of whose authorship nothing more is known than it is by "F. O.," the most reasonable explanation of the derivation is given. It is there said it is derived from the French word *bailler*, and that also cometh from the Greek. They both signify to deliver into the hand. The same word includes the bailing (delivery) of one out of prison into the hands of his friends. "*Bail* is derived from the Greek verb *βαλλω*, *id est mitto*, to let pass, *car celluy que beille. Mittit à se, bailes hors*, delivered out, *traditur in ballivo*, delivered upon bail or keeping."

[4] The ordinary deposit of money in a bank is not a bailment, although it is a delivery of the money for safe-keeping to be returned on demand, because it is understood that the money is to be mingled with the banker's general fund and becomes his money; but a special deposit of a package or box of money with a banker or any one else to be kept is a bailment. Foster v. Essex Bank, 17 Mass. 479; People v. Sheppard, 55 N. Y. S. 1130. The retention of the general title in the bailor and the obtention of a special title by the bailee are essential features of the contract; and if the contract permits a complete change of title by permitting a return of other articles or the value of the pledge, it is no bailment. Austin v. Seligman, 18 Fed. Rep. 519.

with several other contracts, apparently as dissimilar, are all of the genus bailments.

Definitions and Distinguishing Features.— The one common feature of all bailments is that the goods are held by the bailee in trust; *i. e.*, he gets a special property in them for a special object.

A bailment is almost universally defined as "a *delivery* of personal property in trust for some special object or purpose."[1]

This trust relationship, with its peculiar feature that the bailee obtains a special property and the bailor retains the general ownership in the thing, distinguishes a bailment in any form from an agency, or the hiring of labor upon chattels where possession does not pass.[2]

One species we have already distinguished from mortgage, namely, a pledge.[3]

Another species, a sub-class — *locatio operis faciendi* — is sometimes exceedingly difficult to distinguish from a sale.[4]

A Finding.— The language of these definitions is not suggestive of the mode in which at least one of the species may arise. The definitions say a bailment is *a delivery* of goods in trust, whereas a bailment may arise by a finding, in which a delivery in fact is absent and the intrusting arises only by implication. For this reason the word *receiving*, instead of delivery, is more apt.[5]

Restoration or Redelivery.—Again, some definitions include the feature that the goods shall be restored to the bailor. This may tend rather to confuse the novice; *e. g.*, in a contract for carrying goods from the vendor to the vendee, the title passes from the vendor to the vendee on delivery to the carrier, and then there is no redelivery, but a delivery to the vendee.

[1] See Law Dictionaries, title "Bailment," and text-books.

[2] *Ante*, p. 884, note 4. An agent occupies a position of trust and confidence, a fiduciary relation, but it is not a trust in the sense here intended. In a pure trust there is in the subject-matter of the trust some form of property in which the trustee holds some sort of title. The bailee obtains such a title and he may sue for an injury to it. Great W. R. Co. v. McComas, 33 Ill. 186.

[3] *Ante*, p. 880.

[4] *Ante*, p. 884, note 4.

[5] Jones very properly says the subject embraces every case "by whatever means the goods *are legally* in the hands of the possessor, whether by delivery from the owner, which is a proper bailment, or from any other person, by finding, or in consequence of some distinct contract."

Definition.— The essential features of a bailment are (1) the receiving of (2) personal property (3) under a contract express or implied,[1] in which it is understood that the bailee shall not become the general owner, but by which he obtains a special property as trustee for some special object.

Forms and Classification.— On a subject so vast in its extent and so varied in its phases, the severest analysis and clearest outline must be resorted to, in order to convey any adequate comprehension of the subject.

The outline on page 887 may serve as an aid in distinguishing the various classes from each other, and in a clearer understanding of the foreign idiom in which the subject is still expressed.

Referring to the synoptical outline, it will be noticed that there are five distinct species of bailments; three of these are without compensation and two of them are with compensation.

Among the first three it will be noticed that in some instances the bailment may be for the benefit of one party, *i. e.*, the bailor, while in other instances it is for the benefit of the bailee, while in the case of a pledge it may be for the benefit of both.[2]

The student will encounter the most difficulty in understanding the species *locatio* and its sub-classes because of the nomenclature, which is still the Latin words in which these subjects were presented in the civil law, and is more intricate than in the other classes.

Some little pains has, therefore, been taken to give these Latin sentences or words their English meaning, which, being presented in the outline, need not be repeated.[3]

It may be emphasized, however, that the student should not allow the use of the word *mercium*, which is generally omitted by writers in describing the other forms of *locatio*, and is always given in connection with the word *vehendarum*, as express-

[1] Dale v. Lee, 51 N. J. L. 678; 14 Am. St. Rep. 688.

[2] For whose benefit the bailment is created has been made the basis of a classification intended to show the degree of care required of the bailee in the keeping and his responsibility for neglect; and while this classification is not without its use, it loses sight of the distinguishing features of each class and sub-class; in other words, it subordinates the fundamental difference to a minor incident. Story, Bail, § 3.

[3] The late Dr. Hammond says: "It is worth any amount of pains to make fundamental principles plain."

SYNOPTICAL OUTLINE OF BAILMENTS.

- **BAILMENTS.**
  - **Without Compensation.**
    - I. *Depositum.* A deposit to keep, p. 888.
    - II. *Commodatum.* Lending for use, p. 889.
    - III. *Mandatum.* To do something, or carry, p. 889.
  - **With Compensation.**
    - IV. *Pignus, pledge or pawn.* A deposit, as security for debt, p. 890.
    - V. *Locatio*, p. 892. *De locatione et conductione.*— Of letting and hiring. Sand. Jus. 448; Gaius III, 142. The reward, *merces*[1] or rent is just as essential to the idea of *locatio* as is the price (money) to the idea of sale. Mackeldey, R. L. 321. See Cooper's Just. III, XXVII, sec. 31, tit. "*De mercede.*" Id., p. 629.
      - (1) *Rei* — the letting and hiring of a thing for rent, p. 892.
      - (2) *Operis*— Hire of work. Story, Bail., 421, 422, p. 893.
        - 1. *Faciendi* (doing, making or paying), p. 893.
          - (1) Labor and service, p. 893.
            - *a.* Artisan, p. 893.
          - (2) *Custodæ.*
            - *a.* Private.
              - (a) Agisters, p. 894.
              - (b) Boarding-houses and lodging-houses, p. 894.
            - *b.* Public.
              - (a) Wharfinger, p. 894.
              - (b) Warehouseman, p. 895.
              - (c) Innkeepers, p. 896.
              - (d) Forwarding merchants, p. 898.
              - (e) Factor, p. 898.
              - (f) Sleeping-cars, p. 898.
        - 2. (*Mercium*) * *vehendarum.* Carriage for hire, p. 899.
          - (1) Private, p. 899.
          - (2) Public. Common carriers of goods and chattels, p. 899.

[1] From *merces*, rent or reward. Mackeldey, R. L. 320; Sand. Jus. 448; Gaius III, sec. 142.

ing the peculiar species called carriers, to mislead him into believing that *mercium* is peculiar to that form of bailment.

The word *locatio*, meaning a hiring, impliedly includes a lender and a hirer, and also the price — *mercium*.

To constitute a renting there must be a lessor and a lessee; so the civilians say *de locatione et conductione:* the renting and hiring.

The first sub-class of *locatio* is *rei*, or *rerum*, the hiring of the use of a thing. The second sub-class is distinguished by the word *operis*, for work, labor or *personal* service, which is again subdivided into *faciendi* and *mercium vehendarum*.

Faciendi[1] indicates that the hiring is of personal services, while the second sub-class, *operis mercium vehendarum*, carrying, indicates that it is a placing of a thing in custody, and that the custodian or bailee shall perform a distinct service in regard to it, *i. e.*, *operis*, by carrying it from place to place, *i. e.*, *vehendarum*.

What May be Bailed.— The subject of a bailment must be personal property;[2] but it need not, as is sometimes said, be a chattel. Many forms of choses in action, such as stocks, bonds, negotiable paper, mortgages, etc., and in general all choses which may pass by delivery, may be the subject of bailment;[3] and of course, delivery being essential to all bailments, the thing must be in existence.

Depositum is a bailment of goods to be kept by the bailee without reward until called for by the bailor, or delivered on his order.[4]

One is not obliged to accept or retain such a bailment, and may at any time tender the property to the owner and terminate the relation.[5]

[1] The doing, making or paying was one of the apt words in reserving rent. Kinney's Law Dict. In this hiring of services the bailor pays the rent or price. In the cases of hiring of things, the bailee pays the hire. This distinguishes *locatio rei* from *locatio operis faciendi*.

[2] *Carriers of passengers.*— It follows that carriers of passengers do not fall within the subject. *Telegraph messages* are not sufficiently of the nature of personal property to be the subject of bailments. Primrose v. W. U. Tel. Co., 154 U. S. 1. *Cf.* Parks v. Alta Tel. Co., 13 Cal. 422; 73 Am. Dec. 589.

[3] Union Trust Co. v. Rigdon, 93 Ill. 465; Joliet Iron Co. v. Scioto F. B. Co., 82 Ill. 549.

[4] Rozelle v. Rhodes, 116 Pa. St. 129; 2 Am. St. Rep. 591.

[5] Roulston v. McClelland, 2 E. D. Smith, 60.

The finder of goods becomes a depositary, or a thief, according to his intent when he takes up the property.[1] He acquires a special property in the goods as against all but the true owner.[2]

A depositary has a title which will prevail against a mere wrong-doer.[3]

Articles are, in contemplation of law, in possession of the possessor of the soil, and he has a title superior to that of a finder.[4]

A finder has no lien on articles found, for their keeping, although he may have a claim for sums reasonably expended. If a reward is offered he has a lien.[5]

Estrays.— The taker up of estrays has no lien except as he pursue the common-law remedy for distress of animals *damage feasant*, or by virtue of some valid statute.[6]

Mandatum is a bailment of chattels for the purpose of being carried from place to place, or to have some work performed upon them without compensation.[7] If the parties agree upon a price (*mercium*), the same service becomes *locatio*.

The essential difference between a *depositum* and a mandate is that in the former the bailee is to do a passive service, as to keep the chattels, while in the latter he is to do something with or on them beside keeping.

Commodatum is the civil and common-law term for the lending of a chattel for use and without compensation.

Should the loan be for a specified time, the bailor may not revoke his license and recall the property,[8] and under an agreement it is the duty of the borrower to return the property at the time and place appointed. A non-compliance amounts to a conversion.[9]

Where the loan is for an indefinite time, trover will lie only after demand and refusal.[10]

[1] If he intends to appropriate it to his own use he commits a larceny. State v. Hayes, 98 Iowa, 619.

[2] Dougherty v. Posegate, 3 Iowa, 88. As to what constitutes a finding, see Goddard v. Winchell, 86 Iowa, 71.

[3] Armory v. Delamirie, 1 Strange, 504; 1 Sm. Lead. Cas. 631; Orsor v. Storms, 6 Cow. 687; 48 Am. Dec. 543.

[4] South S. W. Co. v. Sharmon, 2 Q. B. 44; 74 L. T. R. 761.

[5] Wentworth v. Day, 3 Met. 352; Hendler v. Perkins, 4 Pa. Sup. Ct. Rep. 344.

[6] Rockwell v. Nearing, 35 N. Y. 302.

[7] Bronnenburg v. Charman, 80 Ind. 475.

[8] Root v. Chandler, 10 Wend. 111.

[9] Clapp v. Nelson, 12 Tex. 370.

[10] Montgomery v. Evans, 8 Ga. 178; Phelps v. Bostwick, 22 Barb. 314.

Pignus, pledge or pawn is a deposit of personal property as security for some debt or undertaking.[1]

It is for the mutual benefit of the parties. The pledgor obtains credit and the pledgee security for the debt.

The possession of the subject of the pledge by the pledgee is an essential feature to the creation and continuation of the lien.[2]

The chief distinction between an hypothecation and pledge is that in the former delivery is not necessary and in the latter it is.[3]

A chattel not in existence or to be acquired cannot be pledged, but may be hypothecated or mortgaged.[4]

The distinction between a pledge and a conditional sale and a mortgage has been sufficiently explained.[5]

What May be Pledged.— Personal property of any description, capable of delivery or assignment, may be pledged,[6] and also interests in personal property, but only to the extent of that interest.[7] There are some exceptions, on the ground of public policy, such as the pay of soldiers and sailors in the employ of the government, pension certificates, school land certificates, etc.[8]

[1] A pledge secured by fraud is void. Mead v. Bunn, 32 N. Y. 275.

[2] Rowell v. Claggett, 41 Atl. Rep. 173; Cooper v. Simpson, 41 Minn. 46; 16 Am. St. Rep. 667.

[3] Stearns v. Marsh, 4 Den. 227. The nature of the subject of pledge determines the form and character of delivery. Goods in transit may be constructively delivered. Rochester v. Jones, 4 N. Y. 497; Allen v. Williams, 12 Pick. 297. Cumbersome articles may be delivered symbolically. Perley v. Spring, 12 Mass. 300. Stocks, bonds and negotiable paper by written transfer, accompanied by such a delivery of which they are susceptible. Wilson v. Little, 2 N. Y. 443; Wheeler v. Newbould, 16 N. Y. 392. But in some form it is essential. Re Lanaux's Succession, 46 La. Ann. 1036; First Nat. Bank v. Harkness, 42 W. Va. 156. *Bona fides* will not avail where there is no delivery. Geilfuss v. Corrigan, 95 Wis. 651. See also Willets v. Hatch, 132 N. Y. 41. Possession of pledgor is *prima facie* evidence of fraud, but may be rebutted, Macomber v. Parker, 14 Pick. 497; but such possession can only be for some essential temporary purpose. A redelivery destroys the lien. White v. Platt, 5 Den. 269; Kimball v. Hildreth, 8 Allen, 167.

[4] Macomber v. Parker, 14 Pick. 497.

[5] *Ante*, pp. 879, 880. See Conrad v. Atlantic Ins. Co., 1 Pet. 449.

[6] Money, negotiable and *quasi*-negotiable paper and choses in action are proper subjects of bailment. Schouler on Bailm., sec. 172; Stewart v. Lansing, 104 U. S. 505; Morris Can Co. v. Foster, 9 N. J. Eq. 667.

[7] Moffatt v. Van Doren, 4 Bosw. (N. Y.) 143; Mowry v. Wood, 12 Wis. 413.

[8] Wilson v. Little, 2 N. Y. 443.

Manner of Keeping and Use.— The propriety of using the pledge depends upon the nature of the property.[1] The consent of the pledgor is required, but if the property is of such a character that it may be better preserved by use, the consent of the pledgor will be presumed.[2]

Where expenses are necessarily incurred in its care, they may be charged to the pledgor.[3] The increments of the pledge belong to the pledgor, subject to the lien of the pledgee until the debt has been canceled.[4]

The existence of a *bona fide* original obligation is essential to the continuation of the lien, because a pledge is always collateral and cannot exist separated from the original undertaking.[5] They may be assigned together, but separated the bailment is at an end.[6] The extinguishment of the debt puts an end to the lien of the bailee.

The Remedies of the Pledgee.— Default in the payment of the debt for which the pledge is made does not forfeit the title. The pledgee has the choice of two modes of proceeding. 1. He may file a bill in chancery for a judicial sale under decree. 2. He may sell the pledged property without process after notice to the pledgor to redeem,[7] unless it is negotiable paper,[8] in which case it is his duty to collect,[9] unless specifically authorized to sell.[10] He cannot purchase at his own sale.[11]

[1] Alvord v. Davenport, 43 Vt. 30.

[2] Lawrence v. Maxwell, 53 N. Y. 19. A sewing machine should not be used. McArthur v. Howett, 72 Ill. 358; Coggs v. Bernard, *supra.*

[3] The pledgee may incur necessary and proper expenses. Starrett v. Barber, 20 Me. 457; Hills v. Smith, 28 N. H. 369.

[4] Norton v. Baxter, 41 Minn. 146; 16 Am. St. Rep. 679; Loughborough v. McNevin, 74 Cal. 250; 5 Am. St. Rep. 435.

[5] Merritt v. Bartholick, 36 N. Y. 44.

[6] 3 Otto, 321; Chapman v. Brooks, 31 N. Y. 75, 78; Norton v. Baxter, *supra;* Cooper v. Simpson, 41 Minn. 46; 16 Am. St. Rep. 667.

[7] Robinson v. Hurley, 11 Iowa, 410.

[8] *Distinction between a pledge of ordinary chattels and a pledge of commercial paper.*— "The pledge of commercial paper as collateral security for the payment of a debt does not, in the absence of a special power for that purpose, authorize the party to whom such paper is so pledged to sell the securities so pledged upon default of payment, either at public or private sale. He is bound to hold and collect the same as it becomes due, and apply the net proceeds to the payment of the debt so secured." Joliet Iron Co. v. Scioto Fire Brick Co., 82 Ill. 549, quoted and cited in Union Trust Co. v. Rigdon, 93 Ill. 458.

[9] Joliet Iron Co. v. Scioto Fire B. Co., *supra.*

[10] Glidden v. Mech. Nat. Bank, 53 Ohio St. 588; 43 L. R. A. 737; Rush v. Bank, 71 Fed. Rep. 102.

[11] Id. Pledgee of coupon bonds may collect coupons. Androscoggin R. Co. v. Auburn Bank, 48 Me. 335. He may

Remedies of the Pledgor.— If his goods are lost or damaged by reason of the negligence of the bailee, he may sue for their value or the damage, or a bill in equity will lie to redeem them.[1]

The wrongful sale does not *ipso facto* determine the contract relation between pledgor and pledgee, and until that is legally ended the statute of limitations does not begin to run, and the pledgee may tender the debt and demand the return of the property; and if refused, bring an action for its value.[2]

Locatio Rei — Hiring of a Thing.— The payment of the hire or rent distinguishes it from *commodatum*,[3] and if the time is specified the bailee's qualified interest is certain and cannot be divested even by the bailor, who, although owner, has, as between them, but a reversionary interest in the thing hired.

Use of the Thing Hired.— The use to which the chattel is to be put is subject to the contract of the parties,[4] and this contract may not be deviated from. Such a deviation amounts to a conversion, and the bailee is liable in tort,[5] or the bailor may

collect stock dividends. Gaty v. Holeday, 29 Cal. 142; Hill v. Finnigan, 77 Cal. 267; 11 Am. St. Rep. 297.

[1] *The measure of damages* in a suit against the bailee for a conversion of the subject of bailment is the value of the property, but its value may fluctuate; and it has been held that the owner is entitled to its value at the highest figure it would bring at any time after demand and before trial. See Cortelyou v. Lansing, 2 Caines' Cas. 200; Union Trust Co. v. Rigdon, 93 Ill. 458.

[2] Talty v. Freedman Trust Co., 93 U. S. 321; Day v. Holmes, 103 Mass. 306; Lewis v. Mott, 36 N. Y. 395. There is some apparent conflict of authority upon the question of the necessity for a tender by the pledgee, it being held in some cases that a tender must be made in all cases before a right of action can accrue; others hold that where the pledgee has wrongfully disposed of the subject of pledge, no tender is necessary. But the conflict is more apparent than real. An examination of the cases will disclose that the essential difference between the circumstances of the case distinguishes them. A discussion of the conflict is given in Rush v. Bank, 71 Fed. Rep. 102. Union Trust Co. v. Rigdon, 93 Ill. 458, holds no tender necessary where it is beyond the power of the pledgee to restore. Loughborough v. McNevin, *supra*.

[3] Where the contract stipulates other than a money consideration, such contract is termed innominate.

[4] City of Col. v. Howard, 6 Ga. 213; Cullen v. Lord, 39 Iowa, 302; 40 Conn. 111; Thompson v. Harlow, 31 Ga. 348; Conrad v. Hildebrand, 69 Wis. 396; Clark v. United States, 95 U. S. 539; Zell v. Dunkle, 156 Pa. St. 353; Sims v. Chance, 7 Tex. 561; Stacy v. Knickerbocker Ice Co., 84 Wis. 614; Collins v. Bennett, 46 N. Y. 490; Rotch v. Hawes, 12 Pick. 136. The pledgee is not responsible where loss is occasioned by theft, where he uses due care. Foster v. Essex Bank, 17 Mass. 479; 9 Am. Dec. 168.

[5] Homer v. Twing, 3 Pick. 492; Campbell v. Stakes, 2 Wend. 138. If the thing hired is a horse, the bailee

exercise his right of election and sue *ex contractu* for the value of the goods.[1]

Repair of Hired Chattels.— The rule of the Roman law, that a bailee of a hired chattel is bound to keep the property in repair, is not followed by the common law.[2]

The general rule is that, in the absence of express agreement or custom, he is not liable to make repairs.[3]

Remedy Against Third Persons.—In case of injury to the bailment the general owner is entitled to bring the action; but if it is to gain possession, an action may only be brought by the party entitled to immediate possession.[4]

Locatio operis faciendi — the hiring of labor to be performed[5] upon some chattel, generally by an artisan or mechanic, or of mere care and attention to be bestowed in keeping it.

Bailments of this class fall under two heads:

Faciendi, properly so called, as where the service is in making repairs or manufacture of articles from materials furnished.[6]

Custodæ, where the service consists in safe keeping.

Lien.— The bailee has a lien for the agreed or reasonable value of the services performed and material furnished,[7] and he may enforce that lien against any part of the goods for the whole bill,[8] and may vindicate his right to hold them against any one dispossessing him.[9]

Ordinary skill and care are impliedly guaranteed in reference to the labor upon and keeping of the subject of bailment.[10]

must feed and water it; if a wagon, he must not overload it. Harrington v. Snyder, 3 Barb. 380.

[1] See Andrews' Steph. Pl., § 30 et seq.; 6 M. & W. 499. Should the bailor send his own servant the rule would be otherwise. Blake v. Ferris, 5 N. Y. 49.

[2] Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 50 Fed. Rep. 857.

[3] Id.; Higman v. Camody, 112 Ala. 267; Woodward v. Cutter, 33 Vt. 49.

[4] 13 Smedes & M. 589. Where the agreement was not to remove the goods, and they were removed by an officer making the attachment against bailee, such removal would not entitle bailor to immediate possession, nor to bring an action of replevin against the officer in his own name. Wade v. Mason, 78 Mass. 335; 74 Am. Dec. 597.

[5] Stewart v. Stone, 127 N. Y. 500.

[6] The bailee may furnish materials (Story on Bailm. 436) to an amount in value exceeding those delivered. Gregory v. Stryker, 2 Den. 628.

[7] Grinnell v. Cook, 3 Hill, 486.

[8] Morgan v. Congdon, 4 N. Y. 552.

[9] Eaton v. Lynde, 15 Mass. 242.

[10] Grant v. Button, 14 Johns. 377. Should the bailor be aware of the lack of skill in the bailee, he cannot be heard to complain. Felt v. School District, 24 Vt. 297.

The artisan may employ servants unless his personal service is stipulated for.[1]

A deviation from the service contracted for may defeat or modify the bailee's right of recovery *on the contract*,[2] and render it dependent upon the principles of a *quantum meruit*.

Classes of Custodæ.— Bailments to store and keep simply may be separated into those of a *private* and those of a *public nature*, and upon this classification mainly depends the question of care and diligence exacted of each.

An agister is one to whom horses, cattle or sheep are delivered for pasturage.

The agister obtains a special property as against strangers, but by the common law has no lien,[3] although by statutes in most of the states a lien is secured.[4]

He is bound to the exercise of ordinary care.[5]

Lodging and boarding-house keepers are those who carry on a private business of furnishing food and lodging on a special contract[6] to those whom they may choose to accept,[7] and become bailees by taking charge of the goods of the boarder.

A lien is generally given by statute for unpaid charges, and, when given, extends to permanent boarders as well as to transients.

A wharfinger is one who owns or keeps a wharf for the purpose of receiving and shipping merchandise to or from it for hire.[8]

He has a lien on the goods in his possession for his reasonable charges,[9] and also on the vessel for wharfage.[10]

[1] Hall v. Storrs, 7 Wis. 253; Day v. Holmes, 103 Mass. 306.

[2] Grant v. Button, *supra*.

[3] Bissell v. Pearce, 28 N. Y. 252; Allen v. Ham, 63 Me. 532. The same is true as to livery-stable keepers. Id. But it is held that a trainer of race horses has a lien at common law for his labor. Towle v. Raymond, 58 N. H. 64.

[4] Id. The courts of the different states are not in harmony as to whether this lien is superior to a prior chattel mortgage. That it is, is held in Case v. Allen, 21 Kan. 217; Bissell v. Pearce, *supra*. *Contra*, Sargent v. Usher, 55 N. H. 287. See *ante*, p. 383.

[5] *Post*, p. 907.

[6] Willard v. Reinhardt, 2 E. D. Smith, 148.

[7] Com. v. Cuncannon, 3 Brewst. (Pa.) 347; Phillips v. Evans, 64 Mo. 17.

[8] Bouvier's Law Dict. 660; The Geo. E. Berry, 25 Fed. Rep. 780.

[9] Johnson v. Schooner McDonough, Gilpin, 101; The Dora Matthews, 31 Fed. Rep. 619; The Mary K. Campbell, 31 Fed. Rep. 840.

[10] The Dora Matthews, 31 Fed. Rep. 619.

A warehouseman is one who keeps a public store-house and receives goods for storage for compensation.[1]

It is customary for a warehouseman to give a warehouse receipt[2] for the goods, and by the custom of merchants such a receipt, like a bill of lading, is regarded as negotiable or assignable so as to carry the title of the goods without delivery.[3]

He cannot, however, give a valid receipt for his own property in his own possession to secure a debt.[4]

It frequently happens that the business of warehouseman and common carrier are combined under one management and ownership, and, because different degrees of care are required of each, it frequently becomes an important question to determine when the duties of the one or the other begin and end.[5]

A warehouseman is responsible for ordinary care.[6] He is not an insurer, and is not liable for loss by theft,[7] fire[8] or inevitable casualty,[9] unless his negligence contributed to the loss.

He is bound to deliver the goods to the bailor or his assignee.[10]

Should he attorn to the purchaser of goods in his custody, he will be estopped from afterwards setting up any defect in the vendor's title.[11]

Lien.—He has a specific lien on the goods stored for the

[1] Munn v. Illinois, 94 U. S. 113; Tradesman's Nat. Bank v. Kent Mfg. Co., 186 Pa. St. 556; 65 Am. St. Rep. 876.

A bonded warehouse is one designated by the treasurer of the United States for the storage of merchandise imported into the United States, or of goods upon which excise duties are imposed, until such time as the duties, excise and customs thereon shall be paid. They are generally owned by private individuals, whose liability for loss is the same as required of other warehousemen. The United States is not responsible in case of any loss. Schwerin v. McKie, 51 N. Y. 180. When owned by the government they are called custom-houses.

[2] Dean v. Driggs, 137 N. Y. 274; 33 Am. St. Rep. 721.

[3] Zellner v. Mobley, 84 Ga. 746; 20 Am. St. Rep. 391.

[4] Franklin Nat. Bank v. Whitehead, 149 Ind. 560; 63 Am. St. Rep. 302; Thomas v. Boston & Providence R. R. Co., 10 Met. 472.

[5] Thomas v. Boston & Providence R. R. Co., 10 Met. 472; Mer. Disp. Co. v. Smith, 76 Ill. 520.

[6] Backus v. Start, 13 Fed. Rep. 69; Pike v. Chi. etc. R. Co., 40 Wis. 583; Aldrich v. Boston, etc. R. Co., 100 Mass. 31; Maybin v. South Carolina Ry. Co., 8 Rich. L. 240; 64 Am. Dec. 753.

[7] Lamb v. Western R. Co., 7 Allen, 98.

[8] Francis v. Dubuque, etc. R. Co., 25 Iowa, 60.

[9] Knapp v. Curtis, 9 Wend. 60; American Brewing Ass'n v. Talbot, 141 Mo. 674; 64 Mo. 545. See CARRIERS.

[10] Willard v. Bridge, 4 Barb. 361.

[11] Allenborough v. St. Catherine's Dock Co., 3 C. P. D. 450.

price of storage, and if a delivery of part of the goods is made the balance may be held for the whole bill.[1]

Postmasters occupy a relation somewhat similar to that of a bailee, but which differs in the particular that it does not arise by private contract,— the officer executing a public official duty. His liability rests on the ground of negligent performance of that duty, and not on the basis of a contract of bailment.

Officers are not responsible for the defaults or negligence of assistants, unless they are deputies, if they exercise that degree of care which a prudent man exercises in the superintendence of his own business.[2]

Such assistants are in a measure public officers and responsible for their own misfeasance.[3]

Hotel-keeper or Innkeeper.[4] — An innkeeper is one who habitually makes a business of furnishing accommodations and entertainment for all who choose to visit his place. He becomes a bailee by taking charge of their goods for hire.[5]

By reason of the public nature of the business, they are bound to receive, at any time of day or night, all who conduct themselves properly [6] and are ready to pay for entertainment, and they are obliged to accept and care for a reasonable amount of luggage, clothing, jewelry and money [7] of all comers.

An innkeeper differs from a boarding or lodging-house keeper in that he must receive any who may come, and entertain them from day to day upon an implied contract, while the latter receives only those he may choose, under an express contract, generally for a specified time.[8]

Guests and Boarders.— Those who come to an inn or hotel for transient entertainment are termed guests,[9] while those who

[1] Schmidt v. Blood, 9 Wend. 268; Low v. Martin, 18 Ill. 286.

[2] Dunlap v. Monroe, 7 Cranch, 242.

[3] Story on Bailm. 462.

[4] We deal here only with the responsibility of innkeepers as bailees.

[5] Fay v. Pac. Imp. Co., 93 Cal. 253; 27 Am. St. Rep. 198.

A restaurant keeper is not responsible as an innkeeper. Lewis v. Hitchcock, 10 Fed. Rep. 4.

[6] State v. Steele, 106 N. C. 766; 19 Am. St. Rep. 573; Markham v. Brown, 8 N. H. 523.

[7] Smith v. Wilson, 36 Minn. 334; 1 Am. St. Rep. 669.

[8] Cooley's Elem. of Torts, 265; Willard v. Reinhardt, 2 E. D. Smith, 148; Fay v. Pac. Imp. Co., *supra.*

[9] See Orchard v. Bush (1898), 2 Q. B. D. 284. The common law confined the rights of a guest to *travelers* between different places (Thompson v. Lacy, 3 B. & Ald. 283; Calye's Case,

come on a special contract to board, *i. e.*, take up their residence at the hotel for the time being, are termed boarders.[1]

Liability to Guest.— An innkeeper insures the safety of the property of the guest intrusted to his care, and he is not excused for any loss unless caused by the act of God, the public enemy or the fault of the guest.[2]

At common law the innkeeper could not relieve himself from responsibility by posting notices in the rooms. Now, however, by statute in England and many of the states he may restrict his liability to a certain extent by strict compliance with the terms of statutes enacted for the purpose.[3]

What constitutes a delivery into his care varies according to the nature of the article.[4] It is generally sufficient if the article is in the inn impliedly under his care.[5]

The manner of delivery of money and other valuables may be, and usually is, prescribed by the innkeeper; and if the guest is properly notified of such regulations, either by posting printed slips in each room, or by actual notice, the host is not responsible.[6]

To Boarders.— The hotel-keeper is not responsible for the loss of a boarder's property unless he has been guilty of negli-

8 Co. 31), but modern law has abandoned this idea. Wintermute v. Clark, 5 Sandf. 242; Walling v. Potter, 35 Conn. 183; Magee v. Pac. Imp. Co., 98 Cal. 678; 35 Am. St. Rep. 199.

[1] Moore v. Long Beach D. Co., 87 Cal. 483; 22 Am. St. Rep. 265; Orchard v. Potter, 35 Conn. 183–185.

Boarder and guest distinguished.— Fixing of time and price will not change the character of the relationship so that the guest will become a boarder. Berkshire Co. v. Proctor, 7 Cush. 417; Pollock v. Landis, 36 Iowa, 651; Fay v. Imp. Co., *supra;* Hall v. Pike, 100 Mass. 495; Norcross v. Norcross, 53 Me. 163. An army or navy officer having no fixed home, but spending his time at hotels, is a guest (Hancock v. Rand, 94 N. Y. 1); but a railway conductor, who stops at hotels located at the end of his usual trip, has been held to be a boarder. Horner v. Harvey, 3 N. M. 307. See McDaniels v. Robinson, 26 Vt. 316.

[2] Cooley's Elem. of Torts, 366; Bowell v. De Wald, 2 Ind. App. 303; 50 Am. St. Rep. 246; Sholtz v. Wall, 134 Pa. St. 262; 19 Am. St. Rep. 686. In several states the innkeeper is not held to the liability of an insurer. The rule in these states is that the loss of the goods makes out only a *prima facie* case of liability, and the innkeeper may exonerate himself by showing that there was no negligence on his part. Eden v. Drey, 75 Ill. App. 105; Cutter v. Bonney, 30 Mich. 259.

[3] Chamberlain v. West, 37 Minn. 54; Cooley's Elem. of Torts, 267.

[4] Clutt v. Wiggins, 14 Johns. 175; Piper v. Manny, 21 Wend. 282.

[5] Story on Bailm. 471; Cayle's Case, 8 Co. Rep. 32.

[6] Kellogg v. Sweeney, 1 Lans. 397.

gence, either personally or through a servant, where he has exercised ordinary care in the selection of the servant.[1]

Lien.— Because of this extraordinary liability, an innkeeper has a lien on the goods and baggage of his guest for his reasonable charges.[2]

Such lien covers all goods brought by the guest to the hotel, even if they are goods of a third person; but he cannot seize and take from his guest other articles and subject them to the lien.[3]

Forwarding merchants are those who, for compensation, receive and forward goods, advancing the transportation charges.[4] He is responsible only for ordinary care in the selection of carriers.

Factors (or other bailiffs) are those to whom goods are consigned by the principal or owner, to be sold by him for a commission. He is responsible for reasonable skill and ordinary care of the goods, and bound to follow the instructions of the principal.[5]

Sleeping-car proprietors furnish cars to railroads, reserving the right to collect pay for the use of the berths. They put their own conductors and porters in charge,[6] and take charge of the personal property of the travelers, much as do innkeepers, but they are not common carriers.[7]

Liability.— Their duty is to exercise reasonable care for the safety of the baggage brought by the passenger into the car,[8] but they are not insurers.[9]

[1] Taylor v. Downey, 104 Mich. 502; 29 L. R. A. 92; Moore v. Long Beach Co., 87 Cal. 483; 22 Am. St. Rep. 265.

[2] Pollock v. Landis, 36 Iowa, 651; Case v. Fogg, 46 Mo. 44.

[3] Singer Mfg. Co. v. Miller, 52 Minn. 516; 38 Am. St. Rep. 568.

[4] He has no property in the vessels or wagons in which the goods are transported and no interest in the freight. Bouvier's Law Dict. 610; Blossom v. Griffin, 13 N. Y. 569; Maybin v. S. C. Ry. Co., 8 Rich. Law, 240; 64 Am. Dec. 753.

[5] Bouv. Law Dict. 370; Marfield v. Goodhue, 3 N. Y. 62; Brown v. McGran, 14 Pet. 479.

[6] Pullman P. C. Co. v. Matthews, 74 Tex. 654; 15 Am. St. Rep. 873.

[7] Notes 26 Am. St. Rep. 332.

[8] Pullman P. C. Co. v. Matthews, 74 Tex. 654; 15 Am. St. Rep. 873; Carpenter v. Railroad Co., 124 N. Y. 53.

[9] Woodruff Sleeping-Car Co. v. Diehl, 84 Ind. 474; Pullman P. C. Co. v. Gavin, 93 Tenn. 53; Pullman P. C. Co. v. Smith, 73 Ill. 360; Duval v. Pullman P. C. Co., 62 Fed. Rep. 265; Lewis v. New York P. C. Co., 143 Mass. 267. The contrary is held in a few cases. Pullman P. C. Co. v. Lowe, 28 Neb. 239.

Locatio mercium vehendarum is the carriage of goods for hire.[1]

There are two species of this bailment, viz.: Private and public, or common carriers.[2]

A private carrier is one who occasionally transports goods from place to place on a special employment for or without compensation. The latter class have had sufficient consideration under the head of *mandatum*.

Private carriers for hire are liable only for ordinary diligence.[3]

The courts are not in harmony in allowing a lien to private carriers for charges.[4] The reason for this divergence is that the lien is given to compensate for the extra hazard of insuring the safety.

A common or public carrier of goods is one who engages in the business of transporting goods or freight on land or water for all who choose to employ him for reward.[5] He obtains a special property in the goods, and one who steals them may be indicted as having stolen the goods of the carrier.[6]

The proprietors of stage-coaches, omnibuses, railways, also ship-owners, draymen, etc., belong to this class.[7]

The business being a public one, there is no choice but to accept goods tendered for transportation,[8] if of the kind the carrier holds himself out to carry,[9] providing the owner of the goods will pay the freight.[10]

If he refuse transportation of goods properly presented, he must respond in damages to the owner.[11]

[1] It is usual to say carrying from place to place, but the latter words are implied.

[2] Coggs v. Bernard was a case of private carrier.

[3] United States v. Power, 6 Mont. 271.

[4] Hutchinson on Carriers, § 46; Jones on Liens, sec. 276. *Contra*, Fuller v. Bradley, 25 Pa. St. 120.

[5] Dwight v. Brewster, 1 Pick. 50; Liverpool Steam Co. v. Phenix Ins. Co., 129 U. S. 397. A *railroad carrying mail* is not a common carrier of the mail. Central R. R. Co. v. Lamphey, 76 Ala. 357. Nor is a *raftsman* of logs. Shaw v. Davis, 7 Mich. 318.

[6] Hutchinson on Car., § 425.

[7] Redfield on Com. Car., sec. 21.

[8] Kirby v. Western Union Tel. Co., 4 S. Dak. 105; 46 Am. St. Rep. 765.

[9] Varble v. Bigley, 14 Bush, 698; Schloss v. Wood, 11 Colo. 287.

[10] Citizens' Bank v. Nantucket S. B. Co., 2 Story, 16; Kirtland v. Montgomery, 1 Swan, 452; Chicago, etc. R. R. Co. v. Jones, 149 Ill. 361; 41 Am. St. Rep. 278.

[11] He may refuse where goods are improperly packed, or otherwise unfit for carriage (Union Ex. Co. v. Graham, 26 Ohio St. 595), or where there is good ground to believe that goods will be harmful to other goods al-

The carrier undertakes to carry only by the usual and customary routes.[1]

Delivery to Carrier.— The trust reposed in the carrier is the basis of his liability,[2] and nothing short of a complete delivery to him will raise the liability. Where a passenger retains custody of baggage the carrier is responsible only as an ordinary bailee for hire.[3]

The delivery must also be for immediate transportation, otherwise he will be responsible only as warehouseman.[4]

No receipt, bill of lading, or other writing is necessary in order to constitute a delivery and acceptance,[5] but where such are given their terms cannot be varied by parol.[6]

Liability for Loss.— Unless otherwise provided by contract, a common carrier is an insurer of the goods he carries against loss or damage, except in the following cases:[7]

1. Where the loss is occasioned by the act of God.[8] 2. The act of the public enemy.[9] 3 Acts of the public author-

ready received. Nitro-Glycerine Case, 15 Wall. 524. The duties and obligations may be enforced through the courts and legislative power. Lough v. Outerbridge, 143 N. Y. 271; 42 Am. St. Rep. 712.

[1] Fish v. Chapman, 2 Ga. 349; Lough v. Outerbridge, *supra;* Merchants' Dis. Tran. Co. v. Kohn, 76 Ill. 520.

[2] Hollister v. Nowlen, 19 Wend. 234.

[3] Tower v. Railroad Co., 7 Hill, 47.

[4] Barron v. Eldridge, 100 Mass. 455; Iron Mt. Ry. Co. v. Knight, 122 U. S. 79; Grand Tower, etc. Co. v. Ullman, 89 Ill. 244.

[5] The Caledonia, 43 Fed. Rep. 681.

[6] Louisville, etc. Ry. Co. v. Fulghan, 91 Ala. 555. See BILL OF LADING.

[7] Hutchinson on Car., § 170*a;* McCarthy v. Louisville, etc. R. R. Co., 102 Ala. 193; McDuffee v. Railway Co., 52 N. H. 430; Willock v. Pa. R. R. Co., 166 Pa. St. 184; 45 Am. St. Rep. 674.

[8] Colt v. McMechen, 6 Johns. 160; Davis v. Railroad Co., 89 Mo. 340.

Act of God.— Accidents which are beyond human power to prevent and which are the result of natural causes, such as earthquake, lightning, storm, death, etc., are termed accidents by the act of God. Long v. Pa. R. R. Co., 147 Pa. St. 343; Maybin v. S. C. Ry. Co., 8 Rich. Law, 240; 64 Am. Dec. 753; Merchants' Dispatch Co. v. Smith, 76 Ill. 542.

[9] Coggs v. Bernard, 2 Ld. Raym. 909; Liverpool Steamship Co. v. Phenix Ins. Co., 129 U. S. 397.

Public enemy.— By the public enemy is understood a nation in open war against our own, and not merely mobs, highway robbers, thieves or strikers. Pirates are enemies of all the world, and would come under this head. See Railway Co. v. Nevill, 60 Ark. 375; 46 Am. St. Rep. 208.

Strikes.— When there is an unreasonable delay in transportation, caused by mere refusal of the carrier's employees to work, the carrier is held liable. Read v. St. L., K. C. & N. R. Co., 60 Nev. 199; Pittsburgh, Ft. W. & C. R. Co. v. Hazen, 84 Ill. 36; 25 Am. Rep. 422; Haas v. K. C., Ft. S. & G. R. Co., 81 Ga. 792. The rule is otherwise where, as is generally the case, the strike is accompanied by intimidation and mob vio-

ity.[1] 4. The act of the shipper;[2] or 5. Inherent nature of the goods;[3] and even then if his negligence contributes to the loss.

Live-stock.— A carrier of live-stock is not an insurer of such property.[4]

He is bound to furnish reasonably safe cars[5] and to transport the car and its contents with ordinary prudence, skill and care, and with reasonable dispatch.[6]

He is not liable for injury occurring from the inherent viciousness of the stock.[7]

Limitation of Liability.— The policy of the law of common carriers as well as all other public bailments is to secure the utmost degree of care and diligence in the performance of the duties of the bailee.

To enforce this the rule was early established that they were insurers of the goods intrusted to them,[8] and that as to passengers they were obliged to exercise the highest degree of care.

A common carrier has a double liability as to the goods en-

lence which the carrier cannot by reasonable efforts overcome. Grismer v. L. S. & M. S. R. Co., 102 N. Y. 563; 55 Am. Rep. 837, and cases cited in note to Empire Transp. Co. v. Phila. & R. Coal & I. Co., 35 L. R. A. 623.

[1] Bliven v. Railroad Co., 46 N. Y. 407.

Acts of public authority.— Where goods are seized under legal process, or are condemned to be destroyed by the proper authorities as having become, without the owner's fault, obnoxious to the police regulations while in carrier's hands, he will not be responsible for their loss; as where they are infected by disease, or are intoxicating liquors intended for use or sale contrary to the laws of the state. Railroad Co. v. O'Donnell, 49 Ohio St. 489; 34 Am. St. Rep. 579.

[2] Gibbon v. Paynton, 4 Burr. 2298; Phillips v. Earle, 8 Pick. 182. Where the owner contributes in any manner to the loss, or is guilty of fraud in not informing carrier fully of the character of the goods shipped, he cannot hold the carrier responsible. McCarthy v. Louisville R. R. Co., 102 Ala. 193; 48 Am. St. Rep. 29.

[3] Mynard v. S. B. & N. Y. R. R. Co., 71 N. Y. 100. Losses occasioned by the inherent nature of the chattel are such as decay of perishable fruits and vegetables, the natural death of animals, or the viciousness of animals whereby they injure themselves, etc. Central R. R. Co. v. Hasselkus, 91 Ga. 382; 44 Am. St. Rep. 37; Selby v. Wilmington, etc. Ry. Co., 113 N. C. 588; 37 Am. St. Rep. 635.

[4] Heller v. Chicago & G. T. Ry. Co., 109 Mich. 53; 63 Am. St. Rep. 541.

[5] Selby v. Wilmington, etc. Ry. Co., 113 N. C. 588; 37 Am. St. Rep. 635; Schaeffer v. Philadelphia, etc. R. R. Co., 168 Pa. St. 209; Richmond, etc. R. R. Co. v. Trousdale, 99 Ala. 389.

[6] Heller v. Chicago & G. T. Ry. Co., *supra;* Toledo, etc. Ry. Co. v. Hamilton, 76 Ill. 393.

[7] Michigan, etc. R. R. Co. v. McDonough, 21 Mich. 165; Betts v. Chicago, R. I. & Pac. Ry. Co., 92 Iowa, 343.

[8] See *supra*, p. 900.

trusted to his care; one as an insurer, and the other in regard to his negligence or care, although it would seem that the former includes the latter.[1]

It is uniformly held that the liability as insurer may be limited either by express stipulations or by notice brought home to the bailor.[2]

A common carrier cannot refuse to accept goods for transportation if the shipper declines to waive his rights with respect to the carrier's common-law liability.[3]

In most of the states, on the ground of public policy, stipulations against the liability of carriers from the consequences of their own negligence are held invalid.[4] A few states uphold such contracts to the extent even of exempting against gross negligence.[5] Other states distinguish between gross and

[1] Railroad Co. v. Lockwood, 17 Wall. 363.

[2] Railroad Co. v. Lockwood, *supra;* Liverpool, etc. S. S. Co. v. Phenix Ins. Co., 129 U. S. 397; Inman v. Railway Co., id. 128.

[3] McMillan v. M. S. R. R. Co., 16 Mich. 111; Mich. Cent. R. R. Co. v. Hale, 6 Mich. 243; Pierce on Railroads, 416; Mo. Pac. R. R. Co. v. Fagan, 72 Tex. 127; 13 Am. St. Rep. 776. Statutes have been passed in a few states to the effect that a common carrier cannot limit his common-law liability by contract; *e. g.,* Iowa Code, sec. 1308; Rev. St. Tex. 1879, art. 278, tit. 13.

A carrier may limit his common-law liability by special contract, but a notice printed on the back of a receipt, and not signed by the consignor, will not constitute a binding limitation. Railroad Co. v. Manufacturing Co., 16 Wall. 318. A condition so printed limiting the carrier's liability to $10, unless extra payment is made, will be binding where passenger has had time to examine it thoroughly before embarking. Merrill v. Grinnell, 30 N. Y. 607; Dorr v. N. J. St. Nav. Co., 11 N. Y. 485; Kimball v. Rutland, etc. Ry. Co., 26 Vt. 247; 62 Am. Dec. 567; Anson, Cont. 18, 19.

Gould v. Hill, 2 Hill, 623, is one of the earliest cases where this question was involved, where carrier gave receipt for goods, stipulating he would not be responsible beyond the sum of $200 if they were stolen or lost by fire. The court here held that the carrier could not limit his common-law liability as insurer. Since the case of N. J. St. Nav. Co. v. Mer. Bank, 6 How. 344 (1848), the reverse has been uniformly held. See Morgantown Mfg. Co. v. Ohio, etc. Ry. Co., 121 N. C. 514; 61 Am. St. Rep. 679; Dixie Cigar Co. v. Southern Ex. Co., 120 N. C. 348; 58 Am. St. Rep. 795; Birds v. Railroads, 99 Tenn. 719; 63 Am. St. Rep. 856; Terre Haute R. R. Co. v. Sherwood, 132 Ind. 121; 32 Am. St. Rep. 239.

[4] Cooley's Elem. of Torts, 290; Abrams v. Milwaukee, etc. Ry. Co., 87 Wis. 485; 41 Am. St. Rep. 55; Chicago, etc. R. R. Co. v. Witty, 32 Neb. 275; 29 Am. St. Rep. 436; Duntley v. Boston & Me. R. R. Co., 66 N. H. 263; 49 Am. St. Rep. 610; Hudson v. North. Pac. Ry. Co., 92 Iowa, 231; 54 Am. St. Rep. 550.

[5] Magnin v. Dinsmore, 56 N. Y. 168;

ordinary negligence, and, while sanctioning the exemption against ordinary negligence, refuse to permit it as against gross negligence.[1]

By any departure from the stipulated method of transportation the carrier will be considered as having waived his exemptions under the special contract.[2]

Limiting a carrier's common-law liability is generally accomplished by a printed notice on the ticket or bill of lading.

By this contract mutual concessions are gained. For instance, the carrier escapes his common-law liability as insurer,[3] and the shipper gets a lower rate, or through transportation, *i. e.*, transportation beyond the carrier's route.

Termination of Liability — Notice.— There are two lines of decisions relative to this subject.

In 1854 the supreme court of Massachusetts laid down the rule that a common carrier's liability as insurer of goods ceased the moment the goods of the consignee were removed from its cars and placed in a safe place upon its platforms or within its depots, and from that time until the goods were delivered to the consignee its liability was that of a warehouseman.[4]

In 1856 the New Hampshire court laid down a different rule, holding that the carrier's liability as such did not cease until the consignee had had a reasonable time after the arrival of the goods to accept and remove them.[5]

Jennings v. Railroad Co., 127 N. Y. 438; Rathbone v. N. Y. Cent. & H. R. R. Co., 140 N. Y. 48.

[1] Arnold v. Illinois Central R. R. Co., 83 Ill. 273.

[2] Maghee v. Railroad Co., 45 N. Y. 514; Mer. Dist. Tr. Co. v. Kahn, 76 Ill. 520.

[3] Southcote's Case, *supra;* Forward v. Pittard, 1 T. R. 27.

[4] Norway Plains Co. v. Boston & M. R. Co., 1 Gray, 263; 61 Am. Dec. 143. This rule is followed in Illinois, Indiana, Iowa, Georgia, California, Missouri, North Carolina, Tennessee and South Carolina. See East Tenn., Va. & Ga. R. Co. v. Kelly, 91 Tenn. 699; 17 L. R. A. 691 and notes; Mer. Disp. Co. v. Smith, 76 Ill. 542.

[5] Hutchinson on Car., §§ 373–377; Moses v. Railroad Co., 32 N. H. 523. This rule is followed by the courts of Alabama, Louisiana, Kentucky, New Jersey, Kansas, Ohio, Vermont, Wisconsin, New York, Michigan, Minnesota, Texas, Connecticut and Pennsylvania.

See the case of Fenner v. Railroad Co., 44 N. Y. 505, which has covered the doctrine of notice quite thoroughly. Mo. Pac. R. Co. v. Nevill, 60 Ark. 375; 46 Am. St. Rep. 208; Berry v. W. Va. & Pittsb. R. R. Co., 44 W. Va. 538; 67 Am. St. Rep. 781. What is a reasonable time within the meaning of the New Hampshire rule is said to be such time as will enable one living in the vicinity of the place of delivery, in the ordinary course of business and in the usual

Both rules, however, will be modified in a given case by known usage or special contract.[1]

Delivery to Consignee.— It is the duty of the carrier to deliver the goods only to the true owner.[2] Fraud and imposition do not excuse;[3] and he is guilty of conversion except when the goods are taken from him by a superior legal title or on legal process.[4]

A carrier may not abandon goods uncalled for, but is required to exercise ordinary diligence and care in reference thereto, storing them in its own warehouse or selecting some other place reasonably safe, and storing same at the owner's expense.[5]

Lien.— A carrier has a lien for his charges so long as he retains possession of the goods.[6]

He may preserve the lien, after refusal or neglect of consignee to receive the goods, by storing in a warehouse.[7]

Discrimination.[8]— At common law, and in the absence of statutory regulations, a carrier may deal with those who employ him on unequal terms, if such terms are *just* and *reasonable* in each case.[9]

The question of what is *just* and *reasonable* is not easy of

hours of business, to inspect and remove the goods. Wood v. Crocker, 18 Wis. 345; 86 Am. Dec. 773; L. L. & G. R. Co. v. Maris, 16 Kan. 333.

[1] McMasters v. Railroad Co., 69 Pa. St. 374; Pindell v. Railway Co., 34 Mo. App. 675; Dresbach v. Railroad Co., 57 Cal. 462.

[2] Kohn v. Richmond, etc. R. R. Co., 37 S. C. 1; 34 Am. St. Rep. 726; Pac. Ex. Co. v. Shearer, 160 Ill. 215; 52 Am. St. Rep. 333. What is complete delivery is a question of law and fact, but court may pass upon the question where the testimony is not conflicting. Whitney Mfg. Co. v. Richmond, etc., 38 S. C. 365; 37 Am. St. Rep. 767; Fitchburg Ry. Co. v. Hanna, 6 Gray, 539; 66 Am. Dec. 429.

[3] Ibid., note; Mo. Pac. Ry. Co. v. Heidenheimer, 82 Tex. 195; 27 Am. St. Rep. 861.

[4] Hutchinson on Carriers, §§ 396–7. Stoppage *in transitu* is a good defense against the consignee. Mo. Pac. Ry. Co. v. Heidenheimer, *supra*.

[5] Gregg v. Ill. C. R. R. Co., 147 Ill. 550; 37 Am. St. Rep. 238; Cahn v. Mich. Cent. R. Co., 71 Ill. 96.

[6] Gregg v. Ill. C. R. R. Co., 147 Ill. 550; 37 Am. St. Rep. 237.

[7] Ibid.

[8] See INTERSTATE COMMERCE.

[9] Sargent v. Boston, etc. R. R. Co., 115 Mass. 422; Menacho v. Ward, 27 Fed. Rep. 529; Root v. Long Island R. R. Co., 114 N. Y. 300; 11 Am. St. Rep. 643; Cowden v. Pac. S. S. Co., 94 Cal. 470; 28 Am. St. Rep. 122; Cook v. Chicago, R. I. & Pac. R. R. Co., 81 Iowa, 551; 25 Am. St. Rep. 512. As to proper basis of all calculation as to what is just and reasonable, see Smyth v. Ames, 169 U. S. 466; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649. See also Interstate Com. Com. v. Ala. Mid. R. Co., 168 U. S. 144; Parsons v. Chi. & N. W. R. Co., 167 U. S. 447; Tex. & P. R. Co. v. Interstate Com. Com., 162 U. S. 197; Interstate Com. Com. v. Detroit, G. H. & M. R. Co., 167 U. S. 633; Wight v.

determination. A discrimination against a particular locality or class of persons would be unjust unless there is some good reason for it.[1]

Connecting Lines.[2]—A carrier is not obliged to accept goods for shipment beyond his own terminus, but he may by contract become liable as carrier until goods are safely delivered to the consignee.[3]

The rule adopted by the famous English case of *Muschamp v. Lancaster & Preston Junction R. Co.*,[4] that a carrier accepting goods for a point beyond his line thereby takes upon himself the duty of delivering them to the consignee, becoming responsible for the damage or loss thereto, has been followed in many states,[5] but the majority of the states have adopted the rule that, in the absence of an express agreement to the contrary, a carrier is liable as such only to the extent of his own line.[6]

He may at all times limit his responsibility to the extent of his own line, even in those states where the so-called English rule prevails.[7]

Baggage may be defined as those articles which a passenger carries with him for convenience, necessity or amusement.

For such articles a carrier is an insurer.[8]

United States, 167 U. S. 512; Cincinnati, N. O. & T. P. R. Co. v. Interstate Com. Com., 162 U. S. 184.

[1] Chicago R. R. Co. v. People, 67 Ill. 11; 16 Am. Rep. 599. A mere inequality of charge is not conclusive evidence of discrimination. Bayles v. Kansas, etc. Ry. Co., 13 Colo. 181. Where a large quantity of freight is shipped, a lower rate would be just and reasonable. Portsmouth, etc. R. R. Co. v. Forsaith, 59 N. H. 122; Schofield v. Railway Co., 43 Ohio St. 571. Or in case of longer distances. Hersh v. Northern C. Ry. Co., 74 Pa. St. 188.

As to express companies.—Railroad companies are not obliged to furnish all independent express companies equal accommodations. The Express Cases, 117 U. S. 1.

[2] A connecting carrier is one whose route, not being the first one, lies somewhere between the point of shipment and the destination of the consignment. He acts as agent of the first carrier. Nanson v. Jacobs, 12 Mo. App. 125.

[3] Ill. Cent. Ry. Co. v. Copeland, 24 Ill. 332; Gray v. Jackson, 51 N. H. 9.

[4] 8 M. & W. 421; St. L. So. Ry. Co. v. Elgin Condensed Milk Co., 175 Ill. 557.

[5] Wabash, etc. Ry. Co. v. Jaggerman, 115 Ill. 407; Atlanta, etc. R. Co. v. Tex. Grate Co., 81 Ga. 602.

[6] Gray v. Jackson, *supra;* Condict v. Railroad Co., 54 N. Y. 502; Central R. R. Co. v. Hasselkus, 91 Ga. 382; 44 Am. St. Rep. 37.

[7] Ill. Cent. R. R. Co. v. Frankenberg, 54 Ill. 88; Bird v. Railroads, 99 Tenn. 710; 63 Am. St. Rep. 856.

[8] Hannibal R. Co. v. Swift, 12 Wall. 262.

As to what would be baggage, and also as to what would be a reasonable amount, would depend upon the nature of the journey, the condition in life of the passenger, etc., all of which are questions of fact for the jury.[1]

Care and Negligence — Summary.— In every bailment, as we have seen, some degree of care is required, but each species has its peculiar quality and degree.

There are cases where the question of the liability of the bailee to redeliver safely the goods, or be responsible for their loss or damage, does not depend upon the presence or absence of negligence.

The degree of care or extent of liability does not depend upon the presence or absence of a consideration, but upon other considerations, deemed in the eye of the law sufficient to impose or excuse a high degree of care.

Those bailees who are insurers cannot answer the owner by saying that they exercised the utmost care. Theirs is an absolute liability to restore.

A depositum, because he receives the goods to keep without pay, and is performing an act for the benefit of the bailor, is only required to exercise slight care, and is liable only for gross negligence.[2]

A commodatum being for the accommodation and benefit of the bailee, and without compensation, the bailee must exercise

[1] Tools of trade or implements of employment may be baggage. Merrill v. Grinnell, 30 N. Y. 594. A right of action against a carrier is assignable; but where the passenger is the bailee of goods, he alone is the proper party to bring suit. Weed v. Saratoga & Schenectady R. R. Co., 19 Wend. 534. Where a commercial traveler purchases a ticket of a carrier and pays for the transportation of his samples as excess baggage, the contract for the transportation of himself and personal baggage and that for the merchandise are independent, and each will support a separate action. Talcott v. Wabash R. Co., 54 N. E. Rep. 1; Merrill v. Grinnell, *supra;* Metz v. California, etc. R. R. Co., 85 Cal. 319; 20 Am. St. Rep. 228; Oakes v. Northern, etc. R. R. Co., 20 Oreg. 392; 23 Am. St. Rep. 126; New York Cent. H. R. R. Co. v. Fraloff, 100 U. S. 24. See further as to what may be taken as baggage, Staub v. Kendrick, 121 Ind. 226; 6 L. R. A. 619.

[2] Southcote's case was a deposit where the bailee expressly agreed to keep safely. *Held*, that he became an insurer; but this case has not been followed. Foster v. Essex, 17 Mass. 479; National Bank v. Graham, 100 U. S. 699.

the highest degree of care, having regard to the nature of the article and the circumstances of the case.[1]

A mandatum being gratuitous and for the benefit of the bailor, the bailee is required to exercise only slight care, and is liable only for gross negligence.[2]

A pledgee is not an insurer, but by a contract agreeing to accept and receive the goods as security and redeliver them on payment, he may make himself liable absolutely to restore them; he is bound to exercise ordinary care, and is responsible for ordinary negligence.[3]

Of those bailments falling under the head of *locatio* the following are required to exercise ordinary care: Artisans,[4] agisters,[5] boarding and lodging-house keepers,[6] wharfingers,[7] warehousemen,[8] forwarding merchants, factors and sleeping-car proprietors.[9]

Innkeepers and common carriers are insurers.[10]

SEC. 620. *Innkeeper's Duty to Guest.*— The duty of the public hotel-keeper in the reception and treatment of his guest rests upon different principles. The guest, being a rational being, is required to exercise due care for his own safety, and the hotel-keeper is only required to exercise ordinary care and reasonable diligence. He is not an insurer against accident or death.[11]

Sufficient has been said in reference to the duty to receive and not to discriminate, the law of the United States against discriminations being embodied in the amendment to the federal constitution heretofore spoken of.[12]

[1] Prince v. Alabama State Fair, 106 Ala. 340; 28 L. R. A. 716; Alvord v. Davenport, 43 Vt. 30; Edwards on Bailm. 138-141; Wilcox v. Hogan, 5 Ind. 546.

[2] Story on Bailm., § 174; Coggs v. Bernard was a *mandatum*. Tracy v. Wood, 3 Mason, 132; Dudley v. Camden & P. Ferry Co., 42 N. J. L. 25; Kincheloe v. Priest, 89 Mo. 240.

[3] Kimball v. Hildreth, 8 Allen, 167; Roberts v. Thompson, 14 Ohio St. 1; McLemore v. Louisiana St. Bank, 91 U. S. 27; Drake v. White, 117 Mass. 10; Preston v. Prather, 137 U. S. 604.

[4] Grant v. Button, 14 Johns. 377.

[5] Bissell v. Pierce, 28 N. Y. 252; Union Stock Y. & T. Co. v. Mallory, etc. Co., 157 Ill. 554; 48 Am. St. Rep. 341.

[6] Taylor v. Downey, 104 Mich. 502; 29 L. R. A. 92.

[7] Willey v. Allegheny City, 118 Pa. St. 490; 4 Am. St. Rep. 608; Rodgers v. Stophel, 32 Pa. St. 111; 72 Am. Dec. 775.

[8] *Ante*, p. 895.

[9] *Ante*, p. 898.

[10] *Ante*, pp. 897, 900.

[11] Weeks v. McNulty (Tenn., Nov. 12, 1898).

[12] *Supra*, p. 627. The innkeeper may turn away a would-be guest who is infected with a contagious disease. A guest who comes in a disorderly manner may be refused, and a dis-

Sec. 621. *Carriers of Passengers.*— We have spoken of the liability of common carriers in reference to the luggage of passengers, but the same rule does not obtain for the like reason given in the case of innkeepers.

A common carrier is not liable as an insurer of the life or safety of passengers, but he is bound to exercise the highest degree of care. In case of an injury by accident a presumption of negligence is indulged. This is a rule peculiar to the law of common carriers, and is based upon the policy to stimulate vigilance and the fact that the carrier has much better facilities for making proof of the circumstances attending an injury.[1] The applicability of the rule where there is an injury not accompanied by an accident disturbing the road or vehicle is questioned.[2]

Cooley in his Elements of Torts says: "Presumptions accept the ordinary and probable as true until it is shown not to be

orderly guest may be removed. But one turned away without cause, before or after being received, may sustain an action. McCarthy v. Niskern, 22 Minn. 90. The state legislature may establish as a regulation of trade that every citizen, regardless of race or color, shall receive equal accommodation at the hands of innkeepers and others catering to public patronage. Donnell v. State, 48 Miss. 661; Ferguson v. Gies, 82 Mich. 358; 9 L. R. A. 589.

[1] Gleeson v. V. M. Ry. Co., 140 U. S. 435. In this case it is said: "Since the decisions in Stokes v. Saltonstall, 13 Pet. 181, and Railroad Co. v. Pollard, 22 Wall. 341, it has been settled law in this court that the happening of an injurious accident is in passenger cases *prima facie* evidence of negligence on the part of the carrier, and that (the passenger being himself in the exercise of due care), the burden then rests upon the carrier to show that its whole duty was performed and that the injury was unavoidable by human foresight. The rule announced in those cases has received general acceptance and was followed at the present term in Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551." Eagle Packet Co. v. Defries, 94 Ill. 598. There is much diversity of language in the authorities upon the point whether the presumption arises in a case where there has been no violent accident. In the case of Railroad Co. v. Pollard, above cited, the injured woman was standing in the car combing her child's hair when she was thrown down and injured by a sudden concussion. But the presumption was held to exist even in such a case. Hutchinson on Carriers, § 800, cites cases in support of language of a contrary import.

[2] The rule as stated in the text is very generally indorsed, and applies where the injury is caused by a defect in the roads, cars or machinery, or by want of diligence in those employed, or by any other thing which the company can and ought to control as a part of its duty to carry the passenger safely. Thomas v. Philadelphia R. R. Co., 148 Pa. St. 180; 15 L. R. A. 416; Doyle v. C., St. P. & K. C. R. Co., 77 Iowa, 607; Thomp. Neg. 153; Lawson, Pres. Evid. 124.

true. . . . It is reasonable, when an injury to a railway passenger is shown, the cause of which is not apparent, to assume that it is chargeable to some want of care in the company or in some of its agents or servants."[1]

The relation arises by contract, but a passenger is not only he who is actually riding in the train, vehicle or vessel of the carrier, but one who contemplates a journey and is already at the place provided for receiving passengers for the purpose of taking passage,[2] equally with one who has already purchased a ticket and is waiting for the train.[3] The duty of the carrier begins when the relation begins, and ends only when it ceases, and includes the furnishing of safe and convenient platforms, approaches to the trains and waiting-rooms.[4]

Carriers have a right to make and enforce reasonable rules for the conduct of their business,[5] and they have a right to provide different cars for different classes of passengers, provided they make no unjust discriminations, such as are within the inhibition of the constitution and the general principles of the common law.[6]

The rule *respondeat superior* of course applies to the common carriers, and they are liable for the negligence or even the *wanton, wilful acts*[7] of their servants in reference to passengers.

The liability of carriers in such cases rests primarily upon their agreement or contract, but further upon duties imposed by law;[8] and violation of contract is so mingled with negligence or trespass as to allow election or choice of a form of action, either in tort or on contract.[9]

Sec. 622. *Insurance* is a contract to indemnify one against the consequences of an event uncertain to happen, or the time of the happening of which is uncertain.

[1] Cooley's Elem. of Torts, 280.

[2] Spangler v. C. & A. R. R. Co., 31 Ill. App. 406. The place must be under the control of the carrier. Donovan v. Hartford St. Ry. Co., 65 Conn. 201, 29 L. R. A. 297. In this case it is held that a person in the street hailing a street car, intending to take passage, is not a passenger. Thomp. Car. 43; Toledo, etc. Ry. Co. v. Beggs, 85 Ill. 80.

[3] W. & St. L. Ry. Co. v. Rector, 104 Ill. 296.

[4] C., K. & W. Ry. Co. v. Frazer, 55 Kan. 582; C. & A. Ry. Co. v. Scates, 90 Ill. 586.

[5] *Ante*, sec. 528.

[6] Ibid.

[7] L. S. & M. S. Ry. Co. v. Bodemer, 139 Ill. 596; Bouwmeester v. G. R. & I. Ry. Co., 63 Mich. 557; Cent. Ry. Co. v. Denson, 84 Ga. 774.

[8] Donovan v. Hartford Ry. Co., 65 Conn. 201.

[9] See Election of Remedies.

It will be seen that it bears a close resemblance to wager. Formerly, at common law, a marine policy of insurance guaranteeing profits of a voyage to one not having an interest in the ship or cargo was allowed.[1]

The common law did not forbid wagering policies of insurance, but by statute 14 Geo. III, ch. 48, it was provided that no insurance should be made on lives, or any other event, wherein the party insured had no interest.

A bottomry bond combines the features of a pledge, hypothecation or mortgage with those of an insurance contract.[2]

By this contract the owner or master of a ship may procure the repairs and supplies necessary[3] to enable the ship to complete her voyage, pledging the ship by a contract which provides that if the ship is lost there shall be no personal liability.[4]

In this feature the contract is like an insurance except that the payment is in advance.

If the ship survives the voyage, and if the debt be not paid, it may be sold; but there is no personal responsibility beyond the proceeds of the ship and tackle.[5] The lender takes the hazard of the ship's safety, and also furnishes the use of the

[1] Buchanan v. Ocean I. Co., 6 Cowen, 319–331.

[2] Slight differences exist between a loan on the ship (bottomry) and a *respondentia* loan or loan *on the cargo*, but the same instrument may embrace both. Insurance Co. v. Gossler, 96 U. S. 656.

[3] The necessity is essential to the validity of the contract and the question is open to proof. The Grapeshot, 9 Wall. 129.

The necessity which alone will authorize the hypothecation of a vessel by the master is twofold in its character: it must be a necessity of obtaining repairs or supplies in order to prosecute the voyage, and the owner and master must be so lacking in credit as to be compelled to resort to such an expedient. They must be unable to procure the required funds in any other way. Insurance Co. v. Gossler, 96 U. S. 645, citing Thomas v. Osborn, 19 How. 22. But in order to establish the lien it is not necessary to prove absolute and indispensable necessity. The Grapeshot, 9 Wall. 129.

[4] Id. This feature is essential. Braynard v. Hoppock, 32 N. Y. 571.

Construction.—Bottomry bonds are greatly favored in courts of admiralty, and, where there is no suspicion of fraud, every fair presumption is to be made to support them. The Prince George, 4 Moore, P. C. 28. The whole contract must be brought into view, and interpreted with reference to the nature of the obligations between the parties and the intention which they have manifested. O'Brien v. Miller, 168 U. S. 297.

[5] Braynard v. Hoppock, *supra*.

money, and is entitled as compensation to a premium for insurance and interest for the use of the money; hence the rate of premium is not regulated by the usury law.[1]

An insurable interest in the insured is by the modern law essential to the validity of the contract in any form of insurance.[2]

An interest which is insurable must be an interest in favor of the continuance of the life, and not an interest in its loss or destruction.[3] To create such an interest kinship is not necessary.[4]

A creditor, part owner, or, in case of life insurance, persons bearing such a relationship to another, whether by consanguinity, affinity or contract,[5] that they may suffer in their legal rights by accident or death,[6] have an insurable interest.[7] But a creditor may not obtain a policy largely disproportionate to the amount of his claim.[8]

In such cases it is not essential to the continuing validity of the policy that the same interest, or any interest, shall continue;[9] but in case of insurance on property, the policy usually stipulates as to the effect of changes of title.[10]

[1] Id.; 2 Cooley's Blk. (4th ed.) 457; The Grapeshot, *supra*.

[2] Tate v. Com. Bldg. Ass'n (Va.), 33 S. E. Rep. 382. Where there is a real interest to protect, the contract is not a wager. Briggs v. Com. M. Ins. Co., 125 N. Y. 7; 21 Am. St. Rep. 716.

Insurable interest—Estoppel.—Where plaintiff, who sold land on which was a building covered by an insurance policy, took back a judgment for part of the price, and under the advice of the secretary of the insurance company, who knew the circumstances, delivered the deed to the purchaser without transferring the policy, and paid the assessments under the policy for three years, up to the time of a loss, the company is estopped from asserting that the policy was void for want of an insurable interest in plaintiff. Light v. Countrymen's Mut. Fire Ins. Co., 169 Pa. St. 310. But it is not essential that the beneficiary have an insurable interest. Martin v. Stubbings, 126 Ill. 387; Guardian M. L. Co. v. Hogan, 80 Ill. 35.

[3] Holmes v. Gilman, 138 N. Y. 369; 34 Am. St. Rep. 463; Guardian M. L. Co. v. Hogan, 80 Ill. 35, 46.

[4] Carpenter v. U. S. etc. Ins. Co., 161 Pa. St. 9; 41 Am. St. Rep. 880.

[5] Insurance Co. v. Bailey, 13 Wall. 619.

[6] *E. g.*, a woman engaged to be married has an insurable interest in the life of her affianced husband. Chisholm v. Nat. Cap. I. Co., 52 Mo. 213.

[7] A creditor may insure the life of the debtor. Ruse v. Mut. Ben. L. I. Co., 23 N. Y. 518.

[8] Cammack v. Lewis, 15 Wall. 643.

[9] Bevin v. Conn. Mut. Co., 23 Conn. 244. Common carriers may insure freight. Savage v. Corn Exch. I. Co., 36 N. Y. 655.

[10] Bodle v. Chenango Mut. Co., 2 N. Y. 210.

And the creditor obtaining any form of insurance is not, unless by special contract, limited in his recovery to the amount of his debt.[1]

Classes of Insurance.— Parties have a right to insure against loss arising from any cause — death, personal accident, fire, flood, tornado, lightning, burglary; in fact, there is no reason why any contingency may not be guarded against by a contract of indemnity.[2]

Mutual insurance has attained great prominence within the last twenty years.[3] It is effected by the association of many persons, each contributing ratably to a common fund for the purpose of indemnifying the members or their beneficiaries against loss on account of the happening of the event insured against, whether it be death, accident, sickness, loss of employment,[4] etc. The members of such an association are those to whom the charter is granted and those who come in afterwards under provisions of the charter or constitution. If the charter is silent on the question of the admission of new members, the whole matter is in the control of the corporation.[5]

Assessment.— The contribution or premium is collected by assessment, and the prompt payment of valid assessments is always a condition to the obligation of the society.[6]

Fraternal Societies — Mutual Benefit Societies.— It has become quite common to unite in one association the features of a mutual insurance company with those of a fraternal organization;[7] but in order that both features be safely combined, both should be stated in the charter.

[1] Loomis v. Eagle Ins. Co., 6 Gray, 396. *Contra*, Barbers v. Larnes, Assignee, 51 S. W. Rep. 5.

[2] Title guarantee insurance is now common. By this contract one person agrees to indemnify another against the failure of title to land granted by a third. See form of such policy and construction of it. Minn. Title & Tr. Co. v. Drexel, 36 C. C. A. 50.

[3] The subject is exhaustively treated in Niblack on Mutual Benefit Societies.

[4] The certificate of membership constitutes (with the constitution and by-laws of the society) a contract of insurance. Supreme Council v. Forsinger, 125 Ind. 52; 21 Am. St. Rep. 196; Farmers' Mut. F. Ins. Co. v. Knight, 162 Ill. 470.

[5] Minnesota v. Sibley, 25 Minn. 387.

[6] Farmers' Mut. Fire Ins. Co. v. Knight, 162 Ill. 470.

[7] Because of this feature some states have by statute distinguished between pure insurance companies and those mutual benefit societies by expressly providing that the latter shall not be treated as ordinary insurance companies; *e. g.*, Ill. Stat., ch. 73. Such societies are not to all intents and

ANATOMY OF A TYPICAL FRATERNAL MUTUAL BENEFIT SOCIETY.

1. Membership.

1. *Corporators Who Procure Charter.*
2. *Members Who Join After Charter Granted.*

2. Franchises.

1. *Of the Corporators and Members.*
   122 Ill. 293.
   1. To be a corporation.
   2. To have a common name, sue and be sued, contract, take, grant, etc.
   3. To have a fixed location, separate and independent of the residence of the members.
   4. To have perpetual succession.
   5. The right to make by-laws for the guidance of officers — not inconsistent with the law of the state.
2. *Of the Corporation as a Corporation.*
   133 Ill. 413.
   1. To prosecute the business designated in the provision of charter relating to the object.
   2. To conduct it in the manner pointed out in the provisions relating to the plan.

3. Objects of the Corporation.

The fraternal feature, if not mentioned in the statute under which the association was incorporated, would seem to fall within the principle of Gas Trust Case, 130 Ill. 268. *Ante*, § 484.

1. *Indemnity by Assessment.*
   The two objects of the organization are entirely distinct.
   The indemnity feature is an indemnity to the living by the bounty of the dead.
   A mere compensation made for a consideration paid.
2. *Charity by Fraternity.*
   The fraternal feature is essentially different and distinct from the indemnity. It is a charity to the living by the living.

4. Agents or Agencies of the Corporation.

1. *Head Counsel.*
   The chief executive office.
   - Presides at meetings.
   - Has general supervision over affairs of the society.
2. *Head Clerk.*
   Ministerial office.
   - Duty as recorder.
   - Duty as bookkeeper.
3. *Directors.*
   58 Ill. 444–46.
   164 Ill. 427–45.
   1. Have the power and duty to manage the affairs of the corporation.
   2. Right to make by-laws — not inconsistent with the law of the state.
   3. Audit claim.
   4. All officers must report to them.
   5. Duty to protect the charter.
   6. To exercise the corporate powers of the corporation.
4. *The Fraternal Organization.*
   The prominence of the fraternal feature doubtless caused the separation of these societies into classes in the Illinois laws of 1893 and the designation of one class as "fraternal beneficiary societies," the other as "assessment" companies.
   1. The Head Camp (or Grand Lodge, or some similar designation). The representative body or congress of the society.
   2. The Local Camps. Constituent organizations, useful only in reference to the fraternal functions of the society.

The outline on page 913, made to exhibit the essential features of the *Modern Woodmen of America*, at present the largest of the fraternal benefit societies, may prove helpful in understanding and analyzing other similar societies.

Form.— The contract of insurance may be by parol or in writing, and between single individuals or corporations; in fact, there is no special feature essential to the formation and validity of the contract of insurance other than controls other contracts, although, perhaps, the business is almost entirely conducted by corporations and transacted in writing, and the evidence of the contract is called a policy, or a certificate of membership.[1]

It should be borne in mind that all state laws relating to the specific company, and all by-laws and writing referred to in the written certificate or policy delivered, are a part of the contract.[2]

Application.— The contract is usually brought about by an application for insurance, although, in fact, the applicant is generally solicited to apply by an agent of the insurance company, and in such cases the knowledge of facts or conduct of the agent may estop the company [3] from insisting upon statements in the application.[4]

Representations and Warranties.— Statements in the application are important because they are the basis of the promise to indemnify and are generally considered warranties that the facts stated exist;[5] and if the property is described as of one

purposes life insurance companies. Martin v. Stubbings, 126 Ill. 387, and cases cited; Niblack on Mutual Benefit Societies, 193.

[1] A certificate of membership is not altogether like a policy of insurance. Martin v. Stubbings, 126 Ill. 387.

[2] It has been deemed necessary in some states to provide by statute against such reference by obscure clauses in fine print. In Pennsylvania such a statute made void any such matter referred to unless a copy was attached to the application or policy. Ritter v. Mut. Life Co., 169 U. S. 144.

[3] Guardian M. L. Co. v. Hogan, 80 Ill. 35.

[4] *Statements made by medical examiner.*— The medical examiner of a mutual benefit society is the agent of the society, notwithstanding conditions to the contrary in the application and certificate; and where he fails to insert the answers to questions in the application as given by the assured, his act is the society's, and not the assured's. Royal Neighbors of America v. Roman, 177 Ill. 27.

[5] National Bank v. Union Ins. Co., 88 Cal. 497; 22 Am. St. Rep. 324; Wheaton v. N. B. Ins. Co., 76 Cal. 415; Ruggles v. Am. Cent. Ins. Co.,

character, when it is essentially different, there is no contract.[1]

In the insurance of property there is generally a survey or a statement in the application describing the property.[2]

In life insurance the medical examination upon the statements of the application, and the answers to questions put by the medical examiner, coupled with the statements in the application, are representations upon which the insurer acts.[3]

The policy or certificate contains the promises and obligations of the insurer.

Conditions and Covenants.— It is usual to stipulate in the contract conditions either as to the use to which the property shall be put,[4] or against changes of title[5] or the occupations which an individual shall follow,[6] or the places where he may travel,[7] or as to the manner of his death,[8] which shall not be considered as within the agreement of the parties. Such conditions must be strictly complied with, and a violation will defeat a recovery except where such conditions fall within some inhibition of the law, or are void as against public policy.[9]

Suicide.— A very common condition is that if a party shall die by suicide the insurer shall not be liable, and such a clause, if considered to mean a deliberate act of self-killing by a sane

114 N. Y. 415; Menk v. Home Ins. Co., 76 Cal. 51; 9 Am. St. Rep. 158.

[1] Thomas v. Com. N. Ass. Co., 162 Mass. 29; 44 Am. St. Rep. 323.

[2] Id. The survey may be in the office of the company and be referred to in the policy or application. Clinton v. Hope Ins. Co., 45 N. Y. 46.

[3] Hann v. National Union, 97 Mich. 513; 37 Am. St. Rep. 365; Cobb v. Mut. Ben. Ass'n, 153 Mass. 176.

[4] Wheeler v. Traders' Ins. Co., 62 N. H. 450; 13 Am. St. Rep. 582; Renshaw v. Missouri, etc. Ins. Co., 103 Mo. 595.

[5] In such cases change by any mode, as by descent, avoids the policy. Sherwood v. Agricultural Ins. Co., 73 N. Y. 447; Miller v. Germania Ins. Co., 54 Ill. App. 53.

[6] Berliner v. Travelers' Ins. Co., 121 Cal. 458; 66 Am. St. Rep. 49; Holliday v. Am. Mut. Accident Ass'n, 103 Iowa, 178.

[7] De Loy v. Travelers' Ins. Co., 171 Pa. St. 1; Meadows v. Pac. Mut. Life Ins. Co., 129 Mo. 76; Evans v. U. S. Life Ins. Co., 64 N. Y. 304.

[8] See form of this clause in Ritter v. Mut. L. Co., 169 U. S. 143; Union Cas. Co. v. Harroll, 98 Tenn. 591; 60 Am. St. Rep. 873; Willard v. Masonic E. A. Ass'n, 169 Mass. 288. It is held in some states that a temporary prohibited use only suspends the policy, which revives upon discontinuance. Insurance Co. of N. A. v. Garland, 108 Ill. 220.

[9] Dover G. Works Co. v. Am. F. I. Co., 1 Mar. (Del.) 32; 65 Am. St. Rep. 264.

person, is upheld,[1] but is not generally considered to include an insane act of self-destruction.[2]

Without any stipulation, wilful self-destruction will defeat liability, it not being within the contract; or if the contract were payable to a specified beneficiary, and he murder the assured, he could not be allowed to recover.[3]

It is therefore common to stipulate that death by the hand or act of the insured, "sane or insane," shall exempt from liability, and the courts are in harmony in enforcing the clause, although there is some confusion as to the condition of mind and character of act which will exempt, for it is not every act of self-destruction which will relieve.[4] The deceased must have been conscious of the act and its effect, but it is not necessary that he appreciate its moral nature.[5]

Rescission and Change in Policy.— In ordinary contracts it is entirely within the discretion of the parties to make any changes which they see fit, but in case of insurance of life a change cannot always be made in the beneficiary. With regard to ordinary life companies the rule is that no change can be made without the consent of the beneficiary.

Mutual benefit societies have, as a general rule, provisions in the constitution or by-laws under which the insured may, by complying with certain liabilities, name a new beneficiary without consulting the one formerly named.[6]

Where no reference is made to this subject in the constitution or by-laws, it is held by some authorities that these socie-

[1] Ritter v. Mut. Life Ins. Co., 169 U.S. 139; Supreme Lodge v. Kutscher, 179 Ill. 340.

[2] Ritter v. Mut. Life Ins. Co., *supra*. As to the degree of insanity, see this case; Mut. Ins. Co. v. Wisewell, 56 Kan. 765; 35 L. R. A. 258, and note; Grand Lodge v. Wheeting, 168 Ill. 408; 61 Am. St. Rep. 123.

[3] N. Y. Mut. Life Ins. Co. v. Armstrong, 117 U. S. 591, approved in 169 U. S. 156; Runk's Ex'rs v. Insurance Co., 28 U. S. App. 612. A distinction has been made between policies payable to the estate of the deceased and those payable to a third person, and it has been held that, where the policy is payable to the wife of the deceased or some specific beneficiary, a sane act of suicide will not defeat a recovery. Morris v. State Mut. Life Ins. Co., 183 Pa. St. 563.

[4] "If the insured was conscious of the physical nature of his act, and intended by it to cause his death, although at the time he was incapable of judging between right and wrong, and of understanding the moral consequences of what he was doing." Bigelow v. Berkshire Life Ins. Co., 93 U. S. 284.

[5] Id.

[6] Martin v. Stubbings, 126 Ill. 387; Lane v. Lane, 99 Tenn. 639.

ties are not sufficiently distinct from ordinary life companies to justify a different rule in this regard.[1]

Suit Against Person Causing Loss.— The subject of insurance, if it be property, may be injured or destroyed by the wilful or negligent act of a third person, and in such cases the general rule is that both the insured and insurer have a right to sue;[2] and it is no answer to a suit for damages by the owner against the tort-feasor to show that the assured has been paid the amount of his insurance policy;[3] but in case of a suit by the insured against the insurance company the case is different.[4]

Sec. 623. *Guaranty and Surety.*— *A guaranty* is a contract or obligation, collateral to some other original contract between the person whose contract is guaranteed and his obligee, by which the guarantor warrants the ability of the principal to fulfill his obligation, and makes himself liable to the promisee if the fulfillment of the promise cannot be enforced by the exercise of ordinary diligence.[5]

Suretyship is likewise a contract, *collateral* to an original undertaking of the principal, by which the surety binds himself to what the original promisor has agreed to do if he does not perform; *e. g.*, a surety on a bond for the faithful performance of covenants or agreements does not agree that he will perform, but he agrees that they shall be done or he himself will answer in the penal sum stipulated in the bond.[6] He is not a party to the principal's original promise.

It is said that "a surety is usually bound with his principal by the same instrument, executed at the same time and on the same consideration. He is an original promisor and debtor

[1] Love v. Clune (Colo.), 50 Pac. Rep. 34; Weisert v. Muehl, 81 Ky. 336; Block v. Association, 52 Ark. 201; 20 Am. St. Rep. 166. But many cases hold the contrary.

[2] 2 May, Insurance, sec. 454, p. 1033; Hall v. Long, 13 Wall. 367; Hartford Ins. Co. v. Pennell, 2 Ill. App. 609. An insurer subrogated for the insured by reason of payment of the policy may, in a suit against a common carrier brought in name of shipper, recover full amount of loss or damage, without regard to amount named in policy. Mobile & Mont. R. Co. v. Jurey, 111 U. S. 585.

[3] Harding v. Townshend, 43 Vt. 536; 5 Am. Rep. 304. In such cases the insured sues for the use of the company. United States v. Am. Tobacco Co., 116 U. S. 468.

[4] Niagara Ins. v. Fidelity Ins. Co., 123 Pa. St. 523; 10 Am. St. Rep. 540.

[5] Hall v. Farmer, 5 Den. 484. The derivation of the word "guarantee" is the same as "warrant," *garantir*. Burrill's Law Dict.; Smith's Mer. Law, p. 562, note.

[6] A surety may execute the contract in some cases. *Infra*, p. 925.

from the beginning, and is ordinarily held to know every default of his principal."[1]

But while it is true that the surety promises with the principal and in that sense the contract is an original one, it is also true that the surety's contract, whatever its form,[2] is distinct from the principal's original undertaking with the creditor, and is always collateral thereto;[3] and very frequently the bond or obligation which is signed by the principal and surety is an entirely distinct and different thing from the contract debt or obligation which the principal has already entered into or become liable upon;[4] so that in speaking of the contract of surety and guaranty being collateral contracts, it should be borne in mind that they are each collateral to the principal's original obligation, which is not merged in the contract of suretyship, and upon which he remains liable.[5] This is always the nature of a pure contract of surety.[6]

Suretyship and Guaranty Distinguished.— The contracts are distinguished in point of form, and they differ substantially in the nature of the obligation and extent of liability.

The distinguishing feature between suretyship and guaranty is in the nature of the obligation, which in the case of the guarantor is that, if the promisee by the use of diligence cannot compel the original promisor to pay, he will then respond to him in damages; or if it be a guaranty of payment, then he agrees absolutely to pay if the other does not; and in the latter he makes the same promise that a surety does, except that he does not make it in the same manner and at the same relative point of time.[7]

Both the contract of surety and contract of guaranty are conditional upon the non-performance of the principal, but the reason for the non-performance of the principal differs; for the

[1] Brandt on Suretyship, sec. 1.

[2] Parol evidence is admissible between parties having notice to show that a party to a contract is really a surety, although there is no indication of it in the contract. Drummond v. Yager, 10 Ill. App. 382; Morrison v. Drakely, 40 Conn. 552; Rose v. Wollenberg, 31 Oreg. 269; 65 Am. St. Rep. 828; Bulkeley v. Home, 62 Conn. 459; 21 L. R. A. 247.

[3] Otherwise the contract would be a mere joint contract, and the question of suretyship would not arise.

[4] For example, surety on a criminal bail bond.

[5] Nugent v. Wolfe, 111 Pa. St. 88.

[6] *Infra*, p. 921.

[7] Cowles v. Peck, 55 Conn. 251; 3 Am. St. Rep. 44. Compare Brandt on Suretyship, sec. 84.

surety agrees absolutely that the principal will pay or do, while the guarantor guarantees or warrants the ability of the principal to do or pay.[1]

In other words, the promise of the surety goes to the performance of the principal's contract, while the promise of the guarantor goes to the ability of the principal to perform.[2]

It is plain that there is a substantial difference in principle between the two promises, and that if the creditor is not active to enforce the obligation it relieves in case of a guarantor, whereas mere passive negligence will not have the same effect as to a surety.[3]

The difference in form between the two contracts indicates also a substantial difference.

The contract of suretyship is joint and several with the principal's obligation on the undertaking, and in the same contract with the principal. It may or may not express that one contracts as principal and the other as surety. But no contract which is joined in by the debtor and another can be one of mere guaranty.[4]

It cannot be said that the surety's contract is absolute in the extreme sense of this term. There may be such a degree of negligence as will discharge a surety, but it must be so gross as to be evidence of fraud;[5] or the principal's refusal to act may amount to such bad faith as to exonerate the surety.[6]

[1] Saint v. Wheeler & Wilson Co., 95 Ala. 362; 36 Am. St. Rep. 210.

[2] Before an action can be maintained against a *guarantor* it must be shown that the principal is *unable* to perform. "The surety says to the creditor: 'If your debtor will not pay, I will pay.' The guarantor says to him: 'Proceed first against the principal, and if he should not be able to pay, then you may proceed against me.' It has been said that there is no instance in the books of a guarantor contracting jointly with his principal. Much has been written upon this subject, but we think the above expresses the true distinction between the two classes of contracts." Manry v. Waxelbaum Co. (Ga.), 33 S. E. Rep. 701.

[3] Campbell v. Sherman, 121 Pa. St. 70; 31 Am. St. Rep. 735.

[4] Manry v. Waxelbaum Co. (Ga.), 33 S. E. Rep. 701; McMillan v. Bull's Head Bank, 32 Ind. 11; Saint v. Wheeler & Wilson Co., *supra*.

[5] Marberger v. Potts, 16 Pa. St. 9, and cases cited in 31 Am. St. Rep. 738. To discharge a surety from his contract there must be some positive act done by the plaintiff to the prejudice of the surety, such as the surrender of a security, or extending the time by a valid agreement, or such a degree of negligence as to imply connivance amounting to fraud. Mayor v. Stout, 52 N. J. L. 35.

[6] The rule in New York is that if a surety requests the creditor to proceed against the principal at a time

And again, a principal may forfeit his rights against the surety by affirmative acts, such as extending the time of payment,[1] or changing the terms of the contract or nature of that which is contemplated by the contract.[2] The surety will be discharged by an alteration of the contract, whether in a material point or not.[3] But the surety is not discharged by the discharge of the principal in a bond by operation of law.[4]

The Requisites of the Contract are in the Main the Same as Other Contracts.— It is not necessary that any prescribed form be followed in a contract of surety or guaranty. It is sufficient if the obligation appears from all the words of the contract and the circumstances; but in case of official bonds, to become binding as a statutory bond, the formalities prescribed should be strictly followed, and yet the obligation may exist as a common-law obligation.[5]

Notice of Acceptance.— In case of guaranties *of future acts*, it is obvious that the contract cannot be obligatory on the guarantor until acceptance, and it is thoroughly settled that he must be given direct and timely notice that the proffered guaranty is being acted on;[6] but the notice need not precede the giving of credit, and in the case of continuing guaranty need only be within a reasonable time after the limit of credit has been reached and default made.[7]

when the latter is solvent, and the creditor neglects so to do, and the principal subsequently becomes insolvent, the surety is exonerated. King v. Baldwin, 17 Johns. 384; Remsen v. Beekman, 25 N. Y. 552. In the last-mentioned case it is held that want of notice to the creditor of facts tending to show that the delay was likely to prove injurious to the surety makes no difference. The rule is substantially the same elsewhere, so far at least that the surety may compel the creditor to proceed against the debtor. Brandt, Sur., §§ 205, 206.

[1] Bishop v. Eaton, 161 Mass. 496; 42 Am. St. Rep. 437.

[2] Douglass v. Reynolds, 7 Pet. 113; First Nat. Bank v. Pierce, 99 Ill. 272; Benson v. Phipps, 87 Tex. 578; Bank of Uniontown v. Mackey, 140 U. S. 220; Union Mut. L. Ins. Co. v. Hanford, 143 U. S. 187; National Mech. B. Ass'n v. Conkling, 90 N. Y. 116; Page v. Krekey, 137 N. Y. 307; 21 L. R. A. 409; McCartney v. Ridgeway, 160 Ill. 129; 32 L. R. A. 555.

[3] Page v. Krekey, *supra*.

[4] Whereatt v. Ellis (Wis.), 79 N. W. Rep. 416.

[5] *Ante*, sec. 446; People v. Shuman, 10 Ill. App. 364. A bond is valid without the insertion of the name of the obligor in the body. Reed v. Kemp, 16 Ill. 449, citing Ex parte Fulton, 7 Cow. 484. It is valid even without the signature of the principal thereto. Board of Trustees v. Scheik, 10 Ill. App. 51–55.

[6] Powers v. Bumcratz, 12 Ohio St. 273; Douglass v. Reynolds, 7 Pet. 113.

[7] Id.; Manry v. Waxelbaum Co. (Ga.), 33 S. E. Rep. 701.

Statute of Frauds.— The fourth section of the statute provides that no action shall be brought to charge any one on a special promise to answer for the debt, default or miscarriage of another, unless the promise or a memorandum thereof shall be in writing.[1]

Are the contracts of suretyship and guaranty within this statute?

A pure contract of guaranty is clearly within the statute, but because of the idea that a surety is an original undertaking, some confusion of expression exists.

The question presents itself in several phases:

1st. As a contest between the creditor and the surety.[2]

2d. Between the principal debtor and the surety on the obligation to indemnify.

3d. Between sureties in questions relating to the obligation to contribute to each other or indemnify because of some special agreement varying the legal obligation.

4th. Or the contract may be to indemnify and save harmless one who becomes surety to a third person upon an obligation to a fourth, where the person promising does not bind himself to the principal creditor (fourth person), or with the principal debtor (third person), or in any way become a party to the surety contract.

A contract to be within the statute of frauds must be a collateral contract to answer for the principal's default on an original obligation.[3] It is plain the prime distinction for the purpose of determining whether these contracts concerning suretyship are within the statute is as to which of them constitutes an original and what a collateral agreement.[4]

But every pure contract of surety is a collateral contract agreeing to answer for the debt, default or miscarriage of another, and equally with the contract of guaranty within the statute,[5] though there are several contracts similar to or in-

[1] On the construction of the statute see *ante*, sec. 600, p. 739, and notes.

[2] There is much confusion in the decisions on these questions.

[3] Blank v. Dreher, 25 Ill. 293; *ante*, p. 739, note 3; Nugent v. Wolfe, 111 Pa. St. 88.

[4] Id.; Chapin v. Lapham, 20 Pick. 467; Beaman v. Russell, 20 Vt. 205; Andrews v. Spence, 72 Ind. 315; 37 Am. Rep. 162; Brandt on Surety, § 58.

[5] Brandt on Surety, sec. 41, p. 56, note 2; Mallory v. Gillett, 21 N. Y. 412; Aldrich v. Ames, 9 Gray, 77, *supra*.

volved in surety contracts which are not within its provisions. It is this original contract between the creditor and the surety, in which the principal and surety bind themselves to the *third person* (creditor), which is within the statute.[1]

When the question arises on the contract between the principal and surety to indemnify, if it is claimed that the contract is something more or different than the obligation arising by operation of law or *quasi*-contract,[2] it seems equally plain that the contract is as to them in no sense a contract to answer for the debt, default or miscarriage of a third person, and hence not within the statute.[3]

If the contest is between co-sureties, and it is claimed that the contract is other or different from the legal obligation to contribute, *e. g.*, where one surety signs an agreement with the other to indemnify and to keep him harmless, it is equally clear that this contract, for the same reason, is not within the statute of frauds.[4]

Where the contest arises under the fourth supposed situation, it would seem on principle that the promise to indemnify was not a promise to answer for the debt or default of the original debtor,[5] and consequently the contract was not within the stat-

[1] "The contract upon which they are co-debtors or sureties only *expresses* the relation between them and their creditor, and is entirely distinct from the right of contribution which exists between themselves." Rose v. Wollenberg, 31 Oreg. 269; 65 Am. St. Rep. 827. The obligation to indemnify or contribute is not express, but arises by law. *Infra*, p. 424. The main cause for the confusion in decisions results from not clearly distinguishing between pure contracts of suretyship and joint contracts of purchase, or between it and the original contract wherein the obligation to the creditor has its inception, and the contract of the principal to indemnify, or contracts between sureties to contribute with each other. Bugbee v. Kendricksen, 130 Mass. 437; Wainright v. Straw, 15 Vt. 215; Gibbs v. Blanchard, 15 Mich. 292; Hetfield v. Dow, 27 N. J. L. 440; Eddy v. Davidson, 42 Vt. 56.

[2] Drummond v. Yager, *supra;* Paul v. Berry, 78 Ill. 158; Rose v. Wollenberg, *supra.*

[3] "The principal who has obtained the benefit of the contract or suffered the forfeiture of his bond or obligation is always bound to indemnify his surety who has sustained loss upon his account, and he cannot interpose the statute of frauds to prevent it. . . . A promise to indemnify does not, as it appears to me, fall within either the words or the policy of the statute of frauds." Rose v. Wollenberg, *supra.*

[4] Rose v. Wollenberg, *supra;* Horn v. Bray, 51 Ind. 555; Ferrell v. Maxwell, 28 Ohio St. 383; 22 Am. Rep. 393.

[5] Eastwood v. Kenyon, 11 A. & E. 438.

ute of frauds; and such it is believed is the rule sustained by the weight of authority in America.[1] There has been great conflict in England and America, and there are a number of states yet adhering to the opposite doctrine.[2]

Forms of Guaranty.— There is a difference between a contract guaranteeing the payment or fulfillment of an obligation and one guaranteeing the collection of a debt.[3]

In the former case the guarantor is liable immediately upon default; in the latter only after reasonable diligence has been exercised to make the collection.[4]

While the guarantor of payment assumes the same obligation as to time of performance as does the original debtor or principal promisor, his obligation is always conditional upon good faith and diligence on the part of the creditor. Demand of payment must be made by the creditor (if the principal is solvent) and notice given to the guarantor of failure to pay. These are as essential as are the same in case of indorsers of commercial paper.[5]

Scope of Surety's Contract.— The contract of surety is *strictissimi juris*, *i. e.*, to be strictly construed as it is expressed, and it will not be extended by implication.[6] But if a contract drawn

[1] Anderson v. Spence, 72 Ind. 315; 37 Am. Rep. 162.

[2] Nugent v. Wolfe, 111 Pa. St. 88; 56 Am. Rep. 291. The Indiana case above cited contains a review of the authorities *pro* and *con*.

[3] The difficulty in these cases is to determine whether the guaranty is an absolute one of payment, or the conditional one of solvency, which requires the exercise of due diligence in prosecuting the collection of the note. See illustrations, Cowles v. Peck, 55 Conn. 251; Brandt on Suretyship, sec. 84. A guaranty to pay interest runs only to the maturity of the note. Rector v. McCarthy, 61 Ark. 420.

[4] Craig v. Parkis, 40 N. Y. 181.

[5] Oxford Bank v. Haynes, 8 Pick. 423; 19 Am. Dec. 334; Powers v. Bumcratz, 12 Ohio St. 273.

[6] Coleman v. Lamb, 15 Wend. 329; Powers v. Bumcratz, *supra;* Lafayette v. James, 92 Ind. 240; National Mech. Ass'n v. Conkling, 90 N. Y. 116. "C. executed to plaintiff a bond with sureties, which recited his appointment by defendant as bookkeeper, and was conditioned that he should faithfully perform the duties of any other office, trust or employment relating to the business of said association which may be assigned to him, or which he shall undertake to perform. He served several years as book-keeper and then was appointed receiving teller, and while so acting embezzled funds of the bank. *Held*, that the sureties were not liable." National Mech. Bldg. Ass'n v. Conkling, 90 N. Y. 116. See American Dist. Tel. Co. v. Leming, 139 Pa. St. 594; First National Bank of Baltimore v. Gerke, 68 Md. 449.

by the surety is susceptible of two meanings, that which is least favorable to the person drawing it will be taken.[1]

Existence of a Valid Original Obligation Essential.— The contracts of guaranty and suretyship being collateral to another principal indebtedness, its existence, validity and continuation depend upon that of the original debt, or the terms of the guaranty.[2] If the original debt is invalid the surety is not bound; if it be extinguished, he is released.

If the original contract is in any manner departed from without the consent of the surety, the contract of guaranty is extinguished.[3]

There is no discretion in the creditor and the principal debtor to depart from the strict performance of the contract.

Surety's Rights.— After default of the principal the surety has rights which must be respected.[4]

He has a right to have proceedings instituted, and for that purpose may use the name of the creditor and make use of all securities by indemnifying him against costs.[5]

Subrogation — After Payment by Security.— A surety who is obliged to pay the debt is entitled to stand in the shoes of the creditor and be subrogated to his rights, not only against the principal debtor, but against the other sureties, if there be several, and he is entitled to all the securities which the creditor may have.[6]

For the purpose of protecting the surety who has paid the debt, it is not to be considered as extinguished, and will be kept alive for the benefit of the surety.[7]

Sureties on the bond of a contractor, upon failure of the lat-

[1] American Surety Co. v. Pauly, 170 U. S. 133. This rule applies to contracts generally.

[2] Gay v. Ward, 67 Conn. 147.

[3] Miller v. Stewart, 9 Wheat. 681; First Nat. Bank v. Pierce, 99 Ill. 272; Myers v. Fairbury, 78 id. 257; Brandt on Suretyship, sec. 415. Fraudulent concealment of facts which will release a guarantor must have operated as an inducement to him to bind himself. Lachman v. Block, 47 La. Ann. 505.

[4] *Ante*, p. 7; Brandt, secs. 205, 206.

[5] Id.; Rockingham Bank v. Claggett, 29 N. H. 292; Remsen v. Beekman, 25 N. Y. 555.

[6] Hubbell v. Carpenter, 5 N. Y. 171; Lewis v. Palmer, 28 N. Y. 271; Wright v. Grover, etc. Co., 82 Pa. St. 80; Elliott v. Abbott, 12 N. H. 549; 37 Am. Dec. 227; Ezzard v. Bell, 100 Ga. 150; Pratt v. Thornton, 28 Me. 355.

[7] A judgment paid by the surety should be assigned to him, or to a trustee for his benefit. Prebles v. Gay, 115 N. C. 38.

ter, may complete the contract in order that they may collect the consideration.[1]

Remedies Between Sureties.— Upon the principle that equality is equity,[2] if one of several sureties pays the debt, he may at once sue his co-sureties for their proportional share of the amount paid.[3] It is not necessary that he should have paid the debt in money. Payment by a promissory note,[4] or payment made by a third person on the procuration of the surety, is sufficient.[5]

A surety may recover at common law under the common or special counts,[6] or he may proceed in equity to compel the co-sureties to bear an equal share of the burden. In equitable proceedings the principal must be made a party so that the equities between all the parties may be adjusted and settled.[7]

Upon the same principle of equity a surety is bound to bring into hotchpot for the benefit of his co-sureties a security given him by the principal,[8] although he only consented to become surety on condition of such security, and though the other sureties were not aware of it.[9]

If one of several co-sureties *subsequently* take a security from the principal for his own indemnity, it inures to the common benefit of all the sureties.[10]

Sec. 624. *Negotiable Instruments.*— The distinction between assignability and negotiability of choses has been mentioned.[11]

The topic now under consideration deals only with the species of choses in action which are *negotiable* as distinguished from those merely assignable.

[1] Rhode v. Biggs, 108 Mich. 446.

[2] The obligation of contribution is founded upon the above stated equitable principle and not upon contract. Drummond v. Yager, 10 Brad. 380; Aspinwall v. Sacchi, 57 N. Y. 331.

[3] Norton v. Coons, 6 N. Y. 33; Adams v. Hayes, 120 N. C. 383; Pace v. Pace, 95 Va. 792.

[4] Ryan v. Knesor, 76 Mo. App. 496.

[5] Meeske v. Pfenning's Estate (Mich.), 79 N. W. Rep. 795.

[6] Porter v. Horton, 80 Ill. App. 333.

[7] Craythorne v. Swinburne, 14 Vesey, 161.

[8] Moore v. Thompson, 100 Ky. 231.

[9] Steele v. Dixon, L. R. 17 Ch. Div. 825.

[10] Dering v. Earl of Winchelsea, 1 L. C. Eq. (3d Am. ed.), 162, 163; Agnew v. Bell, 4 Watts, 31; Gibson v. Sheehan, 5 App. D. C. 391; 28 L. R. A. 400. If a surety collects upon an indemnity bond from a surety company, he holds the indemnity in trust for all. Such surety company cannot compel contribution from the co-sureties. Gibson v. Sheehan, *supra*.

[11] *Ante*, sec. 613.

The transfer of any chose was contrary to the policy of the common law;[1] but modern law favors the transfer of all rights in the nature of property rights as distinguished from mere personal torts.[2]

Origin of Negotiability.— The common law took little account of commercial transactions, and it was not until the development of commerce with foreign nations that that system of law which has contributed so much to her prosperity and prestige, namely, maritime and mercantile law, obtained recognition in England as a branch of the common law.[3]

The law merchant is not the invention of the lawyer or the legislature. It is not the special creation of any time or country. Being the regulator of commerce, it does not, any more than commerce, notice state lines or national boundaries. It is an elaborate system of rules and usages found convenient by the merchants of the world, and sanctioned by the courts as a part of the law of nations.[4]

Whatever the jealousy of the ancient common-law lawyers led them to say, Lord Holt and Lord Mansfield, who developed it into a model for future generations, never scrupled to give credit to the ancient fountains from which they so freely drew — the *jus gentium* of the civil law as developed by the merchants of Europe into an elaborate system called the *Lex Mercatoria*, uniform in its provisions and universal in its operation throughout the commercial world.[5]

Originally Regarded as International.— The remarks of Mr. Justice Foster in a New Hampshire case[6] show the cosmopolitan spirit of the law merchant: "*Jus autem gentium omni humano generi commune est; nam usu exigente, et humanis necessitatibus.* (The law of nations is common to all mankind,

[1] *Ante*, pp. 800–801, notes; 2 Cooley's Blk. (4th ed.) *468.

[2] *Ante*, p. 799, note 5; 1 Dan. Neg. Inst., 1 et seq.

[3] *Infra*, p. 937, note 1.

[4] *Ante*, pp. 243, 247, secs. 201, 204; 1 Wilson's Works, 335. It is so treated by Caines in his Lex Mercatoria (1802), and Beawes. But it does not deny the power of the state to establish a rule of contract or liability different from that universally recognized elsewhere. Phipps v. Harding, 70 Fed. Rep. 467.

[5] *Ante*, p. 244, note; 1 Wilson's Works, 337. *E. g.*, in Luke v. Lyde, 2 Burr. 889, Lord Mansfield refers to the Rhodian Laws, the Consolato del Mare, the Laws of Oleron, etc.

[6] Hill v. Spear, 50 N. H. 253; 9 Am. Rep. 208.

for nations have established certain laws, as occasion and the necessities of human life required.) . . . Upon the foundation of this doctrine rests the whole system of sales, agencies, credits, and negotiable instruments; 'and,' says Judge Story, 'no more forcible application can be propounded of this imperial doctrine than to the subject of international private contracts.'[1] . . . With peculiar cogency does the doctrine apply to the positive necessities of a country like ours, composed of thirty-seven (now forty-five) distinct sovereignties, in strictness wholly independent of local laws, but most essentially dependent for their general prosperity upon the deference, respect and regard for each other's peculiar policy which the comity of nations demands."[2]

Says Mr. Justice Wilmot, in *Pilland v. Mierop*,[3] "to consider this as a commercial case, all nations ought to have their laws conformable to each other in such cases. *Fides servandi est; simplicitas juris gentium prævalet.*" (Faith must be kept; the simplicity of the law of nations must prevail.)[4]

And at a comparatively recent date Mr. Justice Clifford confirmed this view, saying: "Commercial law is *a system of jurisprudence* acknowledged by all maritime nations, and upon no subject is it of more importance that there should be, as far as practicable, uniformity of decision throughout the world."[5]

New Negotiable Instrument Law.— The desire and necessity of restoring to this body of law its pristine force as a uniform international code is the moving cause of the recent commendable attempts to codify the negotiable instrument law.[6]

No motive could be more worthy, and the result cannot be too highly commended.

But no code can cover every situation, and therefore the acts provide that "In cases not provided for in this act, the rules of the law merchant shall govern."

It is unfortunate that an opening is thus left so well calculated to let in the very discord which it is the purpose of

[1] Story's Confl. Laws, sec. 242; Phipps v. Harding, *supra*.

[2] Hill v. Spear, 50 N. H. 253; 9 Am. Rep. 208.

[3] 3 Burr. 1672.

[4] Burrill's Law Dict.

[5] Railroad Co. v. National Bank, 102 U. S. 32.

[6] Fifteen states have already adopted it. See a valuable discussion of its provisions by G. W. Bates, Chicago Legal News, vol. 31, p. 444.

the act to remedy, viz., the discordant construction of the act and the rules of the law merchant.

Practically the whole law of negotiable instruments has heretofore been the law merchant. The trouble has arisen from the multitude of tribunals which have had to declare what the law merchant is on a given point. One state holds it to be one thing, another perhaps the opposite. Hence the confusion.

The remedy is obvious, and was suggested by the author of the Ordinance of 1787, viz., to provide in the state statutes that the law merchant *as declared by the supreme court of the United States* shall constitute conclusive evidence of the law merchant. We may then have some hope of the desirable uniformity.[1]

Negotiable Distinguished from Other Choses in Action.— We have seen that choses in action embrace not only promises to pay money, but rights of action growing out of torts to personal property.[2]

The law of negotiable paper, although it always deals with a class of choses, does not embrace all these.

Negotiable instruments only embrace choses promising to pay *money*, and by the law merchant certain of these are given the quality of negotiability.

Words of Negotiability.— The character of every contract is determined by its language, and the negotiable quality of a chose is at common law given by the words "to order"[3] or "to bearer."[4]

[1] Mr. Dane, quoted *ante*, p. 249, note 8. This is all the more imperative for the reason that the supreme court will not follow the local courts on questions of commercial law. See discussion and review of doctrine. Phipps v. Harding, 70 Fed. Rep. 468.

[2] *Ante*, sec. 95, p. 125, note.

[3] Benj. Chalm. Dig., arts. 8, 107; Chitty on Bills (12th ed.), *151, note 2; Turner v. P. & S. Ry. Co., 95 Ill. 134. In Illinois a bill payable to one, or bearer, must be indorsed; otherwise as to one payable to bearer. Id.

[4] A bill in form payable to Jones, or bearer, was not originally negotiable in the full sense. In Hodges v. Steward, 1 Salk. 125 (1693), an action on an inland bill of exchange by indorser against drawer, Lord Holt held: "1st. A difference was taken between a bill payable to J. S., or bearer, and J. S., or order; for a bill payable to J. S., or bearer, is not assignable by the contract, so as to enable the indorsee to bring an action if the drawer refuse to pay, because there is no such authority given to the party by the first contract, and the effect of it is only to *discharge the drawee*, if he pays it to the bearer, though he comes to it by trover, theft or otherwise. But when

Statutory Negotiability.— A mere written acknowledgment of indebtedness or a promise to pay or deliver anything but money is not, except by statute, negotiable, but if there are words implying a promise to pay money coupled with words of negotiability the instrument becomes negotiable paper.[1]

It was held by Lord Holt[2] that promissory notes were not negotiable so as to allow an action of *assumpsit* in the name of the holder.

This decision occasioned the statute of Anne, which provided that they should be regarded as negotiable paper.

It has been the practice of legislatures of states and countries to extend the character of negotiability to other instruments than those originally so regarded.[3]

the bill is payable to J. S., or order, there an express power is given to the party to assign, and the indorsee may maintain an action. 2d. Though an assignment of a bill payable to J. S., or bearer, be no good assignment to charge the drawer *with an action* on the bill, yet '*it is a good bill between the indorser and indorsee*, and the indorser is liable to an action for the money; for the indorsement is in nature of a new bill.'" In Hill v. Lewis, 1 Salk. 132, "indorsement of this bill (payable to defendant only, without the words 'or to his order') did not make him that drew the bill chargeable to the indorsee; for the words, 'or to his order,' give authority to the plaintiff to assign it by indorsement; and it is an agreement by the first drawer that he would answer it to the assignee. But the indorsement of a bill which has not the words 'or to his order' is good, or of the same effect between the indorser and the indorsee to make the indorser chargeable to the indorsee." See the same doctrine in the United States. Mandeville v. Riddle, 1 Cranch, 290, and elaborate note giving history of negotiability in appendix to that volume, original edition.

[1] Gay v. Rooke, 151 Mass. 115; Benj. Chalm. Dig., art. 2.

[2] Clark v. Martin, 2 Ld. Ray. 757 (1702); 1 Salk. 129; Buller v. Crips, 6 Mod. 29; Mandeville v. Riddle, *supra*.

[3] Cowan v. Hallock, 9 Colo. 572. *E. g.:* "The statute 3 & 4 Ann., c. 9, respecting promissory notes is not in force in Virginia, but there is an act of assembly 1786, c. 29, by which it is enacted that 'an action of debt may be maintained upon a note or writing, by which the person signing the same shall promise or oblige himself to pay a sum of money or quantity of tobacco to another;' and that 'assignments of bonds, bills and promissory notes and other writings obligatory for payment of money or tobacco shall be valid; and an assignee of any such may thereupon maintain an action of debt in his own name, but shall allow all just discounts, not only against himself, but against the assignor, before notice of the assignment was given to the defendant." 1 Cranch, App. 367–68. In Mandeville v. Riddle, 1 Cranch, 290, Marshall, C. J., held that this statute did not create privity between *remote* indorsers and the holder. The present Illinois statute would embrace a simple written

Privileges Accorded Negotiable Paper.— Certain rights which rest in intangible obligations of one individual to another, that is, rights *in personam*, pass by assignment wherever the policy of the law allows them to be transferred, while other similar rights, resting on the obligation of a definite person, are accorded the wider privilege of being *negotiable*.[1]

There are three especial qualities accorded by the law to negotiable instruments which mark them as more favored than ordinary contracts.

First. The right of the holder, however remote from and unknown to the acceptor, to sue on it in his own name, the doctrine of privity having no application to these contracts;[2] and generally wherever the bill is fully negotiable it creates privity between each and all of the parties, however remote from each other.[3]

Second. The peculiar facility of transfer, by which the bill passes from hand to hand, investing a *bona fide* holder with a good title, irrespective of the infirmity of, or want of, title in him from whom he received it.[4]

acknowledgment of indebtedness as well as a promise to pay in money or a specific thing. Bilderback v. Burlingame, 27 Ill. 338.

[1] "These additional rights and privileges have been conferred upon such holder by law for good and sufficient reasons, too well known and understood to need to be stated, but which are incident to and dependent upon the attribute of negotiability which these instruments possess." Clark v. Pease, 41 N. H. 414. To be entitled to this privilege the instrument must be strictly negotiable. It is said that a negotiable bill is a "courier without luggage;" that is to say, it can have these incidents of free passage provided it is not incumbered, but if anything is inseparably added not within the idea of negotiability, the negotiable character of the paper is destroyed. Overton v. Tyler, 3 Barr, 346; 19 Am. Dec. 645. It was held in this and other cases that a power of attorney to confess a judgment destroyed its negotiability; but such is not the general rule. Such paper carries on its face its own history so that nothing can be alleged against it, and an innocent holder is only affected by what appears on its face, or of which he has actual knowledge. Brown v. First Nat. Bank, 103 Ala. 123; Schneider v. Schiffner, 20 Mo. 571.

[2] Broom's Max., quoted in note to sec. 613; Miller v. Race, 1 Burr. 452; Master v. Miller, 4 Term Rep. 320; 2 H. Blk. 140. See 1 Cranch, App. A., for history of introduction of negotiability; Benj. Chalm., Bills and Notes, Int.; 3 Kent, Com. 84; 2 Dan. Neg. Int., § 769*a*.

[3] For the history of this, see Mandeville v. Riddle, *ante*, and 1 Cr., App. A., cited above.

[4] 1 Dan. Neg. Inst. 1 et seq.; Miller v. Race, 1 Burr. 452; Jones v. Nellis, 41 Ill. 482; Shipley v. Carroll, 45 Ill. 285; Clark v. Johnson, 54 Ill. 296; Loomis v. Ruck, 56 N. Y. 462; Clark v. Pease, *supra*.

Third. This freedom of circulation from hand to hand, unincumbered with the equities or claims which exist between the original parties or subsequent holders.[1]

Favoring Presumptions. — Besides these positive qualities there are other advantages which are given the holder of a bill or note.

The bill is presumed to have been given on a sufficient consideration.[2] The holder is presumed to be a taker before maturity without notice and for value.[3]

These presumptions are rebuttable and yield to proof of the actual facts.[4]

On proof of any infirmity of title, or want of consideration or fraud in the inception, these presumptions vanish and the holder is obliged to show himself a *bona fide* holder[5] in usual course.[6] This is because it is easily within his power to explain.[7]

Wrongful Negotiation. — It is the duty of a holder of negotiable paper to credit on the back of it payments as they are made, and to deliver the note to the person paying, on full payment; and one who neglects to credit all sums which are regarded in law as part payment and negotiates the note to a *bona fide* holder, thus cutting off defenses, is liable to an action as for money had to the use of the maker.[8]

A bona fide holder is one who takes the bill for a valid consideration[9] in the usual course of business, either without notice

[1] Thatcher v. W. River Bank, 19 Mich. 196; Benj. Chalm. Dig., art. 134; Favorite v. Lord, 35 Ill. 149; Clark v. Pease, 41 N. H. 414.

[2] This is not true as to non-negotiable note not expressing value received. Bristol v. Warner, 19 Conn. 7.

[3] Benj. Chalm. Dig., art. 97; Commissioners v. Clark, 94 U. S. 278; Charles v. Rennick, 54 Ill. App. 121.

[4] Id.

[5] Vosberg v. Diefendorf, 119 N. Y. 357; Gibberson v. Jolly, 120 Ind. 301; Tilden v. Barnard, 43 Mich. 376.

[6] Kellogg v. Curtiss, 69 Me. 212; Sperry v. Spaulding, 45 Cal. 549; Wright v. Brosseau, 73 Ill. 381.

[7] 1 Dan. Neg. Int., pp. 142, 662.

[8] Nashville Lumber Co. v. Fourth Nat. Bank, 94 Tenn. 374; 27 L. R. A. 519. Usury paid is considered as part payment on the debt, and is not regarded as voluntarily paid till the whole transaction is closed. Payne v. Newcomb, 100 Ill. 612; White v. Franklin Bank, 22 Pick. 181. And if the holder transfers the note and cuts off the defense of usury, an action will lie to recover it. Lacy v. Brown, 67 Ind. 478; Carter v. Moses, 39 Ill. 542; Wood v. Lake, 13 Wis. 84.

[9] Pre-existing debt. Herman v. Gunter, 83 Tex. 66; 29 Am. St. Rep. 632.

of any infirmity in the bill itself or the title of his immediate transferrer;[1] or —

One (not a party to any fraud connected with the note) receiving it from a *bona fide* holder.[2]

A holder in due course is one who takes *before maturity* and in the ordinary course of business.[3] The maturing of the note divests it of the second and third peculiar *advantages* of negotiability above spoken of. The bill is still negotiable, but is subject to all equities.[4]

Defenses to Actions on Bills.—It is evident, therefore, that one resisting the enforcement of a bill or note must take different courses, according to the character in which the holder sues.

Between original parties the ordinary defenses, denying capacity to execute,[5] delivery, execution, consideration, or showing payment, or establishing a set-off or recoupment, are always open,[6] and it is always allowable to show by parol or evidence that the paper was but a part of another transaction, or not intended as a note.[7]

Between remote parties the nature of the defense allowable is controlled largely by the time and manner of taking the bill.

If taken before maturity, the advantage is all with the holder, and the defendant can only rely on showing the paper *void*

[1] Benj. Chalm. Dig., art. 85; 1 Dan. Neg. Inst., §§ 769*a*, 789.

Negotiable Paper—Notice of Infirmity.—The pendency of a suit relating to the validity of negotiable paper not yet due is not constructive notice to subsequent holders thereof before maturity, and this general rule cannot be changed by state laws or decisions so as to affect the rights of persons not residing and not being within the state. Enfield v. Jordan, 119 U. S. 680. Mere negligence, even though it be gross, in not knowing the facts and circumstances surrounding the making will not defeat his title; his conduct must be such as to show bad faith and amount to fraud. Rublee v. Davis, 33 Neb. 779; Shreeves v. Allen, 79 Ill. 553; Murray v. Lardner, 2 Wall. 120.

[2] He need not give value, and notice does not affect him. Chalm., art. 87; Commissioners v. Clark, 94 U. S. 278.

[3] Benj. Chalm. Dig., art. 86.

[4] 1 Dan. Neg. Inst., § 788.

[5] In case of corporation securities the defect must extend to complete incapacity, not mere irregularity, unless the irregularity is known to the holder. Louisville, etc. Ry. Co. v. L. T. Co., 174 U. S. 552.

[6] 1 Dan. Neg. Inst., § 769; Marsh v. Chown, 104 Iowa, 561.

[7] Id.

as between original parties,[1] or destroying the character of the plaintiff as a *bona fide* holder, and then introducing the equity.[2] Any defense of fraud, or fraud and circumvention, to be effective, must show the presence of due care on the part of the defendant.

If taken after maturity or after dishonor it is open to more defenses, but the holder still has a more favorable position than an original party. The bill is subject to the enforcement of what are termed equities between the original parties. These do not include all defenses which could be made if the bill were held by the payee, but extend only to those matters which are naturally the incidents of, and in some way usually connected with, the issuing of its paper.

Consideration is essential to a bill, except in case of accommodation paper;[3] hence the want or failure of it is an equity.[4]

[1] Proof of a knowledge of equities short of circumvention or illegality will not have this effect. Commissioners v. Clark, 94 U. S. 285. A plea of fraud and circumvention necessarily involves the question of due care on the part of the defendant in executing the instrument. Leach v. Nichols, 55 Ill. 273; Butler v. Carnes, 37 Wis. 63; Swannell v. Watson, 71 Ill. 456. A party about to take an assignment of a promissory note from any one is under no obligation to call upon the maker and make inquiry before purchasing it, even though he lives in the same place with the maker. Murray v. Beckwith, 81 Ill. 43; Hovey v. Eppinger, 34 Mich. 39; Dan. Neg. Inst., § 775; Goodman v. Simonds, 20 How. 343; Comstock v. Hannah, 76 Ill. 530. If the defendant was guilty of any degree of negligence in signing the note, he cannot set up fraud or circumvention against a *bona fide* purchaser for value. Chapman v. Rose, 56 N. Y. 137, 141; Leach v. Nichols, 55 Ill. 273-277; De Camp v. Hamma, 29 Ohio St. 470; Butler v. Carnes, 37 Wis. 63. The burden of proving fraud is upon the defendant, and also that he acted without negligence. Ross v. Doland, 29 Ohio St. 473.

[2] Fraud, duress, illegality, payment, and the like, will not do. 1 Dan. Neg. Inst., § 769*a*. Illegality will not render a note void unless by an express statutory declaration. Town of E. v. Kohn, 84 Ill. 293; Clark v. Pease, 41 N. H. 414.

[3] *Accommodation paper* is a common form of lending credit. It is a negotiable paper, but without consideration. And want of consideration, even if known, is no defense; but a diversion of the use from that agreed upon, if known to the taker, may defeat a recovery. Miller v. Larned, 103 Ill. 562; Monument Nat. Bank v. Globe Works, 101 Mass. 151. There is a distinction between such a note and a mortgage given to secure it; the mortgage not being negotiable is open to all defenses and equities. Jones on Mort., § 838.

[4] Benj. Chalm. Dig., art. 134, Explanation 3; 2 Dan. Neg. Inst., § 401; Favorite v. Lord, 35 Ill. 149.

Payment is expected, but, it being the usual course of business to take back the note, notice of payment must be shown.

A set-off being an independent matter is not sufficiently connected with the note to be an equity; and where an executory contract is the consideration, the failure to perform is not an equity, and is only available by showing that the holder took with notice of the breach.[1]

An independent covenant is like an independent contract, and in such a case a breach ought not on principle to constitute an equity.[2]

Species of Negotiable Paper.—There are, properly speaking, but three, viz.: *bills of exchange*, *promissory notes* and *checks*,[3] although instruments with other names have attained such prominence and extended use as to almost constitute separate species, namely, *bonds and stocks*, *bank notes*, *city warrants*, etc., but these are only other forms of promises to pay. Because issued by public or private corporations, and frequently sold in open market, they have received these special designations,—the names do not change their essential characteristics. They are not distinguishable from other promises to pay money to a specified person or bearer or order.[4]

A bill of exchange is an absolute unconditional order by one person on another for the payment of a certain sum of money to a third person.[5]

There are in form three parties to a bill of exchange: the drawer, or maker; the drawee, or person requested to pay, who if he honors the draft and accepts it is called the acceptor; and the person in whose favor the draft is drawn, called the payee.

Only two are necessary, for by custom it is allowable to draw

[1] Gage v. Lewis, 68 Ill. 604, 617; Willetts v. Burgess, 34 Ill. 494; Davis v. McCready, 17 N. Y. 230. But notice of a breach may be notice of an equity. Thatcher v. The W. River Bank, 19 Mich. 196; Siegel, C. & Co. v. Chi. Tr. & Sav. Bank, 131 Ill. 569; Rublee v. Davis, 33 Neb. 779; 29 Am. St. Rep. 509.

[2] *Ante*, p. 933, note 3. But see Johnson v. Bank, 24 Ill. App. 353.

[3] As to checks, see *infra*, p. 948.

[4] Louisville, etc. Ry. Co. v. L. T. Co., 174 U. S. 552; Gelpcke v. Dubuque, 1 Wall. 175 (city bonds and coupons). These anomalous negotiable instruments are described in the notes to Miller v. Race, in Smith's Leading Cases, any edition. Delafield v. Illinois, 2 Hill, 159, cited in Bank v. N. Y. & N. H. R. R. Co., 13 N. Y. 625; Jones v. Nellis, 41 Ill. 482 (involving government bonds); Meyer v. Richards, 163 U. S. 385.

[5] Chitty on Bills, 2; Turner v. P. & S. R. R. Co., 95 Ill. 144.

a bill payable to oneself, or even to a fictitious person, and by indorsement give the bill all the qualities of a bill.[1]

An indorser is he who transfers a bill by writing his name across the back.

The *indorsee* is he who takes it.

Holder designates the present owner.

Inland and Foreign Bills.—It was allowable originally only to use bills of exchange between different mercantile countries. These were called foreign bills; but in time the same device was allowed between inland merchants, and hence the designation foreign and inland bills; and in the United States the different states are deemed for this purpose foreign to each other.[2]

They are executed in sets of three, one being kept by the drawer, one sent forward to the drawee, and one being delivered to the payee.

A promissory note is a direct transaction between two persons, and in the definition of this instrument there are eight essential features.

A negotiable note is a written[3] promise[4] by one person to pay absolutely and at all events[5] a sum certain[6] in current

[1] Benj. Chalm. Dig. 3.

[2] The principal distinction between inland and foreign bills of exchange is that no protest of the former is required to hold assignors or other parties secondarily liable. Daniel, Neg. Inst., §§ 7, 926; Tiedeman, Com. Paper, § 3; Smith v. Curlee, 59 Ill. 221.

[3] A note in pencil is good. Reed v. Roark, 14 Tex. 329; 65 Am. Dec. 127. As to meaning of a writing, see Henshaw v. Foster, 9 Pick. 312. Need not be on paper or parchment, though one or the other is usual. Any substance that will receive and retain the characters will answer.

[4] The word "promise" need not be used. Hibbard v. Holloway, 13 Ill. App. 101. But there must be an express undertaking as distinguished from an implied promise. Gay v. Rooke, 151 Mass. 115; 21 Am. St. Rep. 434.

[5] A promise in the alternative will not do. Smalley v. Edey, 15 Ill. 324. The instrument cannot depend on any contingency. Husband v. Epling, 81 Ill. 172. Orders payable out of particular funds are not. Worden v. Dodge, 4 Den. 159.

[6] It is not sufficient that the amount can be made certain in the future (58 Mo. 24), unless it depends merely on calculation. Knight v. Jones, 21 Mich. 161. Marginal figures are sufficient to render the amount certain though the amount is left blank in the body. Witty v. Mich. Mut. Ins. Co., 123 Ind. 411; 8 L. R. A. 365. But see Hollen v. Davis, 59 Iowa, 444; 44 Am. Rep. 688. Words "with exchange" have been held to render the amount uncertain, and so to destroy negotiability. Culbertson v. Nelson, 93 Iowa, 187; 27 L. R. A. 222. Provision adding attorney's fees if

money[1] at a definite time[2] to a person named, or his order, or to bearer.[3]

There are two essential parties: the person who signs the note and makes the promise, called the maker, and the person to whom the promise is made, called the payee; but as in bills of exchange one may make a note payable to himself, or to a fictitious person, and by indorsement and delivery set it afloat as a negotiable promissory note.[4]

Bills of lading are sometimes classed with negotiable paper, but they are not of the same species as bills and notes.[5] They

sued upon destroys negotiability. Bleckley Co. v. Alewine, 48 S. C. 308; 37 L. R. A. 86. *Contra*, Oppenheimer v. Farmers' & Mer. Bank, 97 Tenn. 19; 33 L. R. A. 767.

[1] That is, coin and paper at par value. Block v. Ward, 27 Mich. 191. Whatever is current as money. Bull v. Bank of Kasson, 123 U. S. 105. By statute in several states, written promises to pay in specified articles other than money are made negotiable. Bilderback v. Burlingame, 27 Ill. 338. See Culbertson v. Nelson, 93 Iowa, 187; 27 L. R. A. 222. Note payable in "Canada money" is negotiable. Black v. Ward, 27 Mich. 191. *Contra*, Thompson v. Sloan, 23 Wend. 71.

[2] A note payable "on or before" a certain date, held in some cases to be non-negotiable for uncertainty. Stutts v. Silva, 119 Mass. 39. The weight of authority, however, is contrary. First Nat. Bank v. Skeen, 101 Mo. 683; 11 L. R. A. 748. A note payable a specified time after death of maker is negotiable. Crider v. Shelby, 95 Fed. Rep. 212. But otherwise if payable at a time that may never arrive, as at majority. Kelley v. Hemmingway, 13 Ill. 604. Place of payment need not be designated at common law. But in several states, by statute, all the characteristics of negotiable paper attach only to such notes as are made payable at a bank in the state. Clark v. Carey, 63 Ind. 105.

[3] *Ante*, pp. 928, 929, and notes.

[4] See Gordon v. Anderson, 83 Iowa, 224; 32 Am. St. Rep. 302. Alternative will not do. Musselman v. Oakes, 19 Ill. 81. If payee is ascertainable it will do. Adams v. King, 16 Ill. 169. Note to two, see Ryhiner v. Feickert, 92 Ill. 305. Fictitious payee indorsed equivalent to bearer. Armstrong v. National Bank, 46 Ohio St. 512; 15 Am. St. Rep. 655. If two of same name, the real payee may be shown by parol. Hall v. Tufts, 18 Pick. 455. Addition of the word "trustee." Fox v. Citizens' Bank & T. Co. (Tenn.), 35 L. R. A. 678 (1897).

[5] "While bills of lading are not negotiable in the sense applicable to commercial paper, they are very commonly transferred as security for loans and discounts, and carry with them the ownership, either general or special, of the property which they describe. . . . The carrier issuing them has no right to believe, and never does believe, that their office and effect is limited to the person to whom they are first and directly issued. . . . If he desires to limit his responsibility to a delivery to the named consignee alone, he must stamp his bills as 'non-negotiable.'" Bank of Batavia v. New York, L. E. & W. R. R. Co., 106 N. Y. 197. In Landa v. Lattin (Tex. Civ. App.), 45 S. W.

do not promise money, nor is their negotiability of the same quality.

A bill of lading is usually drawn promising to deliver *to the consignee's order*, or *bearer*, and may be transferred from hand to hand, passing the title of the property to the bearer;[1] but this is essentially different from transferring the promise of A., made to B., to C., D. or E.

The property in the chattel, evidenced by the bill, changes ownership, but a chose in action is not thereby transferred.[2]

The Obligation of Parties to Bills.[3] — *Presumption from Manner of Signing.* — If one's name appears on a bill or note it is reasonable to presume that in signing he intended to incur liability thereby.[4]

Rep. 48, it was held that a bank which cashed a draft drawn by a consignor on a consignee of wheat, with a bill of lading attached, and collected the draft before the consignee had opportunity to inspect the wheat, was liable for a breach of warranty as to the quality of the wheat. The bank was held to be a purchaser of the wheat, and therefore a successor to the liabilities as well as the rights of the consignor.

[1] Lord Holt settled the law of bills of lading in this respect in Evans v. Marlett, *infra*. Lord Mansfied simply acquiesced. Buller, J., says: "The custom of merchants has established that the delivery of a bill of lading transfers the whole property. Evans v. Marlett, 1 Ld. Raym. 271; Wright v. Campbell, 4 Burr. 2046 (by Mansfield), and Caldwell v. Ball, 1 Term R. 205. Then it has been said that a bill of lading is not transferable like a bill of exchange; but the custom of merchants has made that transferable which in its nature perhaps is not so, and the cases above referred to decide that point." Ashhurst, J., indorses Buller's, J., argument saying: "So it is like a bill of exchange, in which case, as between the drawer and the payee, the consideration may be gone into, yet it cannot between the drawer and an indorsee; and the reason is, because it would be enabling either of the original parties to assist in a fraud. *The rule is founded purely on principles of law, and not on the custom of merchants.* The custom of merchants only establishes that such an instrument may be indorsed, but the effect of that indorsement is a question of law." Lickbarrow v. Mason, 3 Term R. 63; Smith's Ld. Cases.

[2] Bank v. New York, L. E. & W. R. R. Co., 106 N. Y. 195. A valuable note to this case will be found in Parson's edition New York Reports. Freedlander v. Texas & Pac. Ry. Co., 130 U. S. 416; Chandler v. Sprague, 5 Met. 306; 38 Am. Dec. 410. See note to Miller v. Race, 1 Sm. Ld. Cas. (9th ed., Edson), 785.

[3] It is of course determined by the *lex loci*, unless there is evidence of intent that it shall be performed elsewhere. Phipps v. Harding, 70 Fed. Rep. 471.

[4] One signing a note becomes a principal unless he clearly indicate in the paper that the promise is not his (Mechanics' Bank v. Bank of C., 5 Wheat. 326); and the mere affixing of a description which may as well be intended to identify him will not do. Little v. Bailey, 87 Ill. 239; Hypes

Custom has sanctioned modes of signing commercial paper which furnish a presumption as to the liability intended to be assumed by signing.[1]

In many cases this presumption may be explained by parol evidence.[2]

When the payee or holder indorses a note or bill the law presumes the contract of indorsement. "There is in legal contemplation written over his signature the extent and nature of his undertaking, which cannot be varied by parol."[3]

The maker's promise is that he will pay it at maturity.

The drawer engages that it shall be accepted by the drawee if duly presented, and paid according to its terms,[5] and that if it is not he will indemnify the holder, provided due protest (if required) and notice of dishonor are given him.[6]

The drawee is not a party to the bill until acceptance, when he is called the acceptor. Unless he has contracted so to do,[7] he is under no obligation to accept the bill, though he owes or has funds of the drawer.[8]

The acceptor promises absolutely to pay the bill in money at maturity.[9]

Indorsers Are of Several Kinds — The Holder.— A party as payee or indorsee of a bill or note who indorses his name thereto is properly called the indorser.[10]

An indorser proper of a bill or note makes the same contract

v. Griffen, 89 Ill. 135. In Leadbitter v. Farrow, 5 M. & S. 345, Lord Ellenborough, C. J., says: "Is it not an universal rule that a man who puts his name to a bill of exchange thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it for another, or by procuration of another, which are words of exclusion? Unless he says plainly, 'I am the mere scribe,' he becomes liable." Village of Cahokia v. Rautenberg, 88 Ill. 219; Powers v. Briggs, 79 Ill. 495.

[1] Tiedeman, Com. Paper, § 12*a*.

[2] Lennon v. Goodspeed, 89 Ill. 438.

[3] Chalm. Dig., art. 56 and notes; Worden v. Salter, 90 Ill. 165; Aymer v. Sheldon, 12 Wend. 439.

[4] Benj. Chalm. Dig., art. 286.

[5] Tiedeman, Com. Paper, § 507.

[6] Benj. Chalm. Dig. 215; Sherry v. Robinson, 1 Day, 11. See Phipps v. Harding, 70 Fed. Rep. 468. This implied engagement may be changed by statute. Id.

[7] Chitty on Bills, 281; Tiernan v. Jackson, 5 Pet. 580.

[8] Crawford's Neg. Inst. 93–96; Huffcut's Neg. Inst. 613. A promise by a party to pay a draft is equivalent to an acceptance. National Bank v. Diefendorf, 90 Ill. 396.

[9] Benj. Chalm. Dig. 211; Crawford's Neg. Inst. 92 and notes; Chitty on Bills, 204.

[10] Benj. Chalm. Dig. 111.

that the drawer of a bill of exchange does.[1] He also warrants the validity of the bill, the genuineness of previous signatures, and his title to it.[2]

The indorser of a non-negotiable note or bill, as between himself and the immediate parties to the indorsement, incurs the same liability as if the bill or note was negotiable,[3] but as to remote parties his liabilities are either none at all, or qualified.[4]

It has been held that he guarantied the payment only.

While a bill of exchange payable to bearer may be transferred by mere delivery if it is indorsed, the indorser incurs the usual liability of indorser.[5]

Stranger Indorser.— The name of a stranger to the bill or note often appears upon it, and we commonly call such an indorser, which is technically incorrect, because under some circumstances the party does not incur the same liability as an indorser.[6]

Where a stranger indorses an ordinary note or bill, the extent of his liability differs according to when he signed it.

1st. Whether at the time it was executed and before delivery to the payee.

2d. After delivery to the payee, but before negotiation.

3d. After the payee has indorsed it.

Upon these questions the doctrines of the courts of the different states are by no means harmonious, and there is conflict of authority found in the same state in several instances.

In Illinois the indorsement of a bill or note in blank by a stranger to a note raises a presumption of liability as guarantor of payment if made before delivery of the note.[7]

[1] Chitty on Bills, 227; Slocum v. Pomeroy, 6 Cranch, 222; Lenox v. Prout, 3 Wheat. 520; Hill v. Lewis, 1 Salk. 132; Tiedeman on Com. Paper, sec. 256.

[2] Benj. Chalm. Dig., art. 219; Onondaga Co. Sav. Bank v. United States, 64 Fed. Rep. 703; Rhodes v. Jenkins, 18 Colo. 49; 36 Am. Rep. St. 263. The most valuable case discussing the warranties of the transferrer is Meyers v. Richards, 163 U. S. 385. It was a case of a negotiation by delivery of invalid municipal bonds of the state of Louisiana. Hence the civil-law obligation was involved and was contrasted by the learned judge with the common law, and the two held to substantially agree.

[3] Story, 128.

[4] Chitty on Bills, 226.

[5] Tiedeman, Com. Paper, secs. 257*a*, 259; Johnson v. Mitchell, 50 Tex. 212; Dale v. Weeks, 4 Mass. 451. See Meyers v. Richards, *supra*.

[6] Hendrie v. Kinnear, 84 Hun, 141.

[7] Kingsland v. Koeppe, 137 Ill. 344; Fish v. Glover, 154 Ill. 86. See Good v. Martin, 95 U. S. 90.

This presumption may be rebutted and the true contract established by parol evidence.[1]

In such cases no other consideration than that for which the note is given need be proved.

In some states the party is held as joint maker,[2] in others as surety, while still others hold that the law *implies* no contract from that mode of signing.[3]

If a stranger indorses a note or bill after delivery to the payee, but before indorsement by him, the weight of authority is that *prima facie* he intends the contract of guaranty, and a new consideration must be shown.[4]

When a stranger indorses a bill or note payable to the maker or his order, he *prima facie* incurs the liability of second indorser.[5]

An indorsement without date is presumed to be at the date of the making of the note.

When the holder of a note made payable to bearer or when the note becomes so by a blank indorsement negotiates it by delivery, he incurs no liability on the bill itself.[6] But he may become liable on the consideration for the transfer, as he does enter into some contract in regard thereto.[7]

Where one is held as joint maker his rights and duties are of course those of maker.

The liability of guarantors has been pointed out.[8]

If guarantor of collection, the primary debtor must be pursued till suit is unavailing.[9]

If contract is that of indorser, due protest and notice must be given.

[1] Stowell v. Raymond, 83 Ill. 120.

[2] Sylvester Bleckley Co. v. Alewine, 48 S. C. 308.

[3] On this conflict, see Fitzhugh v. Love's Ex'rs, 6 Call, 5; 3 Am. Dec. 569; Chaddock v. Vanner, 35 N. J. L. 517.

[4] Chitty on Bills, 599; Fitzhugh v. Love's Ex'rs, *supra;* Chaddock v. Vanner, *supra.* There is a *dictum* by Walker, C. J., in the case of White v. Weaver, 41 Ill. 411, that seems to say that, by thus signing, the liability as second indorser is incurred. But in this case the indorsement of the payer had been on the note and erased.

[5] Brandt on Surety, sec. 148; Kayser v. Hall, 85 Ill. 511.

[6] Benj. Chalm. Dig. 223 and notes.

[7] Id.; Meyers v. Richards, 163 U. S. 385. The holder of a note indorsed in blank has a right to write over the signature any contract consistent with such an instrument and in accordance with the agreement of the parties. Cushman v. Dement, 3 Scam. 444; White v. Weaver, 41 Ill. 412–13.

[8] *Ante,* p. 923.

[9] Story, sec. 478.

If the guaranty is upon a negotiable paper and general, it runs with it; that is, the guaranty is negotiable; otherwise if in separate writing directed to a particular person.[1]

Inland and Foreign Bills.— *Presentation for Acceptance.*— The object of presentation is to fix the liability of parties, which is conditional on due presentation, notice, diligence, etc. The holder of a bill of exchange payable in any terms has the right to present it for acceptance even on the day it falls due.[2] An inland bill does not require presentation; a foreign one does.

Bills of exchange payable at sight, or within a specified time after sight or after demand, must, and those on demand or at a certain time after date need not, be presented for acceptance.[3]

The holder of a bill requiring presentation for acceptance must, within a reasonable time, negotiate it or send it forward for acceptance. If this is not done and loss follows in consequence, the holder loses his right of recourse against the drawer and prior holder.[4]

Presentation for acceptance must be to the drawee or an agent authorized to accept.[5]

If the bill is drawn on two or more persons, presentment to one is probably sufficient.[6]

When the drawer draws without provision for acceptance, or when the drawee is a fictitious person, no presentment need be made.[7]

The bill must be presented during business hours, and these, unless the bill be drawn upon a bank, range through the whole day down to bed-time.[8]

Delivery for Acceptance.— The person who presents a bill must deliver it up to the drawee if requested, and the drawee may keep it twenty-four hours to decide whether he can accept it.[9]

If he refuses to return it or destroys it, he is liable the same

[1] Webster v. Cobb, 17 Ill. 459. A guarantor is liable only to persons to whom he made the guaranty. Second Nat. Bank v. Diefendorf, 90 Ill. 396.

[2] Benj. Chalm. Dig. 153; Plato v. Reynolds, 27 N. Y. 586.

[3] Benj. Chalm. Dig. 149.

[4] Benj. Chalm. Dig. 150, 153; Montelius v. Charles, 76 Ill. 303.

[5] Benj. Chalm. Dig. 153.

[6] Id. 154.

[7] Id. 155; Lawrence v. Schmidt, 35 Ill. 440.

[8] Skelton v. Dustin, 92 Ill. 49.

[9] Or such other period as the holder may allow.

as if he had accepted it,[1] and the party has also the right to treat it as dishonored, and probably he has a double remedy — to notify the antecedent parties, and also proceed against the drawee when due.[2] (*Quære.*)

The neglect of the holder to use due diligence in presentment for acceptance or payment, and to give notice of non-acceptance and dishonor, if loss is occasioned by the laches, deprives him of recourse against the prior holders or the drawer upon the bill, and also discharges them from liability upon the debt for which the bill is drawn.[3]

Presentment is excused —

(1) When the drawee is discovered to be a fictitious person, or when by the exercise of reasonable diligence presentation cannot be effected.

(2) When the drawer is not in funds and has no reasonable expectation that the bill will be accepted.

(3) When no place of payment is fixed and acceptor or drawee absconds.

(4) Where reasonable diligence fails to effect presentation, or by a waiver of presentation.[4]

Where circumstances over which the person whose duty it is to present the note has no control preclude, without laches on his part, presentation, delay in making it is excused. Prevalence of a contagious disease, wars, a delay in the mails, etc., also excuse delay. But when the cause of delay is removed the note must be presented within a reasonable time.[5]

Acceptance of a bill is the promise of the drawee to pay it when due.

The drawee must guard against forgery or the alteration of the bill, for in that case he is liable to a subsequent innocent purchaser.[6]

The holder has the right to insist upon a general, *i. e.*, an unqualified, acceptance of the bill, and it is not safe for him to take less.[7]

A qualified acceptance is one that makes payment dependent

[1] Matteson v. Moulton, 79 N. Y. 627.
[2] Smith v. Miller, 43 N. Y. 171.
[3] Robinson v. Ames, 20 Johns. 146.
[4] Benj. Chalm. Dig. 166, 167.
[5] Id. 169; Story on Notes, § 260.
[6] Yocum v. Smith, 63 Ill. 321; Master v. Miller, 4 Term R. 320; Sm. Ld. Cas.
[7] Benj. Chalm. Dig. 52, 53.

on a condition, or is partial as to the amount, or restricts the payment to a particular place, or is qualified as to time, or where it is drawn upon several jointly, and only part accept.[1]

The acceptance may be in writing either on the bill or on a separate paper,[2] or oral, or may be implied from acts.[3]

A written or perhaps verbal promise to accept a bill, made within a reasonable time before or after the existence of the bill, designating the bill, will, if acted on, bind as an acceptance.[4] This may also be done by telegram.[5] But the rule that an acceptance by parol promise to accept before the bill exists may be made is not by any means universal.

And this rule is not applicable to bills payable at or after sight, since the time such bills are to run must be determined by presentation for acceptance.

A letter of credit is a collateral acceptance by which the writer authorizes the party addressed to draw on him.[6]

There are bills which are held accepted by the act of drawing them, as bills drawn by a partner upon his firm, or by one officer upon another officer of the same firm or corporation.[7] These are in substance promissory notes.

Dating Acceptance.— An acceptance need not be dated, but the acceptance of a bill payable after sight should be dated to show where it is due, though the date of acceptance may be proved.[8]

An acceptance without date is *prima facie* an acceptance before due.[9]

Acceptance for Honor.— With the holder's consent after dishonor or protest, or for better security after acceptance, a stranger to it, for the honor of any person liable on it, may ac-

[1] See Brown v. Jones, 113 Ind. 46; 3 Am. St. Rep. 623, which held that designation of place of payment is allowable.

[2] Olcott v. Tioga R. R. Co., 27 N. Y. 586. Acceptance may be by telegram. Brinkman v. Hunter, 73 Mo. 179; Molson Bank v. Howard, 40 N. Y. 15; Savings Bank v. Richards, 109 Mass. 414.

[3] Sturgis v. Fourth Nat. Bank of Chicago, 75 Ill. 597.

[4] Nelson v. First Nat. Bank of Chicago, 48 Ill. 37; Bank of Michigan v. Ely, 17 Wend. 508; 2 L. R. A. 709. As to oral promise, see Allen v. Leavens, 26 Oreg. 164; 26 L. R. A. 620.

[5] Johnson v. Clark, 39 N. Y. 216; Lindley v. First Nat. Bank, 76 Iowa, 629; 2 L. R. A. 709; *supra*, note 2.

[6] Robins v. Bingham, 4 Johns. 476.

[7] Or where a letter of credit authorizes the drawing of a bill of exchange. Bissell v. Lewis, 4 Mich. 450.

[8] Tiedeman, Com. Paper, 220.

[9] Id.; Begbie v. Levi, 1 C. & J. 180.

cept. It is also called *acceptance supra protest*, but it is optional with the holder whether he will allow such an acceptance or not.[1]

A bill may be accepted after it is overdue or after it has been dishonored by refusal to accept, or dishonored by non-payment and protest.[2]

Protest and Notice.— Where the holder of a note presents it for acceptance and acceptance is refused, whether it was necessary to present the bill for acceptance or not, the holder must give the drawee notice of the dishonor, unless the drawer did not draw on funds and had no reason to expect the bill would be accepted; or where the drawer and drawee are the same persons, or same in interest;[3] or the drawee is a fictitious person or has not capacity to contract; or when the drawer has taken an assignment of all the goods of the drawee;[4] and some courts hold when the drawer has taken only part of the goods as security, if the security is ample.[5]

When the holder desires to hold an indorser he must give notice, unless the indorser is the principal debtor, and has no reason to believe it will be honored; or when he is the person to whom the bill is presented for payment; or when the drawer is a fictitious person and the indorser knew it; or when the indorser has received an assignment of all the goods of the drawee.[6]

In all cases where the exercise of reasonable diligence to give notice has failed, notice is excused.[7]

Where a creditor takes a bill from his debtor drawn upon a third person, this is regarded as *prima facie* a payment of the debt, and if the bill is dishonored he must use such diligence as will charge the parties to it, or the debt will be discharged.[8]

[1] It must be again presented for payment, and again protested if not paid. Schofield v. Bayard, 3 Wend. 488.

[2] Grant v. Shaw, 16 Mass. 344; Stockwell v. Bramble, 3 Ind. 428.

[3] Rosson v. Carroll, 90 Tenn. 90; 13 L. R. A. 727; Benj. Chalm. Dig. 195, 196.

[4] Benj. Chalm. Dig., art. 200, Ex. 4 and 5 and note.

[5] Id.

[6] No funds does not excuse notice to indorser. 3 Kent, *110; Chitty on Bills, *328; Welch v. Taylor Mfg. Co., 82 Ill. 579; Bank v. Hughes, 17 Wend. 94.

[7] Benj. Chalm. Dig., p. 198.

[8] Dayton v. Trull, 23 Wend. 345–347.

When a foreign bill of exchange was dishonored it was necessary at common law, and still is, in order to fix the liability of the parties, except acceptor, to protest it before a notary public, and give all the parties sought to be held on the bill due notice of the dishonor and protest.[1] The certificate of the notary is *prima facie* evidence of the facts contained therein.[2]

As to inland bills and promissory notes, no protest was needed or allowed at common law, but only notice as above described;[3] but protest is now allowed in many states by statute, and in some it is required.[4]

Protest of a foreign bill is dispensed with by circumstances which would dispense with notice of dishonor in case of an inland bill, and delay in protesting is excused by circumstances that would excuse delay in notice.[5]

Protest.— In the first instance presentation of whatever kind may be made by the holder of the bill, but in order to perfect the liability of persons secondarily liable a more formal proceeding must be taken, and this is known under the technical name "protest," which ordinarily must be made by a notary, who takes the instrument, presents it, and then writes a formal statement certifying that he did present the note, serving a copy of this declaration upon all of the parties who are desired to be held, and indicating that they will be expected to stand good for exchange, re-exchange, damages, costs and interest.

The notice should be formally certain as to the note and the parties, the time, amounts, and the like.[6]

Unless by statute or local custom, the notary cannot delegate any part of his duty; and it has been a question whether protest might be made, where the services of a notary could not be procured, by two respectable persons of the vicinity.

[1] See Johns on Notaries; Gale v. Walsh, 5 Term R. 239; Union Bank v. Hyde, 6 Wheat. 572; Benj. Chalm. Dig., art. 181; Dennistoun v. Stewart, 17 How. 606.

[2] Dickens v. Beal, 10 Pet. 582; Howard v. Bank of Carson, 50 Md. 27.

[3] Daniels' Neg. Inst., § 927· Tiedeman, Com. Paper, § 321.

[4] Such statutes are generally permissive, thus affording an additional remedy. Bailey v. Dozier, 6 How. 589.

[5] Benj. Chalm. Dig., art. 182; Hull v. Myers, 90 Ga. 674.

[6] As to the requirements, see Dennistoun v. Stewart, 17 How. 606; Benj. Chalm. Dig., arts. 175, 176, 177, 178, and notes.

The new negotiable instrument act provides that such protest is good.[1]

When formally made according to the *lex loci*, the certificate of protest is *prima facie* evidence of the material facts,[2] and entitled to full faith and credit in the courts of all commercial countries.[3]

Maturity means the point of time when the payment must be made, and the ascertainment of it is not so simple a matter as might at first blush appear.

Custom has established rules of computation and practice. Thus paper payable in a certain way is entitled to grace, *i. e.*, several more than the nominal days fixed for payment. These differ in different localities.[4]

Again, if the day of payment is *dies non* (no day) by law and not a day of grace, the next is the absolute day of payment; but if it be a grace day, payment must be made on the preceding day.[5]

Bills payable on demand and at sight must, to bind those secondarily liable, be presented within a reasonable time.[6]

Where time runs from a fixed day, that day is excluded, and the next day is the first in the computation.

A month is a calendar month irrespective of the number of days.[7]

Presentation for payment, to fix secondary liability, differs from presentment for acceptance in this: that presentment for acceptance must be made *to the person* who is expected to accept the bill or his authorized agent, but the place of presentation is not material; while presentation for payment must be made *where the bill is payable*, and is essential. It is not essential that it be presented to the person who is expected to pay, unless he be at that place.[8]

[1] See Burke v. McKay, 2 How. 66; Benj. Chalm. Dig., art. 177, note; Commonwealth Bank v. Varnum, 49 N. Y. 269; Par. Bills & Notes, p. 641, note *a*.

[2] Daken v. Grave, 48 N. H. 45; Towsley v. Sumrall, 2 Pet. 170.

[3] Pierce v. Endseth, 106 U. S. 546.

[4] Four days' grace were allowed in the District of Columbia. Renner v. Bank, 9 Wheat. 582; Dan. Neg. Inst., § 617; Bowen v. Newell, 13 N. Y. 290.

[5] Benj. Chalm. Dig., art. 20; Reed v. Wilson, 41 N. J. L. 39.

[6] Seaver v. Lincoln, 21 Pick. 267.

[7] Calendars different in different countries. Russia uses the Julian calendar, while we use the Gregorian, and there is twelve days difference. 1 Dan. Neg. Inst., § 632.

[8] Benj. Chalm. Dig., arts. 152–55,

A bill payable on demand must be presented within a reasonable time.

Presentation must be made in reasonable hours. If the person is a trader, and the bill is payable at his place of business, it should be presented there within or at the close of his business hours;[1] but if made payable at a residence, then the bill may be presented up to bed-time.[2]

The bill must be produced and presented by the holder or some one authorized to receive the money and give a receipt, though a bill may be presented by mail.[3]

Where no place is fixed, then the bill should be presented personally, either at the residence or place of business of the party. The street is not a proper place, if objected to.[4]

When, by the exercise of reasonable diligence, a personal demand cannot be made upon the drawee or acceptor, if the acceptor or maker has, at the maturity of the bill, a place of business, presentation there at the proper hour is sufficient to fix the liability of all parties.[5]

If he has removed to another country or state from where he resided at the time of the execution of the bill, presentation at his former residence or place of business is enough.[6] One is not bound to follow the maker or acceptor into a foreign state; but if he resided in the foreign state at the time of making the note or bill, or accepting it, then it must be presented there.[7]

Where a bill is addressed to or accepted by two or more persons, presentation must be made to all.[8]

160–67. It is the duty of the acceptor to be at the place of payment. Bank v. Smith, 11 Wheat. 171.

[1] Clough v. Holden, 115 Mo. 336; Sulzbacher v. Bank, 86 Tenn. 201; 6 Am. St. Rep. 828; Waring v. Betts, 90 Va. 46. But where, after the close of a banking house, the holder actually obtained admittance to the bank and presented it to the proper persons, it was held a sufficient demand to charge the indorser. Salt Springs Nat. Bank v. Burton, 58 N. Y. 431.

[2] Skelton v. Dustin, 92 Ill. 49.

[3] Benj. Chalm. Dig. 161, 162.

[4] Benj. Chalm. Dig. 165.

[5] Cox v. National Bank, 100 U. S. 704.

[6] Benj. Chalm. Dig. 165; Foster v. Joslin, 24 N. Y. 28.

[7] Spies v. Gilmore, 1 N. Y. 328.

[8] Demand must be made upon all parties primarily liable. Gates v. Beecher, 60 N. Y. 518, 523; Bank of Red Oak v. Orvis, 40 Iowa, 332; Willis v. Green, 5 Hill, 232; 40 Am. Rep. 351; Arnold v. Dresser, 8 Allen, 435. Unless a legal excuse can be shown for not making such demand. Allen v. Harrah, 30 Iowa, 363, 370; Tiedeman, Com. Paper, sec. 313. And

Demand of Payment to Fix Liability of Acceptor and Maker. It is a general rule of law that where there is a debt or a duty to pay without condition no demand of payment need be made.[1] But if the acceptor or maker alleges and proves that he was at the place of payment and willing and able to pay, he will not be charged with interest and costs, and if he has suffered damage by non-presentation it may be that he will be allowed damages.[2]

All that is necessary is to present it before the debt is outlawed, unless the delay has occasioned loss to the acceptor.[3]

Banker and Customer — Checks.— In order to understand the nature of the third species of negotiable instruments above spoken of, it is necessary to understand the nature of the business of banking, because a check is always an order on a banker.

A check, properly speaking, is an order by a customer on a banker to pay immediately upon demand a definite sum of money.

The relation of banker and customer is a peculiar one, and not easy to define except by describing the essential attributes.[4]

A banker is one with whom money is deposited, but even in this case it is not the ordinary deposit of a bailee for safe-keeping. The banker becomes the debtor, and the depositor the creditor, and the money the property of the banker.

Banks are either national banks, created by the United States, or state banks, established under the authority of the states, or private banks.[5]

The organization, powers and management of the first two are regulated by statute, while the latter may or may not be

where one of makers is dead, demand must be made of the administrator. Blake v. McMillen, 33 Iowa, 150. But if joint makers sign as partners, demand of one is sufficient. Gates v. Beecher, 60 N. Y. 518, 522. Signing in the usual manner of partners raises presumption of partnership. Erwin v. Downs, 15 N. Y. 575.

[1] Trust Co. v. Shufeldt, 78 Fed. Rep. 292. And this is true even if payable at a particular place. Salt Springs Bank v. Burton, *supra*.

[2] Benj. Chalm. Dig. 171; Chitty, 365, note.

[3] Benj. Chalm. Dig. 172; New Hope, etc. Co. v. Perry, 11 Ill. 467–471.

[4] The nature of banks, their utility, and the power of the national government to create them, are fully discussed by Judge Wilson in his argument on the Bank of North America, 1 Works, 549; by Hamilton in his argument in favor of a national bank; and by Marshall, C. J., in McCulloch v. Maryland, 4 Wheat. 405.

[5] See Legal Tender Cases, 110 U. S., at p. 445.

regulated by statutory provisions; in the absence of which the law merchant, with certain local customs, will regulate the manner of conducting the business.

Banks of Issue.— Formerly private banks and state banks were in the habit of issuing promises to pay the bearer of the bill the sum indicated. They were called "bills of credit,"[1] and passed from hand to hand as money; but the national tax of ten per cent. on these destroyed the practice.[2]

The obligation imposed by the law is that the banker will honor the checks of his customer to the amount of his deposit, and pay them on demand.

It is said that the relation is one of trust and confidence, but there is no other or further obligation on the banker than his promise to repay.

He is not obliged to hold money, and in practice does not. He has unlimited discretion in reference to its investment, and is not obliged, in the absence of statute, to keep on hand money or security to pay his depositors; and no bank could exist for any length of time whose deposits did not largely exceed the capital of the concern. In the last analysis the banking business rests on the confidence in the integrity and discretion of the banker.[3]

The frequent failure of bankers has led to statutes regulating the business and fixing criminal penalties for the more common forms of fraud practiced by bankers against customers.

It is a crime in many states, and a fraud everywhere, for a banker, knowing himself to be insolvent, to accept deposits from persons ignorant of the situation; and if a failure follows quickly, under some circumstances equity will allow the owner to reclaim the fund on the ground that the assignee or receiver takes only the owner's equities.[4]

[1] The great discussion in Briscoe v. Bank of Kentucky, 11 Pet. 257, gives a history of bills of credit, and involves the effect of the constitution upon the power of state banks to issue them.

[2] This gave rise to the case of Veazie Bank v. Fenno, 8 Wall. 533. It was remarked, and is significant, that the bank was in no sense a fiscal agency of the state. Id., p. 535.

[3] The tacit understanding is that a banker is a discreet person, and will lend his money on safe security for a short time, being always liable to repay all depositors on a short notice. But in fact few bankers are ready to meet all comers.

[4] St. L. & S. F. Ry. Co. v. Johnson, 133 U. S. 566; Wasson v. Hawkins, 59 Fed. Rep. 233.

The rights of the parties are determined in most cases by the doctrines of equity in relation to tracing trust funds, which will be mentioned in connection with equity proceedings.[1]

Bankers as Collectors.— It is a very common practice to indorse checks or drafts to the home bank "for collection," or to draw drafts in favor of a bank for the purpose of constituting them collectors of debts. The relation is then that of agency.[2] The funds collected are, however, generally credited to the transmitting bank, and in cases of insolvency the question arises as to the right to the fund, and here again arises the question of tracing trust funds.[3]

A check is in form an inland bill of exchange, and may be made payable in every respect as a bill of exchange, except that it must be on demand. If payable in any other way than on demand, it becomes a bill of exchange proper, and, as such, entitled to days of grace, protest, notice, etc.[4]

The deposit is generally withdrawn by means of a check, and there is a diversity of opinion as to the effect of making and issuing a check.

It is held in some jurisdictions that a check amounts to an assignment *pro tanto* of the deposit at the time of presentation,[5] and that privity between the payee and the bank is created by presentation, and the payee may sue the bank for refusal to pay.[6]

The English doctrine is contrary to this position, and holds that there is no privity until acceptance. The weight of authority in the United States supports the latter rule.[7]

The relation being that of debtor and creditor, with the obligation to honor and pay imposed *by operation of law*, it is diffi-

[1] *Infra.*

[2] Conn. Nat. Bank v. Armstrong, 39 Fed. Rep. 684; St. L. & S. F. Ry. Co. v. Johnston, 133 U. S. 571; Drovers' Nat. Bank v. Provision Co., 117 Ill. 105; White v. National Bank, 102 U. S. 659.

[3] Id.

[4] Boston M. Bank v. Boston State Bank, 77 U. S. 647; Bowen v. Newhall, 8 N. Y. 190; Culter v. Reynolds, 64 Ill. 321; Harrison v. Nicollett Bank, 41 Minn. 488.

[5] It is nowhere pretended that the fund is affected before presentment. Laclede Bank v. Schuler, 120 U. S. 511.

[6] Munn v. Birch, 25 Ill. 21, is the leading case on this doctrine. The law of the place of payment governs the effect in this respect. Abt v. Am. Tr. & S. Bank, 159 Ill. 467; Met. Nat. Bank v. Jones, 137 Ill. 634; 31 Am. Dec. 406.

[7] See notes to Hemphill v. Yerkes, 132 Pa. St. 545; 19 Am. St. Rep. 670.

cult to see the want of privity, and the Illinois rule has much of logic and policy to commend it.[1]

The depositor's balance does not at any time exceed the amount which the banker owes him after deducting all reasonable set-offs which are due; but this is not a matter of mere book-keeping,— the facts control the books.[2]

At common law he is entitled to the doctrine of set-off, and by statute in some states the equitable doctrine of compensation, which recognizes the banker as debtor only to the amount of the balance after deducting credits, is established.[3]

Certificates of Deposit.— It is usual for the banker, if requested by the customer, to give him a certificate of deposit, which is to all intents a promissory note payable on demand; and this, like a bill of lading, may be transferred from hand to hand, and passes the title to the holder.

A certified check is one which has been presented and marked as good or accepted. It is in fact an entirely new contract between the holder and the banker. The original drawee does not contemplate acceptance, but payment; and if, instead, the drawee take the banker's certificate on the check instead of the cash, the drawee is released, and the relations between the banker and the holder are the same as that of depositor and banker.[5]

[1] Met. Nat. Bank v. Jones, *supra*. It is hard to see how this rule should obtain in New York, where the doctrine of privity established in Lawrence v. Fox, *ante*, obtains, and where the assignability of choses is favored. The new negotiable instrument law follows the weight of authority.

[2] A banker has a general lien on the funds of the customer to secure balances due, but no lien to secure a debt not due which will affect holders of the customer's checks. Niblack v. Park Bank, 169 Ill. 517; Mt. Sterling Bank v. Green, 99 Ky. 262; 32 L. R. A. 568; Schuler v. Bank, 27 Fed. Rep. 424. But as to paper which is due and upon which there are sureties, it is the duty of the bank to apply the deposit, and a neglect will release the surety. Mer. & F. Bank v. Seitz, 150 Pa. St. 632; 30 Am. St. Rep. 853.

[3] Bank of Marysville v. Brewing Co., 50 Ohio St. 151; 40 Am. St. Rep. 660.

[4] Smiley v. Fry, 100 N. Y. 262; Auten v. Crahan, 81 Ill. App. 502. A pass-book, so called, is the same thing in a different form. Telford v. Patton, 144 Ill. 611.

[5] Met. Nat. Bank v. Jones, 137 Ill. 634; 31 Am. St. Rep. 403, note; Lynch v. Bank, 107 N. Y. 179. It follows that a mistake, if discovered before the rights of third parties intervene, may be corrected. Dillaway v. N. W. Bank, 82 Ill. App. 71.

Memorandum Checks.— A memorandum check is in the form of an ordinary bank check, with the word "memorandum" written across its face. They are simply evidence of an indebtedness of the drawer to the holder, and are not to be immediately presented at the bank so as to destroy credit.

It is the custom in commercial cities to draw and use such checks merely as due bills.[1]

Special deposits may be made where the fund is designated as not belonging to the depositor, and in such cases the fund is not liable to the creditor of the depositor.[2]

When a check has been certified by a bank it is in effect an accepted bill, and the bank becomes primarily liable for it.[3]

[1] United States v. Isham, 17 Wall. 503.

[2] Hemphill v. Yerkes, 132 Pa. St. 545; 19 Am. St. Rep. 607.

[3] Meade v. Albany M. Bank, 25 N. Y. 143; Born v. Ind. etc. Bank, 123 Ind. 78; 7 L. R. A. 443; Met. Nat. Bank v. Jones, 137 Ill. 634; 12 L. R. A. 492; Garretson v. North Atchison Bank, 39 Fed. Rep. 163; 7 L. R. A. 428 and note. But a parol statement that the drawer is good has not the effect of a certification. Bank of Springfield v. First Nat. Bank, 30 Mo. App. 275.

OUTLINE OF THE LAW OF REAL PROPERTY.

Things Real.

1. Things Corporeal.
   1. Land.
   2. Fixtures.
2. Things Incorporeal.

Of Ownership.

1. Original source of private ownership.
2. The manner of creating property in land.
3. The capacity of persons to take property in land.
4. The character of ownership which the individual may acquire.
   Property contrasted with tenure.
5. Restraints on power and mode of alienation.

Estates.
Considered with reference to—

1. The quantity of interest, or the duration of enjoyment.
   1. Freeholds.
      1. Of inheritance, or in fee.
         - Fee simple.
         - Fee tail.*
         - Base fee.
      2. Not of inheritance, *life estates.*
         - For life, or *pur auter vie.*
         - *a.* Jure uxoris.
         - *b.* Curtesy.
         - *c.* Dower.
         - *d.* Community.
         - *e.* Homestead.
   2. Less than freehold. Chattels real.
      1. For years.
      2. At will.
      3. On sufferance.
      4. Year to year.
2. Nature of interest and character of possession.
   1. Legal.
      1. Ownership. (Freeholds.)
      2. A tenancy. (Less than freehold.)
      3. Interests without possession, with or without occupancy.
         - Easements. Or servitudes.
         - Licenses.
         - Commons.
         - Rents.
         - Annuities.
         - Franchises.
   2. Equitable.
      - Uses and trusts.
      - Powers.
3. As to time when it may be enjoyed.
   1. Possession.
   2. Remainder.
   3. Reversion.
4. As to the certainty of continuance.
   1. Absolute.
   2. Determinable.
   3. Conditional.
      a. Mortgages.
5. As to the number and connection of tenants.
   1. In severalty.
   2. Joint tenancies.
   3. As partners.
   4. Tenancies in common.
   5. Tenancies in coparcenary.
   6. Tenancies by entireties.

Of Title.†

*This estate is obsolete. See p. 978. †See outline, p. 1007.

CHAPTER XXX.

THINGS REAL.

(PROPERTY IN LAND.)

"What we call the law of property is, in the first place, the systematic expression of the degrees and forms of control, use and enjoyment that are recognized and protected by law." Pollock, First Book of Jur., 159.

SEC. 625. *The Aim* of this brief sketch of the American Law of Real Property is to bring clearly to the surface in natural outline only the essential elements of the system of law regulating the nature of property in land, the manner of acquiring it, how it may be enjoyed and how transmitted, having in mind the saying of Fortescue, "whoever knows the principles and elements of any science, knows the science itself — generally, at least, though not completely,"[1] and it is hoped that this concise summary may facilitate a clear comprehension of this most difficult branch of the law.

Difficulties Encountered.— How to accomplish this so that it may be understood by the reader who is taking his first view of the subject is a matter of no small difficulty.

The nomenclature in common use is largely that employed to express characteristic ideas in a system of law essentially different from our own, and the terms of which cannot be ignored nor others substituted; for example, the words *fee*[2] and *seizin*[3] have changed their primary meaning.

American and English Law Differ.— The American law of real property differs fundamentally from the ancient or modern law of tenure and estates as presented by Blackstone.

This results mainly from the abolition of the institution of sovereignty, and the consequent obliteration of tenure and its

[1] Quoted in 1 Wilson's Works, 12.

[2] Estate, "though called fee, is in truth allodial." 2 Cooley's Blk. (4th ed.), 103, note.

[3] Dane says the word is inapplicable to any American idea. Abridg., Int., p. 13. While this may be theoretically true, a knowledge of its significance is of great practical importance. See Ft. Dearborn Lodge v. Klein, 115 Ill. 177. See *post*, p. 976.

feudal incidents, and from the changes in the status of husband and wife.

Our system preserves that part of the English law of estates resting on *contract*,[1] regulated by those rules of public policy declared in statutes, or resting on general principles of our common law.[2]

We also retain much of their law relating to *titles*, but discard much which was essential to and depended on feudal ideas.

The general topic of real property embraces the right and interest in (*i. e.*, the estate) the subject, or of the right (*i. e.*, the thing),[3] and the titles by which they are held.

The things which are the objects of the right must be distinguished from the right in the same manner that we distinguish property from the subject of property.[4]

Estate or *property* means *the interest* in and to these *things real*.[5]

Title is the one word which designates the means of acquiring interests in land (conveyancing).[6]

The writer's attention has not been called to any modern treatise on real property which makes *clearly*[7] the primary separation of subjects, viz.:

The rules providing what degree of property an individual may acquire from the state, together with the modes of its acquisition, and the rules of law governing the manner of creating and transmitting estates in land by private conveyance or by operation of law.

These matters are as distinct in our law as is the idea of

[1] Van Rensellaer v. Dennison, 35 N. Y. 400. See Holden v. Hardy, 169 U. S., at p. 386.

[2] 2 Cooley's Blk., 102, note.

[3] See 1 Washb. R. P. 32.

[4] *Ante*, sec. 575.

[5] 2 Cooley's Blk. (4th ed.) 103, note 2; Messmore v. Williamson, 189 Pa. St. 73; *infra*, sec. 634.

[6] 1 Washb. R. P. 69.

[7] This word *clearly* is used advisedly, it not being intended to affirm that any modern writer ignores the distinction pointed out. Blackstone makes it the basis of separation; but Washburn, and those who follow him, throw it out of the plan or outline, although Washburn treats the subject clearly. Book I, ch. 2, sec. 98.

Washburn's Outline.

- Real Property.
  - Estates in—
    - Corporeal Hereditaments. (Book I.)
    - Incorporeal Hereditaments. (Book II.)
  - Book III. Titles.
    - By Purchase.
    - By Descent.

Blackstone's Outline.

- Things Real.
  1. The several kinds.
  2. Tenures.
  3. Estates.
  4. Titles.

tenure from that of estate, or estate from title, as treated by Blackstone and Washburn.[1]

Importance of Contracts.— Again, it is believed that sufficient prominence is not given by any of our authors to the now predominating influence of the idea of contract as constituting the principal element in the modern law of real property; that is to say, that the second branch of the subject is not to be regarded as independent of contract.[2]

The use of the words "grant" and "conveyance" has obscured the real fact that most transactions relating to interests in land originate in contracts, and are executed by what is but another form of contract, almost invariably accompanied by covenants and conditions which are essentially nothing but contracts.[3]

So long as the idea of tenure bounded the quantity of the estate of private holders, fettered the modes of conveyance, imposed incidents and conditions by operation of law, and by these incidents obtruded itself upon every private transaction, this view was not important; and in Blackstone's Commentaries we

[1] The loss on this account may not be great if only lawyers are considered, but the student misses the view of the articulating parts of the system.

[2] "We have been laying stress on the late growth of a law of contract, so, for one moment, we must glance at another side of the picture. The master who taught us that 'the movement of the progressive societies has hitherto been a movement from *status* to contract' was quick to add that feudal society was governed by the law of contract. There is no paradox here. In the really feudal centuries, men could do by a contract, by the formal contract of vassalage or commendation, many things that cannot be done nowadays. They could contract to stand by each other in warfare 'against all men who can live and die;' they could (as Domesday Book says) 'go with their land' to any lord whom they pleased; they could make the relation between king and subject look like the outcome of agreement; the law of contract threatened to swallow up all public law. Those were the golden days of 'free' (if 'formal') contract. The idea that men can fix their rights and duties by agreement is in its early days an unruly, anarchical idea. If there is to be any law at all, contract must be taught to know its place." 2 Pollock & Maitland, Hist. Eng. Law (2d ed.), 232. "The Anglo-Saxon relation of lord and man was originally purely personal and founded *on mutual contract*, and perhaps the act of becoming the man of another or homage, then, as in aftertimes, was performed by the person simply declaring that he would be the man of the lord." . . . "As the relation was founded on contract, it might be accompanied, it would seem, by any conditions that were mutually agreed upon." 1 Spence, Eq. Jur. 36.

[3] Fletcher v. Peck, 6 Cranch, 87.

find the subject of contracts occupying merely a subordinate, inferior position, remote from the law of real estate, and apparently affecting only things personal.[1]

Modern View.— All this is now changed, and the change requires a different treatment, necessitating the rejection of all those matters which are incident to ancient and modern tenures, but preserving those rules of ownership and contract not depending upon feudal principles.

This change does not disturb the *order of treatment* with which the profession is familiar, but gives the active principle of our law the prominent place formerly occupied by the obsolete one, and using the old only as a side light to a clear perception of the new.

As to the first branch of the subject, namely, the quantity of interest which a private individual may obtain from the government, and the manner of obtaining it, the greatest change appears, but unlike the English tenure it has given rise to little dispute and litigation. The statement, therefore, of a few plain principles is sufficient to exhibit it.[2]

In the other branch of the law relating to the creation of estates in a particular piece of land by segregating the complete ownership into fractional parts of the entire estate, and the law of private conveyancing (title), there are few changes in principle.

Sec. 626. *The Title of Nations.*— International law, or the common consent of nations, recognizes several ways by which a nation may acquire a right to permanently possess a given portion of the earth, viz.:

Discovery and occupancy of unoccupied land must always be by individuals, but always inures to the benefit of the nation.[3] The domain occupied only by what are called savage races is

[1] 2 Blk. Com., ch. 30.

[2] From the time of the imposition of Norman feudalism by William, the struggle against it never abated; in consequence the subject occupies a prominent place in history and in text-books. In this country the corresponding features of our system of ownership have caused no friction and but little litigation; the struggle against the *remnants of feudalism* in New York being perhaps the most important. Van Rensselaer v. Dennison, 35 N. Y. 393; De Peyster v. Michael, 6 N. Y. 397; Van Rensselaer v. Hays, 19 N. Y. 68.

[3] Warvell, Real Prop. (2d ed.), 136; Cherokee Nation v. Georgia, 5 Pet. 1; Guano Co. v. Id., 44 Barb. 27.

considered as unoccupied. Such people are not accorded the same rights as a civilized nation.[1]

Conquest can only be conducted by nations and can only benefit them.[2]

Cession.—Nations may by treaty fix boundaries or cede territory.[3]

Sec. 627. *Subject of Ownership.—Things real*, as distinguished from things personal, in which one may acquire property, were anciently and are now generally designated by and included in the terms lands, tenements and hereditaments.

This ancient classification, valuable and intelligible only during feudal times, is more likely to prove confusing than helpful, but, being everywhere present, a word of explanation may prove useful.

Hereditaments.—The term "hereditament" extends to everything, corporeal or incorporeal, which may be taken in hereditary succession. The word conveyed a well-defined idea and performed a definite function in the English system.

It could not have originated before inheritable quality was recognized, but when the idea prevailed of allowing property to descend by operation of law to the heir, this faculty of descent was called inheritable, and all subjects to which it attached were termed hereditaments.[4]

Corporeal.— Of those things which, in order to embrace all

[1] Cherokee Nation v. Georgia, *supra;* Johnson v. McIntosh, 8 Wheat. 543.

[2] Id.

[3] *Ante*, p. 220.

[4] At the same time and until 13th Edw. I, the personal property of an intestate did not go to his heirs, *nor to his estate*, but to the bishop, to be distributed for the benefit of his soul. 1 Spence, Eq. Jur. 190. Things real were said to lie in livery or in grant. Things were said to lie in livery when the person in whom the first estate in freehold was vested by the sovereign had the possession of land in right of this estate, because by the common law these things were properly conveyed by livery of seizin. Things were said to lie in grant when one had an estate in any tenement or hereditament, not being land, or an estate in land where he was not entitled to possession, because before the statute of uses a grant was the only method of conveying things of this description to a person who had not some previous estate. The object of livery was to give notoriety to the transfer. For this reason witnesses were called who could testify to the ceremony. The object of livery is now served by complying with the requirements of the registration laws. The division, therefore, of hereditaments into corporeal and incorporeal is now of less practical importance than formerly. Bryan v. Bradley, 16 Conn. 474; Pollock, First Book Jur., p. 177.

in one word, were spoken of as hereditaments, some are in their nature corporeal, that is, tangible, having a body which may be seen and felt, and are embraced in the word "land."

Incorporeal.— The requirements of society render it convenient or essential that persons *other than those in possession* of the land may have certain interests in it or in reference to it. These, in the nature of the case, must rest on some contract; but the subject of the ownership is land, and the estate no more incorporeal than any other so-called corporeal interest not accompanied with real possession. The classification is not based on actual difference.

Once the idea of permitting descent was established, it extended to subjects beyond what we embrace within the designation of estates in land, and then embraced advowsons, tithes, commons, ways, offices, franchises, dignities, heirlooms, corrodies, annuities, rents, and several things not in their nature necessarily connected with land,[1] but because of this feature of permanency and perpetual succession[2] were classed *not as, but with*, real property and termed hereditaments.

In American jurisprudence heirlooms have not generally been recognized.[3] Offices are never inheritable,[4] and franchises are not *generally* recognized as hereditaments,[5] so that the term "hereditament" does not perform any function not filled by the words "land and tenement," and might well be dropped entirely.

Tenement — *Is a Word of the Feudal Law.*— A tenancy of the crown was the largest degree of ownership which a subject could acquire. He could obtain this only in those things denominated *real.* The interest was called an estate; the things a *tenement.*

Naturally, therefore, tenement broadened somewhat the natural notion of land, and included the artificial accompaniments

[1] 2 Cooley's Blk. (4th ed.) 20, notes.

[2] The idea was more nearly that of perpetual succession than inheritance. In discussing hereditaments attention is called to the term "hereditary succession." It must be borne in mind that in the old law the heir took the estate by purchase and not by inheritance as we now use the term. Prest. on Estates, p. 11.

[3] 1 Washb. Real Prop. 20.

[4] *Ante*, p. 160.

[5] Thompson v. People, 23 Wend. 579. Franchises were created by grant, and were held in perpetual succession, and it is easy to see how these qualities affixed to them the classification of hereditament. 2 Cooley's Blk. (4th ed.) 37; 2 Washb. R. P. 291–293. But see *post*, p. 995.

which civilization, with commerce and husbandry, requires, and whatever could be holden of another in tenancy, *i. e.*, in which the other retained a reversionary or paramount right, was a tenement, and its holder or owner in the old nomenclature was a *tenant*.[1]

Land, meaning the soil, was in the old law a tenement, for in reality or in fiction, according to the English system of tenures, all land was held mediately or immediately of the crown.

Sec. 628. *Land* means more than so many square rods of the surface, and includes the space above, and to a qualified extent the water upon or which may pass over the surface. The law recognizes also that the subsoil may be used in connection with or separated from the surface, and the same is true as to minerals, subterranean waters and gases.[2]

In its legal signification it is of comprehensive import and includes whatever is part of the terrestrial sphere, or attached thereto, and signifies, in short, all subjects which admit of manual occupation and are in their nature permanent and immovable.[3]

Buildings.— As a general rule, when a building is placed on land, though by a stranger, the presumption is that it is a part of the real estate, and before it can be treated otherwise a state of facts must be shown rebutting the presumption.[4]

[1] Preston on Estates, pp. 8–10. It is difficult to express the real distinction between lands, tenements and hereditaments. It is also difficult to find any practical use which was made of these distinctions, even by Blackstone. Preston mentions Blackstone's lack of clearness, and Cooley denies his correctness. The student, therefore, need not feel discouraged if the matter is not plain on first reading. See 1 Burr. 110.

[2] A given portion of the earth extending upward and downward from the surface may be separated into several fee-simple estates. See next page.

[3] The rule by which land has an indefinite extent upwards and downwards is an arbitrary rule of law, and the legislature may provide at any time that for the future, and there being no interference with improvements or contracts already made, buildings and other improvements upon land shall be deemed personalty. Ross v. Irving, 14 Ill. 171. At common law valuable mines did not go with the land.

The Georgia code, which purports to be declaratory of the common law, reads as follows: "Realty, or real estate, includes all lands and the buildings thereon, and all things permanently attached to either, or any interest therein, or issuing out of, or dependent thereon." Bagley v. Columbus So. R. Co., 98 Ga. 626, 34 L. R. A. 292.

[4] Titus v. Maybee, 25 Ill. 232. See "Fixtures," *post*, p. 963.

Minerals.— Coal and minerals in place are land, and subject to conveyance as such. The owner of a mineral right has an interest which he may convey distinct from the surface.[1]

Natural gas has become of great utility and value and may be granted without granting the entire estate,[2] and does not pass by a grant of coal.[3]

Ice.— Different considerations apply to water flowing in a stream, and ice formed on its surface. When frozen and fixed it is considered a part of the realty, and the owner may prevent its removal by others or use and dispose of it as he sees fit.[4] When sold, cut or uncut, it is considered personalty.[5]

Crops and Trees.— As between a trespasser and the owner of the soil, or a vendor and vendee, crops are real estate, and it is generally held that crops while attached to the land, as well as trees and shrubs, fruit and grass which grow spontaneously, are part and parcel of the land and pass by conveyance thereof.[6]

Manure.— It is held generally that manure produced by cattle fed on the products of the farm is *prima facie* part of the realty, but when it is produced otherwise than in the course of husbandry, as in connection with a hotel stable, or livery barn, it is personalty.[7]

Church Pews.— In this country church pews are held by a peculiar title and as a qualified and usufructuary right. In the absence of a statute or customs of the church the property of a pew owner is to be treated as real estate,[8] and for a disturbance he may maintain trespass or writ of entry.[9]

[1] Caldwell v. Fulton, 31 Pa. St. 475; Knight v. Ind. Coal & Iron Co., 47 Ind. 105; Lillibridge v. Lack. Coal Co., 143 Pa. St. 293; 13 L. R. A. 627, note.

[2] Chartiers Coal Co. v. Millon, 152 Pa. St. 286.

[3] Id.; Williams v. Jones, 39 W. Va. 231; 25 L. R. A. 222, note.

[4] Wash. Ice Co. v. Shortall, 101 Ill. 46.

[5] Higgins v. Kusterer, 41 Mich. 318.

[6] Powell v. Rich, 41 Ill. 466; Hoffman v. Armstrong, 48 N. Y. 201. The status of crops as between landlord and tenant will be considered under the head of "Emblements," as an incident of life estates.

[7] Snow v. Perkins, 60 N. H. 493; Fay v. Muzzey, 13 Gray, 53; Lewis v. Hyman, 22 Pick. 437.

[8] Mainwaring v. Giles, 5 B. & Ald. 360. By statute in some states this property is made personalty, in others realty.

[9] O'Hear v. De Goesbriand, 33 Vt. 593; 80 Am. Dec. 653. See note. Gay v. Baker, 17 Mass. 435. In England the right to a church pew is regarded as in the nature of an easement, and case only will lie for a disturbance of the occupant. Crabb's Real Prop. 406.

Burial Lots.— Whatever custom may have affixed as incident to public burying grounds, or to cemeteries belonging to religious societies in England or the early colonies, it is clear that the nature of the interest of one in land set apart as a cemetery must depend upon the conventional arrangements by which he obtains his title, and the covenants of which determine the interest and estate therein.

There is no law restricting the purchase of a small piece of ground in fee-simple absolute and placing therein the remains of a deceased friend or kinsman, so the nature of the interest may be a mere license, or a fee simple, or any intermediate estate.[1]

Fixtures.— A fixture is a thing personal in its nature, which, by being attached to the land with the intention of making a permanent annexation, becomes a part and parcel of the realty.

The question as to what are to be considered fixtures arises in various phases, *e. g.*, between the heir and executor, vendor and vendee, mortgagor and mortgagee, landlord and tenant, executors and creditor, a creditor, a tenant and the landlord, and no rule can be laid down as to what, under all circumstances, shall be considered a fixture. The rule varies according to the relation of the parties and the circumstances attending annexation.

In determining the question, regard must be had, first, to the character of the annexation; second, the intention of the party in making the annexation; and third, the nature of the article.

The annexation may be actual or constructive. When a thing is actually attached to the soil the annexation is actual.[2]

It is constructive when the article is not fastened to the realty in any solid manner, but is slightly attached to it in some temporary way,[3] or is so ponderous as to be fixed by its own weight; but in such cases the article is *prima facie* personalty.[4] So railway rolling-stock has been held to be realty.[5]

[1] Thirkfield v. Cem. Ass'n, 12 Utah, 76; Hancock v. McAvoy, 151 Pa. St. 460; 31 Am. St. Rep. 770.

[2] Williamson v. N. J. S. R. Co., *supra.* Instances of such constructive annexation are keys, doors, windows and blinds of a house.

[3] Id.

[4] D'Eyncourt v. Gregory, L. R. 3 Eq. 382. See Titus v. Mabee, 25 Ill. 232.

[5] Minnesota Co. v. St. Paul Co., 2 Wall. 644; Titus v. Mabee, *supra.* But not generally so. See High v. Plattsburg R'y, 54 N. Y. 314.

The degree of annexation is not of great importance; but generally, in order that the article may be considered a fixture, it must be so attached as to give a fixedness in location, or localization in use,[1] unless it be in states where rolling-stock is regarded as a fixture.

As between heir and executor, vendor and vendee, mortgagor and mortgagee,— those persons having a permanent estate in the land,— it is presumed from the permanent manner of annexation that the intention is to make a permanent improvement.

It is competent for parties to give to a permanent improvement the character of a chattel, and where such is the case it may be removed, provided such removal will not involve an injury to the interest of one not a party to the contract.[2]

Trade and Husbandry Fixtures.— As between landlord and tenant the strictness of the rule for determining what shall be considered a fixture is much relaxed.

The common-law rule was that whatever was annexed to the inheritance during the tenancy must be abandoned at the expiration of the term.

An exception was very soon made as to the improvements placed on the land for the purpose of carrying on trade or manufacture;[3] but the exception made in favor of trade fixtures was not extended in England to erections made solely for purposes of husbandry.[4]

At an early date a more liberal rule was adopted in this country, and the exception was made to include agricultural fixtures, and such were allowed to be removed unless the removal was attended by permanent injury to the premises.[5]

The removal in all cases must be during his term, if it be of certain duration,[6] or if not then within a reasonable time after its termination.[7]

[1] Last note *supra*.

[2] Ford v. Cobb, 20 N. Y. 344; Carpenter v. Allen, 150 Mass. 281; Buzzell v. Cumming, 61 Vt. 213.

[3] Elwes v. Maw, 3 East, 38; Van Ness v. Packard, 2 Pet. 137; Climi v. Wood, L. R. 4 Ex. 328.

[4] Boyd v. Shorock, L. R. 5 Eq. 572.

[5] For illustration and general discussion of the laws, see Vaughn v. Huldeman, 33 Pa. St. 522; Maples v. Milan, 31 Conn. 598.

[6] Watriss v. First Nat. Bank, 124 Mass. 571; White v. Arndt, 1 Whart. 91.

[7] Mackintosh v. Trotter, 3 M. & W. 184; Antoni v. Belknap, 102 Mass. 193.

The whole question must be considered in the light of circumstances surrounding the case, and of the varying modes of life and changing customs of business.[1]

Sec. 629. *Origin of Individual Property in Land* has been heretofore mentioned, and we may, merely for the purpose of clearness, here repeat what seems the accepted doctrine as stated by Wilson, who agrees with Paley that the "real foundation of it is municipal law."[2]

Private ownership can only be acquired from the state by grant.

Mere occupation, though frequently spoken of as if it were a source of private title, is never so. It can never ripen into a right against the people;[3] the maxim of the law being that time does not run against the state.[4]

Sec. 630. *Distinction Between Feudal Tenancy and Allodial Ownership.*[5] — Under the later Roman law, the *dominium utile*, *i. e.*, the right to use, was distinguished from the ownership, *dominium directum*, as it was called.

The *dominium directum* always remained in the state, but an absolute right of enjoyment, or *dominium utile*, descendible and alienable, might be acquired by individuals by sanction of the state. This is precisely like a feud.[6]

The Saxon law "originally gave the absolute property with

[1] This is well illustrated by the case of Phial Mort. & Tr. Co. v. Miller (Wash.), 56 Pac. Rep. 382; Tieff v. Hewitt, 1 Ohio St. 511; Williamson v. New Jersey S. R. Co., 29 N. J. Eq. 311; 1 Gray's Cas. 768; Hopewell Mills v. Taunton Sav. Bank, 150 Mass. 522; National Bank v. North, 160 Pa. St. 303.

[2] 2 Wilson's Works, 483. See, for the views of Marshall, Chase, MacIntosh and others, *ante*, p. 693. Blackstone, in the first book of the Commentaries, expressly states that the true reason and only ground for allowing forfeitures for crimes consisted in the fact that all property is derived from society. Page 299.

[3] Jackson v. Frost, 5 Cowen, 346; *ante*, p. 692.

[4] *Nullum tempus occurit regi.* Broom's Max. 65; Hughes' Tech. 133. The rule is otherwise, by statute, in some states. Wheeling v. Campbell, 12 W. Va. 46. This maxim, however, does not apply to municipal corporations. Meyer v. Graham, 33 Neb. 566; 18 L. R. A. 146.

[5] 2 Cooley's Blk. (4th ed.) 104.

[6] 1 Spence's Eq. 31. *A feud* is defined by Sir H. Spelman, the father of the modern English feudists, to be "a right which the vassal hath in the land or some immovable thing of his lord's, to use the same and take the profits thereof hereditarily—*in perpetuum*,—rendering unto his lord such feudal duties and services as belong to military tenure; the mere propriety of the soil always remaining in the lord." 1 Spence's Eq. 32-34.

all its incidents, equivalent to the *dominium directum* of the Roman law, . . . to the owners of the original allotments made at the Anglo-Saxon conquest. The allodial owner, unless fettered by some restriction[1] imposed by those under whom he claimed, had the absolute power of alienation and disposition by gift and sale. The owner of allodial, or, as it was called, *boc land*, might grant it absolutely or for a limited interest, reserving or granting away the reversion at his pleasure. So he might impose any conditions or services he thought proper; nor was there anything to prevent an estate of any kind or quantity being granted, and whether to take effect presently or at a future day, or on the happening of any given event. The only check upon individual caprice in these respects (for the written law was silent) was that in the event of any dispute in respect of the amount of the interest granted, or the time at which it should vest, or the services or conditions imposed, the assembled thanes, at the county or hundred court under their ecclesiastical and civil president, would pass their judgment upon them."[2]

Of English feuds, Spence states: "In entering on this subject the attention of the reader must be recalled to the fact that from the time when William I. established the doctrine of tenure as the *general law*,[3] there was a marked distinction between movable property or *personal* estate, and immovable or *real* property. This doctrine was not applied to property of the former description; generally speaking, the owner of personal property was entitled to the *thing* itself as well as its *profits;* the *dominium directum* and the *dominium utile* were still united; consequently, as regards property of this description, the ancient right of alienation by will, as well as by sale or gift, which was *incident to allodial title*, still existed in all its integrity; though the *mode* of disposition by will underwent some change, as will be noticed hereafter. But it was different as regards immovable or *real* property — as land. The dominion of the soil, *dominium directum*, and the right to the

[1] Contract, as distinguished from general rule of law.

[2] 1 Spence's Eq. Jur. 135.

[3] It is desirable, in order to more easily understand some cases which will be cited, that especial attention should be paid to the distinction between those matters which were incident to feudal or allodial holding and those things which were left to be fixed by contract according to the desire of the parties.

use and profits of the soil, *dominium utile*, were dissevered; the highest interest which a subject could acquire was the *dominium utile*, that is, the right to hold, use and enjoy; this right was designated by the term *seisin*."[1]

Feudalism a Political Institution.— It will be apparent, upon investigation and reflection, that the fundamental principles of the feudal system are not the regulation of land tenures.[2] The manner of holding and enjoying land is but a consequence of the principles dominating the political organization of society.[3] The individual subjects of the sovereign could not upon principle, nor would not on grounds of policy, be allowed to obtain a pure allodium, and that freedom of contract between subjects in reference to the land held of the sovereign must always

[1] 1 Spence's Eq. Jur. 135, 136. "A feoffment in fee did not originally pass an estate in the sense in which we now understand it. The purchaser took only an usufructuary interest, without the power of alienation in prejudice of the heir or of the lord. In default of heirs the tenure became extinct and the land reverted to the lord. The heir took by purchase, and independent of the ancestor, who could not alien, nor could the lord alien the seignory without the consent of the tenant. This restraint on alienation was a violent and unnatural state of things, contrary to the nature and value of property, and the inherent and universal love of independence. It arose partly from favor to the heir, and partly from favor to the lord, and the genius of the feudal system was originally so strong in favor of restraint upon alienation that by a general ordinance mentioned in the book of Fiefs, the hand of him who wrote a deed of alienation was directed to be struck off (3 Kent's Com. 506)." . . . "By the old feudal law the tenant could not alien his fee without the lord's license, and the lord could not alien his seignory without the tenant's attornment." De Peyster v. Michael, 6 N. Y. 497–506.

[2] "Feudalism is an unfortunate word. In the first place it draws our attention to but one element in a complex state of society, and that element is not the most distinctive; it draws our attention only to the prevalence of dependent and derivative land tenure. This, however, may well exist in an age which cannot be called feudal in any tolerable sense. What is characteristic of 'the feudal period' is not the relationship between letter and hirer, or lender and borrower of land, but the relationship between lord and vassal, or rather it is the union of these two relationships." Pollock & Maitland's Hist. of Eng. Law, vol. 1, p. 66. The political rights of subjects were intimately associated with their relation to the soil. See Webster's argument in Luther v. Borden, 7 How. 1; also Ashly v. White, Ld. Ray. 938.

[3] The tenure of land, as it is called, must in every system of government be an important political question. The relation of the occupiers of the soil to the ownership of it and to the government must to a large extent measure the degree of liberty enjoyed. See 1 Burr. 115.

be restrained by limitations resulting from the nature of the relation of lord and man.

Sec. 631. *Ownership of Land in the United States.*— So long as the original colonies now constituting a portion of the United States were dependencies of England, the principles of the feudal system, to a greater or less degree, prevailed.

At some time or other all land was held in tenure,[1] but when the political principles declared in the Declaration of Independence became incorporated into a national constitution, established upon the principle that no man could become the sovereign of another, the foundation of the feudal system was swept away. The highest degree of ownership in land is called a fee, but it is in truth the exact opposite of a fee as understood in the English law of the eighteenth century.[2] It is to all intents and purposes an allodial property in land, and, so far as the public is concerned, when it is once fully acquired by the individual it has nothing of the feudal nature remaining.[3]

The nation imparts everything which in the nature of the case it can give, retaining only the function of protection and regulation.[4] The escheat, so called, is not a reversionary interest, which may by express or implied contract or condition become an estate, but is merely the right of the state to take the land on the contingency that land becomes without an owner because the inheritance line becomes extinct.[5]

[1] Chisholm v. Georgia, 2 Dall. 419. Free and common socage by fealty only.

[2] 2 Cooley's Blk. (4th ed.) 102.

[3] "In America as in England, the sovereignty is recognized as the source of all title, and the state succeeds thereto in default of heirs; but this right is not peculiar to the feudal system; neither is the eminent domain, which is sometimes referred to as a remaining incident of the feudal system." 2 Cooley's Blk. (4th ed.) 103. Chancellor Kent has well said: "Thus, by one of those singular revolutions incident to human affairs, allodial estates, once universal in Europe, and then almost universally exchanged for feudal tenures, have now, after the lapse of many centuries, regained their primitive estimation in the minds of freemen." See 2 Cooley's Blk. (4th ed.) 102.

[4] "The principal end for which the first institution of property was established was to preserve the peace of mankind, which could not exist in a promiscuous scramble. Therefore *a moral obligation arose upon all* 'that none should intrude upon the possession of another.'" Yates, J., in Millar v. Taylor, 4 Burr. 2365; 2 Cooley's Blk. (4th ed.) 10.

[5] Meadowcroft v. County (Ill.), 54 N. E. Rep. 949.

But, after all, this does not change the nature of the subject of property, but affects the quality of that ownership. The soil, the land, is still only land, and in contemplation of law immovable and indestructible, and by no fiction or change of name can there be acquired more than the power to use for a life-time,[1] except that by private and public agreement the individual may be given the power to direct by agreement, conveyance or devise the use it may be put to, or by whom it may be used for a period of time longer that he can possibly use it, and to *a period of remoteness* limited by the general rules of law, which bound the utmost compass of his dominion.[2]

The freedom from personal exactions as a condition of alienation, and the divorcement of personal, political and civil rights from the ownership of land, are the essential differences between feudal and allodial political systems.

Rules limiting the power of the owner in regard to the creation of remote estates,[3] or the course of ownership which the land must take *in futuro*, do not depend on feudal principles.

Sec. 632. *Devolution of Title from the Government.*— The public domain of the nation or states is not held for the purpose of speculation, nor is it contemplated that the whole or

[1] "But is there any distinction between the real estate itself or its owners in respect of it and the rents or income of the real estate coming to the owners as the natural and ordinary incident of their ownership? . . . As according to the feudal law the whole beneficial interest in the land consisted in the right to take the rents and profits, the general rule has always been, in the language of Coke, that 'if a man seized of land in fee by his deed granteth to another the profits of those lands, to have and to hold to him and his heirs, and maketh livery *secundum formam chartæ*, the whole land itself doth pass. For what is the land but the profits thereof?' Co. Lit. 45. And that a devise of the rents and profits or of the income of lands passes the land itself both at law and in equity. 1 Jarm. on Wills (5th ed.), 798, and cases cited. . . . It is the substance and not the form which controls." Fuller, C. J., in Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 580, 581; Eaton v. B. C. & M. R'y, 51 N. H. 504.

[2] "Ownership," says Pollock, "may be described as the entirety of the *powers of use and disposal* allowed by law. This implies that there is some power of disposal, and in modern times we should hardly be disposed to call a person an owner who had no such power." He adds in a note: "For this reason I cannot think it quite correct to say that 'irresponsible possession, protected by a remedy availing against all others, makes ownership.' (Williams, Real Prop. (14th ed.), p. 10.)" Pollock's Jur., Book 1, 166; *post*, § 633.

[3] That is the rule against creating perpetuities.

any portion of it shall be made a vast manor, or to farm or improve by the hiring of servants or leasing to tenants. Such an object is not within any of the grants of power, nor is it a proper or necessary means of accomplishing any express object of government.

The policy of the national government, as declared by the acts of congress, deeds of cession and other public documents, is to hold the land for *bona fide* settlers.

The homestead and pre-emption laws exhibit the method of granting the land, either to actual settlers, who erected their home upon the same, or a public sale to the first person who located or pre-empted it.[1]

The grant of original title from the government is called a patent. Unlike an ordinary deed it needs no delivery.[2] Once issued and recorded or delivered it is beyond recall, and the patentee's estate can only be affected by judicial process.[3]

These two modes are not the only modes of disposition recognized by the government.

The United States has in many instances contracted to grant or granted lands by contracts or grants containing conditions precedent and conditions subsequent which prevented the complete vesting of title or forfeited the title of the holder.[4]

This has been done generally in cases intended to effectuate the *object of public aid for a public purpose.* In such cases grants have been made on condition providing a forfeiture for the non-performance of a service or of the act designed to serve a public purpose.

The public reservations are also authorized by our law, and congress has expressly and impliedly recognized the right of the executive department to withhold or reserve from sale certain portions of the public domain for the use of the public,

[1] The settler's right during the time allowed for completing the occupancy and improvement necessary to obtain a patent is in the nature of a vested but inchoate right. If he acts in good faith he cannot be guilty of waste. He is proprietor as against third persons. See Shivers v. United States, 159 U. S. 491; Stone v. United States, 167 U. S. 178.

[2] Gilmore v. Sapp, 100 Ill. 297.

[3] Id.

[4] Where the condition is precedent the legislative act amounts to a contract to grant. Pacific Ry. Co. v. United States, 124 U. S. 124; Farnsworth v. Minn. Pa. Ry. Co., 92 U. S. 49. Condition subsequent may be in the deed. United States v. C. P. Ry. Co., 118 U. S. 238. See 1 Cooley's Blk. (4th ed.) 153, 154, and note.

and also vast tracts, known as Indian reservations, upon which to furnish habitations for the unfortunate natives from whom the whole domain has been wrested.[1]

The public may also become a holder as proprietor as distinguished from possession as sovereign.[2]

Sec. 633. *The Right to Alien Land —The Jus Disponendi.*[3]— The very idea of ownership involves the capacity to transfer.[4] This is a principle older than the common law of England.[5]

When the political institution called feudalism was imposed upon the people, the sovereign arrogated to himself this complete ownership,[6] and when it was established in England the tenants of the crown got nothing but a tenancy without the power of alienation.

Gradually, however, alienation was allowed; it began in grace, became customary, and ripened into a right.

In time the right to alien the land, after the birth of issue, became so complete as to vest the holder with practically a fee-simple estate.[7]

The practice early arose of creating estates descendible in a specified line, as to the heirs of the body of the grantee.

These were called conditional fees, and were alienable by the grantee after such issue born.[8]

To prevent this alienation, and to establish firmly entail estates, a statute known in history as the statute *de donis* was passed, limiting the powers of the tenant to the disposition of his estate during his life, so that an *estate tail* was substituted for the fee simple, the tenant having really but a life estate.

It required two centuries to completely overcome this statute, although in the meantime the courts devised what is known as a common recovery as a sort of antidote for the bane of en-

[1] Wilcox v. Jackson, 13 Pet. 498; Mo. Pac. Ry. Co. v. Musser-Sauntrey Co., 168 U. S. 604.

[2] Coxe v. State, 144 N. Y. 396.

[3] This quality of alienability means more than merely the tenant's right to sell; it includes the right to sell or transfer in process or proceeding against him, as on execution or insolvency proceedings. Bull v. Kentucky Nat. Bank, 90 Ky. 452.

[4] But the right to transmit after death rests on a different foundation. Re Hamilton, 148 N. Y. 373; United States v. Fox, 94 U. S. 315; *ante*, p. 969.

[5] See Grotius, book 1, ch. 6, sec. 1, quoted in De Peyster v. Michael, 6 N. Y. 493.

[6] See opinion of Wilson, Justice, in Chisholm v. Georgia, 2 Dallas, 419.

[7] Croxall v. Shererd, 5 Wall. 287.

[8] Id.

tail estates;[1] but it was not until the statute of *quia emptores*[2] that every freehold became again freely alienable.

In America the law has been influenced by these same statutes wherever they have been in force; but it may be laid down as a general proposition that no deed of land purporting to convey a fee can be coupled with a condition against alienation, with implied penalty of forfeiture to the grantor in case of breach. In such cases the grant holds good as a conveyance and the condition is void.[3]

Limits of the Power of Disposition.—The policy of modern law is to encourage the transfer and traffic in land and create the utmost compass of ownership and disposition consistent with this principle; but to allow a present owner to direct the future ownership of land for all time would be to defeat the very policy of the law, so that the rule against perpetuities, instead of being in restraint of alienation, in fact favors it.

If this power of the present owner were unlimited, in a broad sense, he might direct where it might go for all future time; but the law sets bounds in this regard as to the creation of future remote estates,[4] and this is called the rule against perpetuities, which, Professor Gray very appropriately says, should have been termed the rule against remoteness.

A restraint on alienation, properly so termed, is a restriction against the right of a person presently interested to dispose of his interest so as to vest it in another.

With one or two exceptions, *e. g.*, spendthrift trusts and charities, our law does not restrain the free and absolute alienation of any interest by its present beneficial owner.

The power of complete control and disposition of interests which one may have in land must be considered from a double standpoint.

First. From the standpoint of the owner's power to direct the future disposition and use of the estate.

Second. As to the power of the present owner to create an interest in the grantee, either for his benefit or for the benefit of a third person, which shall be inalienable.

[1] Lyle v. Richards, 9 S. & R. 352; Croxall v. Shererd, 5 Wall. 287.

[2] 18 Edw. I., ch. 1.

[3] De Peyster v. Michael, 6 N. Y. 493.

[4] Professor Gray says a bequest to the descendants of the testator who shall be living fifty years after his death is bad. Perpetuities, p. 1.

The Rule Against Perpetuities.— An executory interest (*i. e.*, one to begin *in futuro*) must vest within the period of a life or lives in being at the time when the provision creating it takes effect, and allowing a period of twenty-one years in addition;[1] and in case of a posthumous child being the claimant, a period of nine or ten months more will be allowed.[2]

It is not sufficient that it may so vest, but it must be imperative that it shall so vest; for if, by the provisions of the instrument, *i. e.*, the limitation, it might vest at a later period, it violates the rule against perpetuities, and the provision is void, in which case the last prior conditional estate becomes a fee.[3]

Conditions against alienation by the donee[4] cannot be made in a fee-simple estate, although there may possibly be a condition against alienation in a particular direction.[5]

Spendthrift Trusts a Restraint on Alienation.— It has been a matter of great discussion and much conflict of opinion as to whether an owner might convey land *in trust* for the benefit of some object of his affection and bounty, and yet not vest in such beneficiary an interest alienable in its nature.

This question is discussed under the name of "spendthrift trusts," and it is the prevailing doctrine in the United States that creditors not being deprived of a legal right have no interest in the subject-matter, and that public policy does not condemn such a provision in a deed or a will.[6]

Charitable trusts or uses, by which property is devoted perpetually to a certain charitable object, such as educational,[7] hos-

[1] The reason for fixing the period of twenty-one years was originally to allow a child to become of age; but it applies equally where no such child is interested. Gray on Perpetuities, 113–130. Mr. Gray discusses this rule historically and logically with such detail and accuracy as to leave little to be said except by way of repetition or illustration.

[2] Gray on Perpetuities, 127; Andrews v. Andrews, 110 Ill. 223; Gore v. Gore, 2 Stra. 958.

[3] Mandelbaum v. MacDonald, 29 Mich. 93; Pennington v. Pennington, 70 Md. 418.

[4] This phrase does not express the idea implied, that what he may alien may be seized by legal process and sold, which is the manner in which questions of this kind usually arise.

[5] De Peyster v. Michael, 6 N. Y. 495.

[6] Nichols v. Eaton, 91 U. S. 716; Broadway Bank v. Adams, 133 Mass. 170. See Gray's "Restraints on Alienation." Also article by A. P. Will, 49 Cent. L. J. 185.

[7] Female Academy v. Sullivan, 116 Ill., 375; Andrews v. Andrews, 110 id. 223.

pital or religious institutions, do not generally fall within the prohibition against creating perpetuities. Where a corporation is the grantee, the matter falls within the *letter* of the rule against allowing corporations to take and hold perpetually, which is the subject of prohibition by Magna Carta and statutes of mortmain.[1] And where they are to begin in the future after the intervention of other estates, or the creation of a corporation trustee, the question is an open one.[2]

Estates Tail.— Estates tail are not allowed in the United States.

Notwithstanding this rule, the fact that it results from statutory provisions which direct that words which would at common law create an entail shall vest some other estate in the donee renders it essential that a sufficient knowledge of them be had to detect when the language in a deed or a will falls within the provision of these statutes.[3]

An estate tail was an estate in fee, limited to the grantee and particular heirs (less than his heirs general) of his body in lineal descent.

Before the statute *de donis* (1285) such an estate was called a conditional fee, because in default of *such heirs* the condition of the grant was that the estate reverted to the grantor.[4]

After issue born to the grantee of one of these conditional fees he might sell the land and completely cut off the right of reverter in the grantor.

This did not sufficiently trammel the estate in a particular line to insure the perpetuity of that line, and the statute *de donis* was passed cutting off the power of alienation, and turning the old conditional fee into an estate tail; for it was the very object of the statute in creating estates tail to confine an estate for so long a period as possible to a special, direct line

[1] In re McGraw, 111 N. Y. 66.

[2] Gray's Rest. on Alien., ch. XVIII; Ould v. Wash., etc., 95 U. S. 303.

[3] *E. g.*, as is remarked of such a statute in Lott v. Wykoff, 2 N. Y. 357, the statute often overrules the intention of the donor. "The law of 1786 *does not prohibit* them, but when created turns them into estates in fee simple." The act of April 27, 1855, of Pennsylvania, was to the same effect. Grimes v. Shirk, 169 Pa. St. 77; Bodine v. Arthur, 91 Ky. 53; 34 Am. St. Rep. 162.

[4] Croxall v. Shererd, 5 Wall. 287. There are essential distinctions between a conditional fee and an estate tail. See Outland v. Bowen, 115 Ind. 150; 7 Am. St. Rep. 420, with valuable note.

of descent, and in this manner maintain the grandeur of noble families.[1]

Sec. 634. *Estate in Land* means the character of ownership, or the nature of interest which one has in it. Complete ownership may be in a single person, or this entire interest may be enjoyed as an entirety by a number of tenants, or the *estate* may be split up into smaller interests. So also the same land may be made to sustain many estates. One man may have merely an easement to pass over the land, another to till the soil, another to draw water from a well, or take minerals from under the surface, or extract the gases or salt water, etc.[2]

Classification.— All estates may be, for the purpose of clearness, presented —

First. With reference to *the duration of enjoyment*, or, as it is classed by ancient writers, the quantity of interest.[3]

Second. The nature of the interest and character of possession.

Third. With reference to *the time of enjoyment*, or, as it is expressed, the time at which it is to be enjoyed.

The first and third divisions have reference to the time of enjoyment, but the former relates to the extent or duration of time, the latter to the period when the enjoyment shall begin with reference to other estates.

[1] Per Lord Mansfield in Taylor v. Horde, 1 Burr. 115; Mandelbaum v. MacDonald, 29 Mich. 83; Croxall v. Shererd, 5 Wall. 287. No better illustration of the futility of attempting to bind lawyers and courts by statutes can be found than that afforded by the statute *de donis* and the methods taken to evade it. This necessity resulted in the invention of —

The common recovery, a collusive suit, which was nothing but a species of conveyance through the medium of the courts, by which the statute was habitually evaded. Lyle v. Richards, 9 S. & R. 352; 2 Cooley's Blk. (4th ed.) 360. Another device was *a fine*, another fictitious proceeding. It was in the teeth of the statute, but was declared by 32 Hen. VIII. to be a complete bar to the tenant in tail and his heirs. See 2 Cooley's Blk. 36. In case of a fine the suit was compromised before judgment, while in the case of recovery judgment was entered and executed. Watkins, Prin. of Convey., 272. The fine was the most effectual of the methods, however. Croxall v. Shererd, 5 Wall. 287. The reason for their existence having ceased, they are, if not obsolete, long since in innocuous desuetude. Gregory v. Comstock, 17 N. Y. 162.

[2] *Ante*, pp. 961, 962.

[3] 2 Cooley's Blk. (4th ed.) 103; Messmore v. Williamson, 189 Pa. St. 73. But in construing statutes and documents it is not always proper to adhere so closely to the technical meaning as to ignore the intended popular use of the words. Troth v. Robertson, 78 Va. 46; Taylor v. Horde, *supra*, 1 Sm. Ld. Cases.

Fourth. As to the certainty or uncertainty of the continuance.

Fifth. As to the number and connection of tenants.

The second mode of classifying estates above mentioned, while not found *expressed* in any of the treatises, marks a distinction between estates quite as important in its practical utility as the distinction between freehold and less than freehold. It distinguishes the three great classes of interest, viz.: ownership, tenancy, and interests not involving *possession*.[1]

It is not the duration of enjoyment which distinguishes these from the other two, for they are themselves classed as freeholds and less than freeholds. It is the *character of the interest*, not the character *of the thing*, which is the subject of the interest.

Freehold and Less than Freehold.— All estates[2] are, as to duration, either of freehold or less than a freehold.

This classification has reference to the dignity rather than value. At the partitioning of the land among the followers of William the Conqueror, no freeman[3] would at that time accept any allotment to continue for less than his life; because considered appropriate to a freeman it was called freehold. In the beginning, the estate, not being alienable by him, nor yet having the inheritable quality, the tenancy for life was the greatest estate which one could get, as it was the greatest he could enjoy;[4] so that at that time the actual coincided closely with the natural, and this estate, though changing in its character, still retains the ancient name freehold.

[1] Lord Mansfield, speaking of *disseisin*, the opposite of seisin, says: Disseisin was a complicated fact, and differed from dispossession of the freeholder. A disseisor differed from a possessor by wrong, and he terms the latter *intrusion*, because there is no disseisin, and this, even though the owner was entirely out of possession; and after explaining the origin and nature of it, he says: "The precise definition was once well known, but is not now (1757) to be found. The more we read, unless we are very careful to distinguish, the more shall we be confounded." Taylor v. Horde, 1 Burr. 110. See *post*, Prescription.

[2] Washb. Easem., 6.

[3] Freehold, *i. e.*, *liberum tenementum*, the land of a free tenant, a freeholder. Bradford v. State, 15 Ind. 357. So it is still called in pleading. Andrews' Steph. Pl. 351.

[4] The highest interest then contemplated was the right to use and take the profits. See 2 Cooley's Blk. (4th ed.) 105, note. But it was a certain absolute estate and could not be disturbed by the lord except by forfeiture for cause. Bradford v. State, 15 Ind. 357; Warvelle, Real Prop. 24, note 1.

A freehold estate is an estate for the owner's own life, or for the life of another (*pur auter vie*), or any larger estate; for example, an estate tail or a fee simple. Any estate which is of *indefinite duration, and by possibility may last for life*, is a freehold;[1] as an estate to a widow during her widowhood, or an estate for so long as the grantee continues to live in a certain house, or until promotion, or any uncertain time, is a life estate determinable.[2]

Estates Less than Freehold.— Less than a freehold estate embraces all other possessory interests, even though the duration, being fixed and certain, may extend beyond the possibility of a human life. An estate, though it run a hundred or a thousand years, was and is still of less dignity than a freehold. The relation is necessarily a holding from the owner of the larger estate. It may be a possessory right constituting the relation of landlord and tenant; an interest called a chattel real;[3] or it may be a mere right in, through or over land without possession; that is, the so-called incorporeal estate.[4]

In parceling out interests a sovereign might give to his lesser vassals or servants these interests less in dignity, and the freeholder could also grant to his retainers these chattel interests without let or hindrance from his lord, because they affected not the inheritance. None of the estates encroached upon the domain of the *directum dominium*.

As the terms import, the holders of such estates were villeins, and in time these villein holdings ripened into copyhold tenures.[5]

[1] Graves' Summary of R. P. 12; Wyatt v. Larimer, etc. Irr. Co., 18 Colo. 298; 36 Am. St. Rep. 280.

Professor Graves says: "Under this definition, estates at will and by sufferance are to be excepted, as they are certainly not estates of freehold, being scarcely regarded, because of their precarious character, as estates at all; and estates by statute-merchant, statute-staple and *elegit* (see 2 Cooley's Blk. (4th ed.) 161, note), are also to be excepted, because they are merely securities for debts; and, as they pass with the debts to the personal representatives, they are treated as personal estates. 2 Blk. Com. 162.

[2] Reg. v. Gov., 6 Ad. & El. 699.

"*A mortgage debt* is treated as an interest in land of a personal nature in a court of equity, but at law the estate of a mortgagee in fee simple is real estate, and passes to the mortgagee's heirs. Williams, Real Prop. 421." Id., 12, 13.

[3] Williams, Real Prop. 413; 2 Blk. Com. 121; Averill v. Taylor, 8 N. Y. 44.

[4] Easements may be freehold or less according to duration. Washb. on Easements, 6.

[5] 2 Cooley's Blk. (4th ed.) 96.

These estates of freehold and those less than a freehold are respectively divided into classes as pointed out in the outline. These will be mentioned in their order.[1]

Sec. 635. *Of Freehold Estates.*— Fee or feud originally signified land held in tenure, as distinguished from an estate in lands either allodial or feudal;[2] but when the custom of allowing alienation ripened into a right, the interest of the tenant was called an estate, and the fee became a qualifying word indicating the character of possession and the duration of the estate;[3] and now the word "fee" expresses that genus of estates which are of inheritance,[4] and alienable.[5]

Fee Simple, and fee-simple absolute, are at the present day interchangeable terms, and indicate that the complete ownership is vested in a single owner (though the number of tenants may be more than one). The word "simple" was formerly used in the sense of pure, and a fee simple was one which was not restricted in its descent to any heirs in particular, as were conditional fees, but signified that the estate would descend to the legal heirs general without qualification.

All interests in real estate are carved out of this greater estate, and may, by subsequent mutations of surrender, forfeiture, release and merger, ultimately resolve themselves into it.

It follows that there cannot be two fees, or a fee and any other estate, in the same subject. But a fee may relate to less than the whole land.[6]

A base or qualified fee is one which by the terms of the grant may last forever, or may determine or become absolute because of some event mentioned in the grant. The possibility of continuing forever gives it the character of a fee, while the possibility that it may end debases it below the dignity of a fee simple.[7] The subject falls within the view of estates with reference to the certainty of continuance.[8]

Estates for Life.—An estate for life is the least freehold which can exist, and has been defined.

[1] See Williams, Real Prop. 413.

[2] De Peyster v. Michael, 6 N. Y. 497. One having this right was an owner; one not having it could be no more than a tenant. Id.

[3] Id.; 2 Cooley's Blk. (4th ed.) 106.

[4] Co. Lit. 1*a*, note; 2 Blk. Com. 106.

[5] De Peyster v. Michael, *supra*; Henderson v. Horner, 52 N. E. Rep. 68.

[6] *Ante*, p. 959. *Estate tail*, if allowed, would be treated here. It has been sufficiently mentioned above. Page 974.

[7] 4 Kent Com. 9.

[8] *Post*, sec. 639.

Where the terms of the grant are doubtful, the estate will be construed to be for the life of the grantee, rather than for the life of the grantor.[1]

Alienation.— The tenant for life has the full use and enjoyment of the estate, and the rents and profits accruing from it. In the grant under which he holds the estate there may be a condition restraining his right of alienation,[2] but if there is not, he may alienate his whole interest or any estate less than his own.[3] Should he attempt to convey a greater interest than he possesses, the conveyance will take effect to the extent of his estate, but will be void as to the excess.[4]

Duties of Life Tenant.— The rights and duties of a life tenant are so regulated as to give him the most beneficial use of the estate consistent with its preservation for the remainderman, but he takes it with such burdens as should be equitably borne by one having a permanent interest. He must make ordinary repairs;[5] he may make permanent improvements; and in cases where from the nature of the case repairs of a permanent kind are reasonably necessary to preserve the estate, he has a right to an allowance out of the remainder for a part.[6] He must pay taxes,[7] and interest on incumbrances[8] to the extent of the value of the use.

His duty is to preserve the estate,[9] and he must not destroy

[1] 2 Blk. Com. 121. A peculiarity of the estate *pur auter vie* may be noticed. It is generally done away with by statute. If during his life he has parted with the estate, his grantee continues to hold. If, on the other hand, he dies in possession, the common law permitted the first taker to hold it under the appellation of *general occupant;* but if the grant was to one and his heirs, these heirs would take the portion of the estate undisposed of as *special occupants.* 2 Blk. Com. 259; 1 Washb. R. P. 93, 94; 3 id. 51; Atkinson v. Baker, 4 T. R. 229.

[2] Hayward v. Kinney, 84 Mich. 521.

[3] Roseboom v. Van Vechten, 15 Iowa, 414; Jackson v. Van Hoesen, 4 Cow. 325.

[4] Rogers v. Moore, 11 Conn. 553; Dennett v. Dennett, 40 N. H. 505.

[5] Calderscott v. Brown, 2 Hare, 145.

[6] Hancox v. Meeker, 95 N. Y. 528; Dobson v. Eldridge, 103 N. Y. 351.

[7] Pike v. Wassell, 94 U. S. 714; Varney v. Stephens, 22 Me. 334; Prettyman v. Walston, 34 Ill. 175. If the assessment, however, should be made for some purpose that is of permanent benefit to the inheritance, the taxes would probably be apportioned by the court. Cairns v. Chabert, 3 Edw. Ch. 313.

[8] Doan v. Doan, 46 Vt. 458.

[9] Negligence in this respect may constitute waste. Sherrill v. Connor, 107 N. C. 543; Cooley, Elem. of Torts, 123. The duty of the tenant to protect the estate against waste and decay extends to protection against acts of trespassers. Cook v. Champlain, etc. Co., 1 Den. 91.

the improvements, or improperly[1] or improvidently use the natural products so as to impair the inheritance, or he will be guilty of —

Waste.[2] — He may take of these reasonable *estovers* to repair buildings, implements, make fences and for fuel,[3] to an extent reasonable under the circumstances; in short, his rights and duties are correlative and must have due regard to the rights of others in the land.

Emblements. — The doctrine of emblements is applicable to all tenancies, also between administrator and heir.[4] It signifies the growing crops remaining unharvested at the end of the term.

Crops, as well as grass and trees, are realty,[5] and therefore anciently such as remained unharvested at the end of the term were lost to the tenant.

To remedy this injustice the doctrine of emblements was introduced. It proceeds on the idea that the tenant is entitled to gather his crops, even though his term has expired. By this doctrine they are "subject to many, though not all, the incidents attending personal chattels."[6]

A distinction exists between *fructus naturales* (natural products — fruit, herbs, grass, etc.) and *fructus industriales* (the fruit of annual planting).[7]

Estates Resulting from Marriage.[8] — *Estate Jure Uxoris.*[9] By marriage, at common law, the husband obtained, unless re-

[1] The removal of manure may be waste. Hill v. De Rochemont, 48 N. H. 87.

[2] Id.; King v. Miller, 99 N. C. 583. To make over a stable into a dwelling-house, or *vice versa*, would be waste. Huntley v. Russell, 13 Ohio St. 572. So it would be to excavate farming lands in search for minerals. Williamson v. Jones, 39 W. Va. 231; 25 L. R. A. 222.

[3] Hubbard v. Shaw, 12 Allen, 122; 2 Cooley's Blk. 35.

[4] The crops go to the administrator; the natural products, fruit, etc., go to the heir. Graves' Summary, 15. So, if the owner in fee plants crops and thereafter sells or devises the lands without reservation, the crops pass to the purchaser. Dennet v. Hopheimer, 63 Me. 350; 18 Am. Rep. 227; Bradner v. Faulkner, 34 N. Y. 347.

[5] Bagley v. C. S. Ry. Co., 98 Ga. 626; 34 L. R. A. 286.

[6] But not entirely so. The statutory laws must be consulted as to liability to seizure on execution, etc.

[7] A valuable discussion of the law on this subject will be found in Bagley v. Col. So. Car Co., 98 Ga. 626; 34 L. R. A. 286.

[8] See *estate by entirety*, which results from the marriage relation, but also falls within estates considered

[9] In the right of the wife.

strained by an ante-nuptial agreement,[1] almost complete control over the beneficial use of the wife's land. He could do almost anything with it except dispose of it, or permanently injure the inheritance.

During Marriage.— He was really a life tenant in possession and control for her life, with the further estate of curtesy after her death, which she could not impair without his consent.[2]

This is greatly changed by modern statutes called Married Woman's Acts, which, although they do not affect the estate of *curtesy*, practically destroy the husband's estate *jure uxoris*.[3]

Curtesy.— An estate by the "curtesy of England" was a complete freehold estate for the life of the husband in the wife's land after her decease.[4]

This estate, formerly so important, has been abolished in many states, and modified in others in such a manner as to put the man and woman on a more equal plane, but it is not everywhere abolished.[5]

To create this estate four things are essential to *vest* it. *Under the modern* married woman's acts the fourth may be necessary. *First.* A legal marriage. *Second.* Seizin in fact or in law by the wife of an estate of inheritance. *Third.* Birth during marriage of issue born alive capable of inheriting.[6] *Fourth.* Death of the wife during marriage.[7]

These need not all exist at the same time. Seizin of the wife need not be concurrent with the life of the child, but may either precede or follow it.[8]

Seizin was an essential strongly insisted upon by the common law, but since the abolition of livery of seizin, seizin in

with relation to the number and connection of tenants. The common-law rights dependent on the marriage relation are not taken away except by statute. See Hatfield v. Sneden, 54 N. Y. 280; Denny v. McCabe, 35 Ohio St. 576; Commonwealth v. Diredow, 169 Pa. St. 116.

[1] *Ante*, sec. 554; Stroeb v. Fehl, 22 Wis. 337.

[2] Hatfield v. Sneden, 34 N. Y. 280, valuable notes to this case, Weed-Parson edition; Nichol v. Tomlinson, 27 W. Va. 706. See *ante*, sec. 556 and note.

[3] Cooper v. Cooper, 76 Ill. 57; Harding v. Harlingen, 7 Ohio St. 208.

[4] Bouvier's Law Dict., tit. Curtesy; 1 Blk. Com. 126.

[5] Wolf v. Wolf, 67 Ill. 55. See Williams, R. P. (Hutchins' Ed.) 375, note.

[6] 2 Cooley's Blk. (4th ed.) 128, note 2; Marsellis v. Thalhimer, 2 Paige, 235.

[7] Before death he held a vested beneficial right. Death gave him a seizin of a life estate. The modern acts may modify the technical relation. See Lucas v. Lucas, 103 Ill. 121.

[8] Comer v. Chamberlain, 6 Allen, 166.

law, by which is meant a present right to possession, is sufficient.[1]

Actual possession is unnecessary unless there is an adverse claimant, in which case the possession must be regained during coverture.[2]

As to lands held in common, possession of her co-tenant is sufficient.[3] But not so as to joint tenants or partnership land, unless by statute, because of the *jus accrescendi*.[4]

After issue born the estate of the husband is called an estate *initiate*. By the death of the wife the estate becomes consummate.

Curtesy in Trust Property.— Before the statute of uses there could not be dower or curtesy in land held to a use; nor in the land of a trustee, because such trustee was not seized of an inheritance;[5] nor in favor of the wife (or husband) of a *cestui que use*, because there was no seizin at all. That statute, however, in many cases, converted a use into a legal estate;[6] and there may be curtesy in an estate held in trust for the wife, as there may be an equity of redemption.[7]

As to land granted to one for the use of a wife, her husband is entitled to curtesy unless it appears to be the express intention of the settler to exclude him.[8]

Curtesy cannot be had in estates in reversion or remainder unless the attendant particular estate be determined during coverture.[9]

Curtesy is a certain and determinate interest, the value of which is easily ascertainable.[10]

[1] Davis v. Mason, 1 Pet. 503; Chew v. Com., 5 Rawle, 160; Mercer's Lessees v. Selden, 1 How. 57; Borland's Lessees v. Marshall, 2 Ohio St. 508; Martin v. Traill, 142 Mo. 85; Mettler v. Miller, 129 Ill. 630. This is not universally true. Carpenter v. Garrett, 75 Va. 129.

[2] Jackson v. Beekman, 8 Johns. 262; Graves' Summary, 196.

[3] Rhodes v. Robie, 9 App. D. C. 305.

[4] Graves' Summary, 196; *ante*, p. 829.

[5] 1 Washb. R. P. 177, citing Chew v. Com., 5 Rawle, 160.

[6] Shackelton v. Sebree, 86 Ill. 616.

[7] Mettler v. Miller, 129 Ill. 630.

[8] So in equitable estates of the wife, the husband may have curtesy (Ogden v. Ogden, 60 Ark. 70, 40 Am. St. Rep. 151), as an equity of redemption. Mettler v. Miller, 129 Ill. 630; Pool v. Blackie, 53 Ill. 495, an example where such was held to be clearly the intention of the grantor.

[9] Stoddard v. Gibbs, 1 Sumn. 263; Watkins v. Thornton, 11 Ohio St. 367; Ferguson v. Tweedy, 43 N. Y. 543; Martin v. Traill, 142 Mo. 85.

[10] Lessee of Canby v. Porter, 12 Ohio St. 81.

How the Estate May be Defeated.— The husband will lose his interest by divorce,[1] or by accepting a testamentary provision in lieu thereof;[2] or he may release his interest by joining his wife in a deed or mortgage.[3] Non-claim for the period of the statute of limitation will no doubt constitute a bar.

Dower.— Dower was the life interest which a surviving wife took at common law in lands of which her husband was seized during coverture of an estate of inheritance.[4] It was the beneficial use of one-third.[5]

Of the Several Species.— Dower by the common law is the only species which it is necessary that we should treat, it being the only kind which has ever existed in this country.[6]

Essentials.— Two things must concur before the right of dower will attach, namely: a legal marriage[7] and seizin of the husband.[8] The death of the husband consummates the right. Ascertainment by technical assignment or setting apart vests it as an estate.[9]

Seizin.— The wife is not entitled to dower unless the husband during coverture was seized of an estate of inheritance for his sole use and benefit.[10] His estate must be in possession, not in expectancy or remainder.[11] She is not entitled to dower in

[1] Wheeler v. Hotchkiss, 10 Conn. 225; Hahn v. Beslor, 132 Pa. St. 242.

[2] M'Kee's Lessee v. Pfout, 3 Dall. 486.

[3] Hayden v. Pierce, 165 Mass. 359.

[4] Sisk v. Smith, 1 Gilm. 503, is a very instructive case containing a large proportion of the ancient learning on this estate.

[5] It has been abolished in Colorado, Kansas and Washington. Holladay v. Bailey, 1 Colo. 460; Chapman v. Chapman, 48 Kan. 638; Hamilton v. Hirsch, 2 Wash. Ter. 223. In other states other interests have been substituted for it; as in California, where a wife takes a half interest in the common property. Beard v. Knox, 5 Cal. 252; 63 Am. Dec. 125. In several states the wife takes dower only in those lands of which the husband dies seized. Flowers v. Flowers, 89 Ga. 632; Atwater v. Butler, 9 Baxt. 299.

[6] For these, see 2 Blk. Com. 128 et seq.

[7] Cropsey v. Ogden, 11 N. Y. 228; Jenkins v. Jenkins, 2 Dana, 102; 26 Am. Dec. 437. A voidable marriage, if not set aside during husband's life, will do. Bonham v. Badgley, 7 Ill. 622.

[8] An inchoate right of dower then attaches to all land seized. Sutherland v. Sutherland, *supra.*

[9] Sisk v. Smith, *supra.* Assignment is here used in a sense differing from a transfer. See Law Dictionaries.

[10] Owen v. Robbins, 19 Ill. 545; Rands v. Kendall, 15 Ohio, 671; Phelps v. Phelps, 143 N. Y. 197. Estates in reversion and remainder are not within the rule. Kellett v. Shepherd, 139 Ill. 433; Powers v. Jackson, 57 N. Y. 654.

[11] Clark v. Clark, 84 Hun, 262.

lands held by her husband in trust[1] or in partnership,[2] nor in lands held jointly. The possibility of the estate being defeated by survivorship defeats dower.[3]

When the seizin of the husband is accompanied at its inception with a lien, mortgage or judgment, the inchoate right of dower of the wife attaches in subordination to such lien, and if the land is sold in compliance with the forms of law to satisfy such lien the dower is gone, unless the sale be made after the death of the husband, in which case, if there be a surplus, the widow may claim dower in that.[4]

The duration of seizin, provided it is complete and unaffected by a simultaneous right, is not material.[5] It is not the duration but the nature of the seizin[6] which is important; but seizin in law is sufficient.[7] The possession of the tenant for a term of years is counted the possession of the reversioner. Possession under claim of ownership is *prima facie* sufficient.[8]

Death of the Husband.— During the life-time of her husband her interest is a mere inchoate right, valuable and distinguishable, but it does not vest until the death of the husband.[9] The inchoate right is entitled to protection, and the wife will receive the aid of equity in setting aside a deed executed by the husband and one personating the wife, and purporting to release the dower;[10] but until the interest is ascertained and set apart it is not an estate in land, but a right in expectancy.[11] It may be *released* so as to bar the right of asserting it against the owner of the fee, but it cannot be invested in any one not interested in the fee. Only the person entitled to dower under the law can have it assigned.[12]

When assigned her title relates back to the date of seizin,

[1] King v. Bushnell, 121 Ill. 656; Hallett v. Parker, 39 Atl. Rep. 583.

[2] Maybury v. Brien, 15 Pet. 21. In those states where the right of survivorship in estates held in joint tenancy is abolished, there is no reason why dower should not attach. See Miles v. Fisher, 10 Ohio, 1; 36 Am. Dec. 61.

[3] Trowbridge v. Cross, 117 Ill. 109. *Cf.* Simpson v. Leech, 86 Ill. 286. After partnership debts paid.

[4] Seibert v. Todd, 31 S. C. 206; 4 L. R. A. 606.

[5] 2 Cooley's Blk. (4th ed.) 131, notes; Stowe v. Tifft, 15 Johns. 462; Hugunin v. Cochrane, 51 Ill. 302.

[6] King v. Stetson, 11 Allen, 408.

[7] Atwood v. Atwood, 22 Pick. 283.

[8] Gordon v. Dickinson, 154 Ill. 78.

[9] McArthur v. Franklin, 16 Ohio St. 193; Sisk v. Smith, *supra.*

[10] Clifford v. Kampfe, 147 N. Y. 383.

[11] Sisk v. Smith, *supra.*

[12] Best v. Jenks, 123 Ill. 447.

but not beyond the date of marriage.[1] It is the duty of the heirs to formally assign it.

Dower may be divested by divorce,[2] by her own deed of release according to the forms of law,[3] by estoppel,[4] by non-claim for the period of the statute of limitation,[5] by accepting provisions in her husband's will in lieu of dower,[6] and also by eminent domain.[7]

Community property prevailed among the Spanish colonists in America and is based on their laws.[8]

Under this law there is equal ownership between man and wife of all property acquired by their energy or thrift during coverture [9] and while living together.[10]

Statutes regulate what is to be considered as separate property of the husband or wife, and then declares that all property held by them shall be considered community property.[11]

In some features it resembles a partnership, in others it is essentially different.[12]

Community of property will not exist unless there has been a valid marriage celebrated with the statutory formalities.[13]

Homestead Exemptions are founded on the family relation, but not necessarily on marriage or kinship. Homestead laws are construed either as conferring *a mere exemption* or as creating *a freehold estate.* The distinction is of great importance as to rights of creditors and modes of transfer.[14]

[1] Lawrence v. Brown, 5 N. Y. 394; McArthur v. Franklin, *supra.*

[2] Barrett v. Frailing, 111 U. S. 523.

[3] But this must be in strict accord as to formalities of acknowledgment, etc. Mettler v. Miller, 129 Ill. 630 Virginia Coal Co. v. Roberson, 88 Va. 116.

[4] Lawrence v. Brown, 5 N. Y. 394.

[5] Tiedeman, R. P., sec. 131.

[6] Konvalinka v. Schlegel, 104 N. Y. 125. But to constitute such an election it is necessary to show that the wife understood the facts of the case. Cowdrey v. Hitchcock, 103 Ill. 262.

[7] Tiedeman, R. P., sec. 132. See for the common-law modes, Sisk v. Smith, *supra.*

[8] As to the origin, see Cole v. Executors, 7 Mart. (N. S.) 41; 18 Am. Dec. 241. It prevails to some extent in Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas and Washington.

[9] Wren v. Wren, 100 Cal. 276; 38 Am. St. Rep. 287.

[10] Lovering v. Stuart, 79 Cal. 200.

[11] Tanner v. Robert, 5 Mart. (N. S.) 255; Stockstill v. Bart, 47 Fed. Rep. 231.

[12] Wheat v. Owens, 15 Tex. 242; 65 Am. Dec. 164. See also Gulf R. R. Co. v. Goldman, 87 Tex. 567; Holyoke v. Jackson, 5 Wash. Ter. 239. See Stockdall v. Bartlet, 4 Wash. 730.

[13] Stans v. Bailey, 9 Wash. 115; Sumerlin v. Livingston, 15 La. Ann. 519.

[14] Gray v. Schofield, 175 Ill. 36.

Object of Homestead Laws.— The homestead is the family residence, owned and occupied as such, and the law affixes to it certain characteristics in order that the family relation may not be suddenly and rudely broken up by mendacity, misfortune or death. The beneficent provisions of the law apply only to an actual *bona fide* home.[1] It is not a means to evade creditors, but to shelter a family. It is not meant merely to benefit a debtor; accordingly his *mala fide* acts cannot defeat the purpose of the law, which rests on a broad public policy to preserve the integrity of the basis of society.[2] It was unknown to the common law, and the law of each state depends upon the provisions and construction of its statute law.[3]

The occupancy must be actual, but temporary absence is allowable, so long as a *bona fide* intention to retain the home remains.

As in curtesy and dower, the land must be that of the claimant; but the question of seizin does not arise, occupancy being an essential requisite.

Partnership property will not sustain a homestead,[4] but property held in common will.[5]

The Family.— Generally, under the statutes, any one who is the "head of a family" may claim a homestead.[6]

What will constitute a family or the head is a mixed question of law and fact, and it will not do to say that the family must be related by marriage or blood; but in the case of a male claimant there should be either kinship or a mutual dependence,[7] or the head must have the duty of support. A widow keeping boarders with servants, and who has kept up the establishment, is the head of a family.[8]

Homestead laws, being designed to prevent the breaking up of families, are to be liberally construed.[9]

[1] Evans v. G. R. Co., 68 Mich. 602; Backus v. Chapman, 111 Mass. 386; Lamb v. Mason, 50 Vt. 350; Jacoby v. Dist. Co., 41 Minn. 227; Lubbock v. McMann, 82 Cal. 228; First Nat. Bank v. Hollinsworth, 78 Iowa, 575.

[2] Lies v. De Diablar, 12 Cal. 328; Good v. Fogg, 61 Ill. 450.

[3] Hotchkiss v. Brooks, 93 Ill. 386; Carrier v. Sutherland, 54 N. H. 475.

[4] Trowbridge v. Cross, 117 Ill. 109.

[5] Capek v. Kropik, 129 Ill. 518.

[6] Armstrong's Estate, 80 Cal. 71; Silloway v. Brown, 12 Allen, 34; Fountain v. Hendley, 82 Ga. 616.

[7] Tiedeman, R. P., sec. 160; Whaley v. Cadman, 11 Iowa, 226; Blackwell v. Broughton, 50 Ga. 390.

[8] Race v. Oldridge, 90 Ill. 250.

[9] When claiming a homestead he need only in his declaration allege that he is the head of a family, and

Primarily the husband is the head of a family while residing with the same, but the object of solicitude is the family, and the letter of the law must not be allowed to defeat the spirit of it, and to effectuate the intention the wife may be the head.[1]

Is an Estate.— The homestead is not subject to liens of judgments, that is, the lien does not attach to the homestead nor to the tract in which it is claimed until the extent of the homestead is ascertained; therefore a sale without setting it off is void, and a transfer of the tract before setting off passes it clear of the lien of an existing judgment.[2]

The homestead is largely controlled by the head of the family, but not entirely, so there is a sort of joint tenure in the estate between members of the family;[3] and the statutes generally provide for the procedure in case the head of the family is absent or unwilling or unable to act.

The Extent of the Exemption.— The first principle is the constitutional one that a vested right cannot be entirely taken away, even under the guise of an exemption law,[4] and in general there is no exemption against taxes,[5] purchase-money and pre existing liens, and debts contracted before the statute allowing the homestead.[6]

Alienation.— The homestead right may be conveyed by an instrument executed in strict compliance with the requirements of the law for such instruments[7] in which the wife joins.[8]

A mortgage is equally as effective in favor of the mortgagee, but does not avail other creditors, and the value of the homestead may be claimed out of the surplus of sale, and equity will treat it as though it were realty.[9]

need not set out the grounds on which he claims to be such head until his right is disputed. Jones v. Waddy, 66 Cal. 457; Race v. Oldridge, 90 Ill. 252.

[1] Loeb v. McMahon, 89 Ill. 487; Savings Bank v. Evans, 28 S. C. 521; Dunn v. Bulkley, 56 Wis. 192; Linauder v. Longstaff, 7 S. Dak. 157.

[2] Gray v. Schofield, 175 Ill. 36; Nichols v. Spremont, 111 Ill. 631.

[3] Barber v. Bold, 36 Cal. 11.

[4] Bronson v. Kinzie, 1 How. 311; Edwards v. Kearzey, 96 U. S. 595.

[5] Hayes v. Taylor, 43 S. W. Rep. 314.

[6] Cooley, Const. Lim. 348; Edwards v. Kearzey, *supra;* Homestead Cases, 22 Gratt. 266. As to what is purchase-money, see Williams v. Jones, 100 Ill. 362.

[7] Wheeler v. Gage, 129 Ill. 197; Am. Sav. & Loan Ass'n v. Burghardt, 19 Mont. 393.

[8] Kitchell v. Burgwin, 21 Ill. 44; Chopin v. Runte, 75 Wis. 361; Riggs v. Sterling, 60 Mich. 643.

[9] First Nat. Bank v. Briggs, 22 Ill. App. 228; Jones on Mort., § 1613.

Abandonment will extinguish the right or estate, but will not transfer it to a purchaser of the fee so as to cut off creditors.[1]

Sec. 636. *Estates Less than Freehold — Landlord and Tenant.*— The estate next in dignity to a freehold, regarded either as to its duration or the character of possession, is known in law and in common speech as a tenancy.[2]

A Lease.— Creation of the relation (except in tenancies by sufferance) is accomplished by a grant of the *use and occupation* for a particular period for a rent reserved.

A contract providing for a leasing will be held to be a lease, whatever its form, when it expresses a present intention to grant the use and possession, and there is no indication in the writing itself, or in the conduct of the parties, that any other or more formal instrument was intended to be made.[3]

Until the lessee executes the lease by taking possession he has a mere right to enter, known technically as *interesse termini* (an interest in the term).[4]

All leasings contemplate a superior ownership of a greater estate by the lessor.

There is a reciprocal rule which prevents the question of ownership or title arising as an excuse from the consequences of a violation of his obligation by either, viz.: It is not allowable for the tenant to deny his landlord's title, nor for the landlord to deny his ownership.[5]

The Possession.— The tenant has a possession, but it is a qualified possession for a specific purpose, reserving to the landlord the seizin.[6] For an injury which affects the reversion the landlord is the real party in interest, even though the tenant is in possession, and only he can sue; while the tenant can only sue for the injury to that which is his, and for an injury to the possession only he can sue.[7]

[1] Gray v. Schofield, 175 Ill. 36. Neither forced absence (Leake v. King, 85 Mo. 413) nor temporary absence with the intention of returning. Walters v. People, 18 Ill. 194; Wilbanks v. Untriner, 98 Ga. 801; Barker v. Dayton, 28 Wis. 367. As to what will constitute, see Brokaw v. Ogle, 170 Ill. 113.

[2] In the early days of feudalism the owner was lord *parramount la terre* — lord *over* the land.

[3] Shaw v. Farnsworth, 108 Mass. 357; Huntington v. Parkhurst, 87 Mich. 38; 24 Am. St. Rep. 146.

[4] Illinois Starch Co. v. Ottawa Hydraulic Co., 125 Ill. 237.

[5] Lindsey v. Leighton, 150 Mass. 285; 15 Am. St. Rep. 199.

[6] 2 Cooley's Blk. (4th ed.) 142.

[7] Brainard v. Burton, 5 Vt. 97; Gazzola v. Chambers, 73 Ill. 75; Field v. Herrick, 101 Ill. 110. The landlord may by unlawful entry be a tres-

A perpetual leasehold, *i. e.*, one for a long term renewable forever, does not give such seizin as will support dower.[1]

Rent.— The rent which is paid to a landlord by a tenant differs from the other species of rent to be hereafter noticed.[2] It was formerly regarded as a reservation out of the profits which those menial bailiffs or farmers[3] were expected to make from the use of the land;[4] but in modern times only leases expressly reserving such a share have the ancient features. A pure leasing must be for a certain rent payable at a fixed time for a definite period,[5] for the use.[6] This is the rent service of the law,[7] and the only species of rent which contemplates the relation of landlord and tenant.[8]

The performance of the covenant to pay rent may properly be secured by a condition of forfeiture of the term,[9] or a right of entry,[10] and enforced by a summary proceeding known as distress for rent.

A cropper, *i. e.*, one working land on shares, is not a tenant unless he has a demise of the land entitling him to possession.[11] He does not have title to the crop until division of it.[12] Until then the owner and the cropper are tenants in common of the crop;[13] only the owner has possession and legal title;[14] but rent as such may be paid in a share of the crop.[15]

Apportionment of Rent.— At common law a contract for the payment of rent periodically was not to be apportioned during the periods.[16] Where there was a lease for a year's rent, to be paid at fixed periods, if the lessor died between the periods his representative could not collect the rent accruing after the last

passer. See Keegan v. Kinnare, 123 Ill. 280–287.

[1] Abbott v. Bosworth, 2 Bull. 92; affirmed, 36 Ohio St. 605. See Taylor v. De Buss, 31 id. 468.

[2] *Post*, p. 995.

[3] *Supra;* 2 Cooley's Blk. (4th ed.) 142.

[4] 2 Cooley's Blk. (4th ed.) 41 and notes.

[5] Valentine v. Jackson, 9 Wend. 302; Hatfield v. Tullerton, 24 Ill. 278.

[6] 1 Benj. Real Prop. 535.

[7] See 2 Cooley's Blk. (4th ed.) 41 and note.

[8] Id.

[9] New York cases *ante*.

[10] Merwin's Eq. 221 et seq.

[11] He may even commit a trespass on the land. Warner v. Hoisington, 42 Vt. 94.

[12] Moulton v. Robinson, 27 N. H. 550; Ladd v. Robinson, id.

[13] Walker v. Fitts, 24 Pick. 191; De Mott v. Hagerman, 5 Cow. 220; 18 Am. Dec. 443.

[14] Chase v. McDonnell, 24 Ill. 239.

[15] Taylor, Land. & T., sec. 25; Dixon v. Niccols, 39 Ill. 384.

[16] Dexter v. Phillips, 121 Mass. 178.

pay day.[1] This hard rule has been very generally abrogated by statute.[2]

Tenancy for Years is one having a certain definite beginning or commencement, and a certain definite period of termination.[3] Because its duration is absolutely defined, it is called a *term*.[4]

Tenancy at Will is one whose duration depends upon the pleasure of the parties, and either party may determine it. It is absolutely uncertain in duration.[5] It usually occurs by some mischance, but may arise by agreement; and being determinable at the will of either party, the law requires notice of the intention to terminate it.[6]

Where an estate for years is granted by a lease, inoperative for any reason, *e. g.*, being in contravention of the statute of frauds, the estate is held to be one at will;[7] but if entry is made under an agreement providing for a yearly rental, and payment is made, such a lease will be regarded as a tenancy from year to year.[8]

A Tenancy at Sufferance differs from a tenancy at will, not in the quality of its uncertainty of duration, but in the fact that it does not arise from an original contract, but from a holding over without authority after the expiration of an original leasing for a term or for years. The tenant holding over without the consent of the landlord, after his right to hold under the original contract is terminated, is a tenant at sufferance.[9]

[1] 2 Blk. Com. 124. On a covenant to pay rent, appended to a lease, which did not mention heirs, executors, administrators or assigns, it was held in Walsh v. Pickard, 165 Mass. 189; 40 L. R. A. 321, that the rent belonged to the administrator.

[2] Williams on Real Prop. 27.

[3] Watkins on Conv. 11. This term may, however, attach to it a condition which may terminate it, but its utmost bound must be fixed.

[4] The requirement of this rule will be fulfilled if the lease contains the means of making the duration of the term certain. Brown v. Bragg, 22 Ind. 122; Shaw v. Hoffman, 25 Mich. 162.

[5] The fact that it is uncertain is the reason for requiring notice to quit.

[6] But where a tenant at will denies title of his landlord and asserts adverse title, no notice is necessary. Appleton v. Ames, 150 Mass. 34; 5 L. R. A. 206.

[7] Talamo v. Spitzmiller, 120 N. Y. 37; 17 Am. St. Rep. 607.

[8] Coudert v. Cohn, 118 N. Y. 309; 16 Am. St. Rep. 761; Talamo v. Spitzmiller, *supra*.

[9] The landlord has a right to treat the holding over as a trespass (McLeran v. Benton, 73 Cal. 329; 2 Am. St. Rep. 814; Smith v. Littlefield, 51 N. Y. 539), or as a renewal of the

From Year to Year is a very common method of leasing, in fact a very convenient one. It differs from a lease at will in this: that it is incumbent upon either party who may terminate the lease to give notice of the intention to terminate a half year before the expiration of the current year's tenancy.[1]

Relative Duties of Landlord and Tenant.— After the making of the lease the landlord is not obliged to place the tenant in possession.[2] He is not obliged to oust even his former tenants whose term has expired,[3] but he is liable to a tenant who is prevented from taking possession or is dispossessed by any one under a lawful paramount right obtained from him; and the lessee may recover not only nominal damages, but damages for the value of the use if it exceeds the rent agreed upon, and any other reasonable, probable, special damages.[4]

Destruction of Premises.— Unless expressly stipulated, the landlord need not repair the premises, or rebuild in case of destruction,[5] and under the common law the destruction of the premises, though complete, was no ground for abating or apportioning the rent.[6] The doctrine of the civil law was otherwise,[7] and there is a growing tendency to modify the rule, which has gone to such an extent as to mitigate much of its harsh-

lease for a year. Taylor's Land. & T. (7th ed.), § 22 (older editions are in error). In this edition he says: In Massachusetts and some other New England states where tenancies from year to year are unknown, a tenant holding over is said to be in merely by sufferance; he remains a trespasser, and can only become a tenant by mutual agreement. For an excellent review of the subject see Clinton Wire Cloth Co. v. Gardner, 99 Ill. 151; Haynes v. Aldrich, 133 N. Y. 287. The tenant at sufferance is not liable for rent *as such*, but is liable to respond in damages in an action of trespass, which will be the value of the use of the land with any other damages, irrespective of whatever the premises may have been rented for. Keegan v. Kinnare, 123 Ill. 290.

[1] Williams, Real Prop. (17th ed.) 558–596. This species of tenancy is not recognized in Maine and Massachusetts, but all uncertain leasings are at will. Id.

[2] Field v. Herrick, 101 Ill. 110.

[3] The civil-law rule was otherwise; and in Louisiana the lessor must secure to the lessee the possession, use and enjoyment of the thing leased. Viterbo v. Friedlander, 120 U. S. 707.

[4] Cohen v. Norton, 57 Conn. 480; Truell v. Granger, 8 N. Y. 15.

[5] 2 Cooley's Blk. (4th ed.) 145.

[6] Id. But where the premises consist entirely of houses or plants, or practically so, the general rule is that complete destruction releases the tenant. Humiston et al. v. Wheeler, 175 Ill. 514. See opinion of Brewer, J., Whitaker v. Hawley, 25 Kan. 674, and Wattles v. S. Omaha I. Co., 50 Neb. 251.

[7] Viterbo v. Friedlander, 120 U. S. 707.

ness.[1] Eviction by paramount title or by the act of the landlord abates the rent.[2]

The duty of the tenant, aside from the payment of the rent, is to keep the premises in reasonable repair, committing no waste, though entitled to reasonable estovers,[3] and to yield up the premises at the end of the term.

Sec. 637. *Estates Considered with Reference to the Nature of the Interest or Character of Possession* are of two principal kinds — legal and equitable estates.

The treatment which has been given of freehold and less than freehold estates is a sufficient presentation of those estates as well from this point of view as from their duration.

We are now to mention only those interests in land which exist unaccompanied by a real possession, although frequently attended with a *quasi*-possession or right of occupancy, and for this reason commonly called incorporeal estates.

It is common to grant to persons interests in or issuing out of land without accompanying it with either seisin or exclusive possession, but with right of occupancy sufficient to effectuate the purpose of the grant.[4] These interests include easements or servitudes, licenses, commons, annuities, rents and franchises, and are of such a nature as create an interest in lands.

Easements and Servitudes.— An easement is a right to make some use of land other than complete ownership, or the use of the land for profit, or to cast some burden upon it for the benefit of a neighboring piece of land.[5] In these latter cases the estate

[1] See for a review of authorities, Wattles v. S. Omaha L. Co., *supra*.

[2] Wattles v. S. Omaha L. Co., *supra;* Humiston v. Wheeler, *supra*.

[3] 2 Cooley's Blk. (4th ed.) 35.

[4] Burnett v. Crane, 56 N. J. L. 285; 44 Am. St. Rep. 394; Herman v. Roberts, 119 N. Y. 37.

[5] It is a servitude from the point of the person or land burdened; an easement from the other point of view.

Servitudes to Repair.— "A somewhat startling proposition in the law of easements is laid down in the case of Whittenton Manufacturing Co. v. Staples, 164 Mass. 319, Field, C. J., Holmes and Lathrop, JJ., dissenting, that in consequence of payment by owners of land for more than twenty years of an annual sum toward the repair of a dam situated off the premises, the land thereby becomes subject to a servitude to pay that sum annually. The decision is based on the supposed analogy between the duty to repair a dam and the duty to repair fences and highways. A right to compel the performance of positive acts is known as *a spurious easement*, and up to this time has been strictly confined to three classes of cases. The law has recognized the right to compel the repair of fences; repairs in connection with the enjoy-

having this right or privilege is called the dominant estate, and that required to bear the burden the servient estate.

There may be a servitude upon land which is not for the specific benefit of another piece of ground, but rather for the benefit of a person or persons, though they be not the owners of any land.[1] Thus, one may have the right to pass over land *via* a public highway, or by custom or prescription a right to fish in ponds or hunt game;[2] and it will be found that any personal right of this nature depends rather upon the fact that the individual is one of a number known as a community, which has an interest in the locality.[3] It is not necessary that the servient and dominant estates should be contiguous.

Among the most common easements is the right of the dominant estate to cast upon the servient one water naturally flowing upon it, or coming upon it from without in the ordinary course of drainage. This is a natural easement and servitude,[4] and is everywhere modified in the interests of husbandry.[5]

The right of way for man or beast or for the purpose of conducting water, the right to draw water from a spring or well, the water privilege appurtenant to a mill, may all rest in favor of one against another as an easement.[6]

ment of an existing easement (Ryder v. Smith, 3 T. R. 766); and repairs to be made upon the highway by abutting owners (Bac. Abr. Highways, E.)." From Baltimore Daily Record.

[1] 2 Cooley's Blk. (4th ed.) 35, notes.

[2] Such rights are, when granted by a private person, more properly profits *a prendre, i. e.*, a use not for convenience, but for gain. Bingham v. Salene, 15 Oreg. 208. See note 3 Am. St. Rep. 152. When granted by the public are a franchise. *Post*, p. 995.

[3] It is then rather in the nature of a common or franchise.

[4] The civil law required that *surface water* should follow its course. The common law allowed an owner to make embankments against it. Crawford v. Rambo, 44 Ohio St. 279. As to streams a distinction is made, the common law following the civil law, that the flow must not be materially interrupted to the damage of others (Id.), subject to reasonable rights of user, pollution and protection. In Barkley v. Wilcox, 86 N. Y. 140, is pointed out the states following the various rules.

[5] The upper owner may, by digging and banking, change the flow *into* a natural channel, even though the flow is increased. Martin v. Riddle, 26 Pa. St. 415; Peck v. Herrington, 109 Ill. 611. But several channels cannot be united. Limerick v. Turnpike Co., 80 Pa. St. 425.

[6] See 2 Cooley's Blk. 35, note; Floyd v. Smith, 18 Barb. 522; Sterling Hyd. Co. v. Williams, 66 Ill. 393. In Goodrich v. Burbank, 12 Allen, 461; 90 Am. Dec. 161, the judge says: "The right to take water from a well or spring is held to be an interest in land, although not a 'profit *a prendre*,' and may be claimed by custom; and we

A License bears a very close resemblance to an easement, and differs from it in the fact that it does not purport to convey a permanent interest, and is therefore never a freehold estate.[1]

A pure license, although created on consideration and allowing occupancy, and permitting improvements and erections of a stable and enduring character, is never permanent, but is always revocable,[2] even though followed by great expenditure, and therefore like an estate at will. It may be created by parol, whereas a permanent interest in land never can be so created.[3]

If an agreement purports to convey a permanent interest, it creates an easement, and is within the statute of frauds; but when followed by possession and expenditures, the part execution takes it out of the statute, and the change in condition creates an estoppel, and such a grant cannot be revoked. The distinction consists in the nature of the interest intended to be conveyed.[4]

Commons.— A right of common is a very different thing from a tenancy in common; the estate is in a community, and the individuals entitled to the enjoyment have no estate in the land.[5] Commons were held in the original states, and in the West there are commons tracing their origin to the Spanish and French occupation.[6]

A common is a mere right to use, in connection with other persons like situated, a designated parcel of land, or some appurtenant thereto, as a well, or to take fish, although if the so-called common right to take fish is in waters belonging to the public, and restricted to a designated class of persons, it

are aware of no case which denies that the right to an aqueduct may be so created as to exist independently of any particular parcel of land owned by the grantee thereof."

[1] Wilmington W. P. Co. v. Evans, 166 Ill. 548; Foster v. Browning, 4 R. I. 47; 67 Am. Dec. 505, note.

[2] Nat. S. Y. Co. v. Wiggins Co., 112 Ill. 385. Where there is no pretense of giving a permanent interest there is no ground for estoppel. Id. See Party-wall Agreements; Hodgkins v. Farrington, 150 Mass. 19; 15 Am. St. Rep. 168. *Cf.* Russell v. Hubbard, 59 Ill. 335, and comment 112 Ill. 394.

[3] Id.

[4] See Ricker v. Kelley, 1 Greenl. 117; 10 Am. Dec. 41, note; 3 Kent, Com. 452. See note in 31 Am. St. Rep. 712.

[5] Haps v. Hewitt, 97 Ill. 498.

[6] *E. g.:* the old Kaskaskia common, Trustees v. McClure, 167 Ill. 23, and the Cahokia commons, Haps v. Hewitt, *supra.*

partakes rather of the nature of a franchise held in common than a pure common; but it is not necessary that a commoner be an owner of land,— his inhabitancy gives him the right.[1]

Rents.[2] — Rent as a compensation for the use of land by a tenant passes under the technical name *rent service*.[3]

Rent service is always payable to the owner of the land, and it is never granted by him, but is *reserved* in his grant of the term.

Rent Charge.— It was formerly common for an owner to enter into a contract to pay a third person a fixed sum of money designated as arising out of particular lands, and to give to him the right of distress for the enforcement of the charge. It is called *rent* because it issues out of the land, and being a *charge* on the land enforceable by distress is called a rent charge.[4]

Rent Seck.— It is called rent only because the agreement is to pay it out of the profits of the land. Like a rent charge it is granted by an owner to a stranger to the title, but it differs from the latter in that no remedy by distress is given, and because it rests merely on contract is called *rent seck*, or barren rent.[5]

Franchises as a species of estate in land must be clearly distinguished from the franchise to be a corporation or the franchises of corporations. In this connection it can make no difference whether the person owning the franchise be a natural or artificial person.

It is the character of the grantor and the nature of the thing granted in its relation to land (*i. e.*, land or water) which classes it as a franchise. Where the exercise of the right must rest upon a grant from the state, and confers an interest or right to make a profitable use of land, it may properly be termed a franchise in land.[6]

[1] See statement of White, J., in Davis v. Massachusetts, 167 U. S. 43–46, and Illinois cases cited above.

[2] *Annuities* granted by an owner out of the profits of land directly to a third person are very uncommon, and can scarcely be said to constitute an interest in land because not made a charge on land. Such an agreement, if made a charge on an estate, would be a rent seck.

[3] *Ante*, p. 989. See 2 Blk. Com. (4th ed.), 41, note.

[4] Id.; Watkins on Conv. 175.

[5] Id.; Ingersoll v. Sargent, 1 Whart. 359; Rensellaer v. Dennison, 35 N. Y. 393. But the right of distress has been given by statute in all cases of rent in England and in some of the states, thus converting this species into a rent charge. See Vechte v. Brownell, 8 Paige Ch. 212; Lawy. Ed. N. Y. Ch., vol. 4, p. 404.

[6] In Price v. Price's Heirs, 6 Dana, 107, the court decided that stock in a railroad company was real estate,

There are early cases where individual rights of this nature have been recognized as conferring a seisin of the right in the land.[1]

Railroad rights of way are somewhat anomalous. They are generally termed easements, because there is always impliedly a reversion to the owner of the fee if the special use is abandoned. The company is given an interest and a possession differing somewhat from an easement in this: that the railway company is tacitly given an exclusive possession of such a nature as enables it to exclude all other occupants of the land, even to the exclusion of the former owners of the fee if necessary.[2]

Equitable Interests.— By an equitable interest is meant a real interest in land in which the legal title to the same interest is in another.

Uses and Trusts — Origin.— It was anciently common for an owner to grant his estate, *usually by devise*, to a person in whom he had confidence, to hold the same, and use and dispose of it in the manner which the *cestui que use*, or party beneficially interested, should direct.

The devisee or grantee in such a case was the mere repository of the title; the beneficiary had the complete control of the land.

Such a transaction was termed a *use*. It did not confer active duties or powers upon the devisee, nor create any beneficial rights in him.

On the same policy which now restricts the entailment of estates or their ownership by a corporation having perpetual succession, which amounts to the same thing, English statutes, notably Magna Carta and the statutes of mortmain,[3] restricted the right of religious bodies to acquire lands.

and descended to the heirs, and subject to a claim of dower. The court said: "That a franchise created by act of incorporation unlimited in duration, and springing out of the combined use of lands and personalty, should be denominated and classed as *real estate*," and cites 2 Blk. Com. 20, 21, 22, 37, 38. In Holyoke Co. v. Lyman, 15 Wall. 500–15, the right of fishery in unnavigable streams is considered, and a grant spoken of as "*a franchise of a several fishery.*"

[1] 3 Washb. (5th ed.) 304. The exclusive right to maintain a ferry is a franchise and real estate. Dundy v. Chambers, 23 Ill. 369.

[2] Jackson v. R. & B. R. R., 25 Vt. 150; Conn. and Pass. Rivers R. R. Co. v. Holton, 32 Vt. 44; Hazen v. Boston & M. R. R. Co., 2 Gray, 580.

[3] Dead hands.

Statute of Uses.— The device of creating a use was immediately laid hold of to evade the statute. These uses, being regarded as equitable estates, cognizable in chancery and by the chancellor's ecclesiastics or churchmen, the device succeeded admirably until the passage of the celebrated statute of uses.[1]

Trusts Distinguished from Uses.— If taken literally, this would have prevented the existence of trusts, but by judicial construction the courts drew the line sharply between *active trusts* and real uses, or dry passive trusts,[2] *and also* between deliberate conveyances or agreements intended by the parties to create a trust, and trusts arising by operation of law out of transactions where the circumstances rendered it fraudulent and inequitable for one obtaining the legal title to hold it, and out of which equity would create a trust, *i. e.*, between *express trusts* and those arising by operation of law.[3]

By this means is preserved to us that great branch of the law which passes in modern times under the name of trusts.

Charitable Uses.— The law of England never intended to run counter to the policy which encouraged rather than discouraged philanthropic gifts to charitable uses.

In a broad way the definition given by Mr. Binney in his argument in the Girard will case expresses the *character of a charity:* "Whatever is given for the love of God, or the love of your neighbor in a catholic and universal sense — given from these motives and to these ends, free from the stain or taint of every consideration that is personal, private or selfish," is a charity.[4]

The *object* is better expressed by Lord Camden's definition: "A gift to a general public use which extends to poor as well

[1] The statute of uses (27 Hen. VIII., ch. 10), paraphrased, provides that where any person stands seized of estates in hereditaments to the use, confidence or trust of another, by any means of title, *in any manner whatsoever it be*, from henceforth the *cestui que usé* shall stand seized of the legal estate. This statute is generally re-enacted in the United States with the statutes relating to conveyancing. See Silverman v. Kristufek, 162 Ill. 222.

[2] Silverman v. Kristufek, 162 Ill. 222.

[3] See Lantry v. Lantry, 51 Ill. 458, arguments and citations; Stark v. Storrs, 6 Wall. 419.

[4] Page 41 of argument in Vidal v. Girard, 2 How. 128, quoted in 95 U. S. 311. For an enumeration of charities, see Ould v. Wash. Hospital, 95 U. S. 303.

as the rich,[1] but it may be, and generally is, confined to a class or a specific object."[2]

The Statute of Charitable Uses, 43 Eliz. 44, was formerly supposed to be the basis of the validity of these charities;[3] but this view has been changed, and it is now settled that this statute is purely remedial and ancillary for the better protection of charities, which are recognized as valid independently of its provisions.[4]

A Trust Defined.—"A trust is a confidence reposed in some other and not issuing out of land, but as a thing collateral annexed in privity to the estate of the land and to the person touching the land for which the *cestui que trust* has no remedy but subpœna in chancery. . . . The trust or confidence is a thing distinguished from *legal property* or legal right to property. It is neither *jus in re* nor *jus ad rem*."[5] It was held that a trust is not a *legal estate*, but an *equitable* interest.[6]

They may all be *created* by parol, but express trust must be *manifested*, *i. e.*, *proved* by a writing.[7] The statute of frauds applies only to express trusts.[8]

Four species of trusts are clearly distinguishable by the manner in which they are created or how they arise: (1) direct or expressed trusts, (2) implied trusts, (3) resulting trusts, and (4) constructive trusts.

The first class is created by direct words acknowledging the trust in express terms or promises, with mere words as their only foundation; the others all arise by *operation of law* on the facts and are often spoken of as implied trusts. The three species are clearly distinguishable from each other.

[1] Jones v. Williams, Ambler, 652 (1767); Conklin v. Davis, 63 Conn. 377.

[2] A college or hospital. Academy v. Harvard College, 12 Gray, 394; Phillips v. Bury, 2 T. R. 353. No great degree of certainty as to the object is required; the courts will endeavor to carry out the intent if ascertainable. Parish v. Trustees, 67 Conn. 554.

[3] See Story's great opinion, 3 Pet., App'x, 483; also in Baptist Ass'n v. Hart, 4 Wheat. 1.

[4] The course of the discussion is concisely stated in Ould v. Washington Hospital, *supra*. This case is recommended as the first decision to read on the subject, followed by cases on page 309 in the inverse order of their citation. See also Mormon Church v. United States, 136 U. S. 1.

[5] Perry on Trusts, § 13; Lampleigh v. Lampleigh, 1 P. Wms. 112.

[6] Lampleigh v. Lampleigh, 1 P. Wms. 112.

[7] Lantry v. Lantry, 51 Ill. 458. Any writing, no matter how informal, before or after the creation, will do. Id.; Browne on Statute of Frauds, § 97.

[8] 2 Washb. R. P. (4th ed.) 482, 501.

The second class may arise out of an agreement *inter vivos* if the words used imply or infer that the intention was to create a trust and is accompanied by a consideration. They rest upon the intention and the consideration.[1]

The third class arises from the nature of the transaction, irrespective of any intention of the parties. The original foundation of this class of trusts is the natural equity that arises when parties do certain things not the intention.[2]

A principal instance of this kind is where property is purchased with money furnished by or on behalf of one person and title taken in the name of another.[3]

The fourth class of trusts has its foundation in what in equity is regarded as a fraud, as where an influential or confidential relation, or any promise to perform an act for the benefit of the person conveying, or a third person, is made the means of acquiring title. Equity declares that under such circumstances he ought not to hold and enjoy the beneficial use, and will raise a trust by construction out of the transaction.[4] They differ from other trusts in that they are not within the intention or contemplation of the parties at the time the contract is made, from which (the contract) they are construed by the court; they are thrust upon a party contrary to his intentions.[5]

[1] Perry on Trusts, 112.

[2] While it is important to distinguish between the different classes of cases, it is not essential that a case fall entirely within one or the other of the classes.

[3] Perry on Trusts, §§ 124, 133. To constitute a constructive trust it is only necessary that the consideration should be advanced by or *on behalf of* the person claiming the trust. Getman v. Getman, 1 Barb. Ch. 514; Blodgett v. Hildreth, 103 Mass. 487; Siemon v. Schruck, 29 N. Y. 598; Fairs v. Dunne, 7 Bush, 276; Zinn's Lead. Cases, 297; Emmons v. Moore, 85 Ill. 303; Cannon v. White, 125 Ill. 412; Ger. Am. T. Co. v. Shallens, 147 Pa. St. 585; Larmon v. Knight, 140 Ill. 232.

[4] This is a most interesting class of trusts, and requires very often the clearest discrimination in order to keep it without the statute of frauds, because *it rests upon an express agreement*, and the argument always is that so resting upon express agreement it is an express trust and within the statute of frauds; but the element of fraud in procuring the agreement by promise, and the mere neglect to comply therewith, furnishes the equity which changes it from a mere express trust to one *ex maleficio* which equity will enforce. See for an extreme but typical case, Cannon v. White, 125 Ill. 421; Barrell v. Handrick, 42 Ala. 60; Hoge v. Hoge, 1 Watts, 163, 26 Am. Dec. 52; Larmon v. Knight, 140 Ill. 242.

[5] Perry on Trusts, 166; Beach v. Dyer, 93 Ill. 298; Wright v. Gay, 101 Ill. 241; Allen v. Jackson, 122 Ill. 567. In a case where it was insisted that

It is not necessary to show in such cases that there was an intention to defraud.[1]

Powers, when spoken of as an interest in land, means a right vested in a particular person of making either a general or special disposition of land.

It is somewhat analogous to a use, differing, however, in the fact that the person in whom the power is vested has not necessarily vested in him an estate in the land.[2]

A power may be created by a legislative act, and it is then called a statutory power, but the technical power is one which arises by private conveyance, and passes under the name of —

Power of appointment,[3] *i. e.*, a power to limit or direct to what use the estate shall be put, or to whom it shall be conveyed.[4]

This power of appointment is not, strictly speaking, an estate in land, but it is an interest recognized in equity, and which equity will enforce at the suit of one in whose favor its execution is undertaken.[5] A court of equity may compel him to exercise a general power by using his discretion, or a special power by executing the direction.[6]

Sec. 638. *Estates Considered with Reference to the Time of Enjoyment* are either in *possession*, *remainder* or *reversion*.

Estates in Possession are those which the owner has the present right to enjoy. They are called executed estates.

A Remainder is the remnant of an estate in fee, out of which the owner has granted a lesser estate to mediate grantees, and which is *by the same deed* granted to the remainderman to be held after the termination of these mediate estates. The remainderman is always a different person from the grantor.

because the trust was claimed to result from a parol express agreement there could be only an express trust, the court dissent from that view and say the distinction may seem nice but is well established. Lantry v. Lantry, 51 Ill. 458, 465; White v. Cannon, 125 Ill. 412.

[1] Barrell v. Handrick, 42 Ala. 60; Cannon v. White, 125 Ill. 412. In the last case it proves that the trustee intended to act in good faith, but was murdered before carrying out the *express agreement* to convey. See 2 Washb. R. P. 482.

[2] Taylor v. Horde, 1 Burr. 60. The power is on page 63.

[3] A power of attorney is more like an agency, *i. e.*, to perform some act in the name of the person appointing.

[4] Jesson v. Wright, 2 Bligh, 1, 21 Per. R. 1.

[5] Johnson v. Cushing, 15 N. H. 298.

[6] Bispham's Eq., sec. 77; Graves' Sum. R. P. 183; 2 Washb. R. P. 686.

The rule against perpetuities (remoteness) applies, and the remainderman must come to the enjoyment of his estate within the time limit of that rule.[1]

A remainder must be granted in the same instrument with a particular estate, otherwise the estate granted would be a mere grant of a reversion.

The estate in remainder must vest in the grantee during the continuance of the particular estate, or immediately on its termination.

A vested remainder is one subject to no condition precedent, and which is always ready, during its continuance, to come into the possession of a certain person, already existing and ascertained, on the determination of the particular estate, now or hereafter, in any manner whatsoever. And any remainder not so ready is contingent.[2]

A contingent or executory remainder is limited to an unascertained person who may never come into being, or to take effect upon an uncertain event, or which may not happen until after the particular estate has determined, thereby rendering uncertain the contingency upon which the remainder depends.[3]

A Reversion is the remnant left unconveyed of a fee-simple estate out of which the owner has granted less estates.

Although it is spoken of as that estate which returns to him, all freeholds being inheritable, it is to be understood that coming to him means to him and his heirs or devisees.[4]

It resembles very much the escheat of a feudal lord, although resembling not at all what is called the escheat under our law.[5]

A reversion is never created. It simply exists by operation of law wherever a freehold less than the fee has been granted.

Sec. 639. *As to Certainty of Commencement and Continuance,* estates are either *absolute* or *conditional.*

Absolute Estates need no explanation. They are unqualified by any condition or contingency.

Of Conditions, generally, nothing need be added to what has been said in connection with contracts.[6]

[1] Ould v. Wash. Hosp., 95 U. S. 309.

[2] Charles A. Graves in 4 Va. Law Reg. 625; Gray's Perpetuities, § 110.

[3] Id.; 2 Black. Com. 163. See Thomas v. Ritchie, 136 U. S. 519; Wilson v. White, 109 N. Y. 59.

[4] If it is a mere possibility it cannot be assigned or sold. Needles v. Needles, 7 Ohio St. 432; Ruch v. Rock Island, 97 U. S. 693.

[5] 1 Blk. Com. 175.

[6] *Ante,* p. 755; 2 Cooley's Blk. (4th ed.), 155.

When an estate has qualifications annexed to it rendering its commencement or continuance conditional upon the performance or non-performance of some act or the happening of some event, it is an estate on condition.[1]

A mere condition and the happening of the contingency contemplated does not itself revest the estate or terminate it; the title does not change until re-entry is made under the condition.[2]

Estates granted on conditional limitation differ from estates on condition in the following particulars: 1st. A conditional limitation is used where the whole estate passes from the grantor. 2d. Upon the happening of the condition the estate terminates, and no entry is necessary. 3d. In case of conditions there are always persons in being who, by uniting, can pass a title in the fee, but in estates on conditional limitation the whole estate passes to the grantee, and repasses upon the event contemplated.[3]

Mortgages are estates on condition. Mortgages and trust deeds are conveyances of the estate of the mortgagor to the mortgagee as security for the performance of some condition mentioned in the mortgage, accompanied with a stipulation setting forth the condition that when the obligation is performed the deed is void. This is called the defeasance clause.[4] Formerly it was held that the mortgagor was from the beginning a mere tenant at will of the mortgagee, but such is not now the recognized doctrine.[5] Where the mortgagee is in possession he is said to be a trustee of the mortgagor, and that he cannot purchase the fee; but this is not the rule.[6]

The legal title is in the mortgagee, but equity regards the

[1] These conditions are matters of contract, and the contract, like all other contracts, is bounded by public policy. Conditions in restraint of marriage, or conditions inconsistent with the estate granted, are void. Luigart v. Ripley, 19 Ohio St. 24; Canal Bridge Co. v. Methodist Soc., 13 Met. 335; 2 Blk. Com. 157, note.

[2] Barrie v. Smith, 47 Mich. 130; Ruch v. Rock Island, 97 U. S. 693.

[3] 2 Blk. Com. 255, note; Proprietors v. Grant, 3 Gray, 143.

[4] See Walsh v. Brennan, 52 Ill. 193. Merwin's Eq. 342; Jones on Mort., § 17. Without such a clause it is competent to show by parol evidence that what appears to be an absolute deed was in fact given as security, and but a mortgage *in effect*. Emerson v. Atwater, 7 Mich. 12; Campbell v. Dearborn, 109 Mass. 130.

[5] Partridge v. Bene, 5 B. & Ald. 604; 7 E. C. L. 204, note; Willis v. East. T. & B. Co., 169 U. S. 302.

[6] Griffin v. M. Co., 52 Ill. 130.

mortgagor as the real owner, and views the transaction as it is in substance, a mere security for the debt.[1] A mortgage conveying by "bargain and sale" to the mortgagee, "his heirs and assigns," carries after-acquired estates.[2]

After the time has elapsed for the performance of the condition named in the defeasance clause, the mortgagee has the absolute estate, and, but for qualifications annexed to the transaction, first by courts of equity and finally defined by statutory enactments, the estate of the mortgagor would be entirely terminated.

An equity of redemption[3] was very early recognized wherever it was shown that by fraud, accident, mistake or any hardship not involving laches on the part of the mortgagor he had been prevented from performing or was unable to perform the condition, and chancery courts allowed him to redeem upon equitable conditions.[4]

This is called the equity of redemption; and by statute a definite period is fixed within which this redemption must be made.

A mortgage is not in itself and alone assignable;[5] but an assignment of the debt carries with it the security;[6] and if the indebtedness is evidenced by a negotiable note, the note does not lose its negotiability by being secured, but the holder, so far as his rights depend upon the mortgage, holds them subject to equities between the original parties.[7]

Remedies After Condition Broken.— The mortgagor is a mere tenant at will.[8] The mortgagee generally has the right to enter if he may peaceably, or he may bring an action for the posses-

[1] The case last cited and Carroll v. Ballance, 26 Ill. 9, contain full discussions of the nature of the respective estates of mortgagor and mortgagee.

[2] Gibbon v. Hoag, 95 Ill. 45.

[3] See Kenyon v. Shreck, 52 Ill. 382.

[4] 4 Kent, Com. 158; Merwin, Eq., § 640.

[5] Delano v. Bennett, 90 Ill. 533.

[6] But to affect subsequent purchasers, the record is alone effective. If the record shows the mortgage canceled, an assignee of the notes cannot hold against a purchaser. Bank v. Anderson, 14 Iowa, 544; Jones, Mort., § 820.

[7] This may be qualified if done with assent of mortgagor. Matthew v. Wallwyn, 1 Ves. Jr. 118; Melendy v. Keen, 89 Ill. 404.

[8] Carroll v. Ballance, 26 Ill. 9. When a mortgage is given to secure a debt payable in instalments, with option in power of sale, on default in payment of any part, to declare all due, no notice of the option is required, and an assignee may exercise it. Heath v. Hall, 60 Ill. 344.

sion (ejectment, where the ancient names are retained, being the appropriate remedy), and in some instances there is a statutory foreclosure on the law side of the court; and besides these, the equity of redemption may be foreclosed by a suit in equity, wherein it is stipulated that by a short day, if the debtor do not pay, the land shall be sold to satisfy the mortgage.[1] If the mortgage is given to secure the repayment of money, a suit for the money may also be brought. These remedies are cumulative.[2]

Powers of sale are sometimes inserted in mortgages, allowing the mortgagee or trustee to sell the land after condition broken, with or without notice.[3]

They are not generally regarded with favor, and a sale under them may be generally redeemed from in the same manner as if the sale were under a decree of the court.

Sec. 640. *Estates Considered According to the Number and Connection of Tenants.*—

An Estate in Severalty is one held by a single owner.

Estates having a plurality of owners are classified as joint tenancies, tenancies in common, partnership estates, tenancies in coparcenary, and estates in entirety.

Joint Tenancy is created only by purchase, and all the tenants must derive title through the same source. Each must have the same interest in point of dignity, time of enjoyment and quality of possession.[4]

Each and all are said to hold *per my et per tout*,[5] *i. e.*, each holds his share in the whole without any distinction as to parts. The incident of survivorship, or *jus accrescendi*, attaches.[6]

Each, however, may alien his share, but instantly this is done

[1] *The right of possession after sale* under foreclosure of a mortgage is held, in Danehower v. Dawson (Ark.), 44 L. R. A. 193, to be in the purchaser during the year allowed by statute for redemption, where the statute transfers the title subject to redemption, and is silent as to the possession.

[2] Delaney v. Clement, 3 Scam. 201.

[3] Harper v. Ely, 56 Ill. 179; Gibbon v. Hoag, 95 Ill. 45.

[4] The real practical distinction between tenants in common and coparceners was taken away by the English statutes giving the right of partition to tenants in common (31–32 Hen. VIII.). Berry v. Sewall, 65 Fed. Rep. 742.

[5] This is a French sentence, but is not correctly written. It was as late as 1701 properly written by English lawyers, *parmi et par tout*. Law-French Dict., by F. O., 1701.

[6] Babbitt v. Day, 41 N. J. Eq. 392.

the joint tenancy is destroyed because the new owner does not take by the same title.

In this country the courts have not favored estates in joint tenancy, holding that the right of survivorship is contrary to the policy of our institutions,[1] and in most of the states, either by statute or construction, a conveyance by two or more persons is held to create a tenancy in common. Such statutes, however, do not apply to trustees.[2]

Estates in Partnership cannot arise by descent, although title may come by devise or by purchase.

Once vested the estate is given an anomalous aspect. A partnership, as we have seen, is a mercantile arrangement with business for its object, and firm property, whatever its character, is held and treated in law, until all partnership matters are settled, as owned by the firm rather than by the individual members.[3]

Tenancy in Common differs essentially from either of the above. The title may be by purchase or descent, and the various titles need not be similar in any respect.[4]

Unity of possession is all that is required.[5] The interest of a tenant in common may be sold freely, and until partition had such transfer does not change the relation of the various owners.[6]

The co-tenant may manage the whole freely, and at common law was not accountable for overreaching his co-tenants and taking more than his share,[7] but these rights are curtailed and controlled in modern law. They may hold adversely to each other, but such a holding must be clearly shown.[8]

[1] Sergeant v. Steinberger, 2 Ohio, 305.

[2] Several trustees usually hold in joint tenancy, and are not within the statutes aimed at the survivorship. As it was said in Parsons v. Boyd, 20 Ala. 112, trustees are not within the reason of the statute, nor the evil intended to be remedied by it. See also Philadelphia & R. R. R. Co. v. Lehigh Nav. Co., 36 Pa. St. 204.

[3] See *ante*, p. 826 et seq.; Goodwin v. Richardson, 11 Mass. 469; Arnold v. Wainwright, 6 Minn. 241; 80 Am. Dec. 448.

[4] Stevens v. Reynolds, 8 Am. Rep. 330; 143 Ind. 467.

[5] Cecil v. Clark, 44 W. Va. 659.

[6] Brown v. Wellington, 106 Mass. 318.

[7] Brown v. Wellington, *supra*. One tenant may be guilty of waste. Henson v. Henson, 120 N. C. 400.

[8] Kotz v. Belz, 178 Ill. 434; Gross v. Washington (Tenn.), 38 S. W. Rep. 442.

Tenancy in Coparcenary is like a joint tenancy, except that its title is always by descent.

Coparceners do not necessarily hold for the same time. The right of survivorship does not attach.

Each has a right to distinct portions and may alienate or have partition of the estate, whereas the joint tenant cannot, excepting by statute; and to this right of partition is sometimes ascribed the name parcenar.[1] This estate is said not to exist in purity except in Maryland.[2]

Estate by Entirety was an estate granted to the husband and wife, and because of their being considered as one person they took a peculiar estate.[3] *E. g.*, if they *two* were named with several others, say two others, the husband and wife took but as one person — a one-third.[4] As in joint tenancy, the estate went to the survivor, and neither could defeat this right.[5]

The severing of this unity of husband and wife by statute has been held to destroy this estate,[6] but the weight of authority is to the contrary.[7]

Sec. 641. *The Title to Estates.*— The two modes of transfer, viz., by descent and purchase, have been spoken of.[8]

The transfer of property is governed entirely by the laws of *situs* of the property.[9]

Intestate Succession.— The term "descent"[10] does not aptly indicate the law as used at the present time, for heirs include

[1] 2 Blk. Com. 188, 189, *par fr.*

[2] Gilpin v. Hollingsworth, 3 Md. 1190; 1 Washb. R. P. 415; 4 Kent, 367.

[3] Cooper v. Cooper, 76 Ill. 57; Re Parry's Estate, 41 Atl. Rep. 448.

[4] Williams, R. P. (11th ed.), p. 357; Hallett v. Inlow, 57 Ind. 412.

[5] Bartles v. Nunan, 92 N. Y. 152.

[6] Williams, R. P. (11th ed.), p. 376; Cooper v. Cooper, *supra.*

[7] Id.

[8] See 2 Cooley's Blk. 201. The treatment of the subject of conveyancing will be more closely confined to the statement of the fundamental principles and essential features than has been the case in any preceding part of the book, for the reasons that these details depend almost entirely on statutory provisions, are exceedingly variant, and the subject can be examined minutely only in connection with particular statutes. It is believed that a better understanding of the underlying principles can be obtained apart from these details. Warvelle's Real Prop. (2d ed.), a book now in press, will, it is believed, prove on the subject of conveyancing a most useful work both to the student and practitioner.

[9] Robertson v. Pickrell, 109 U. S. 608; Story, Confl. L., sec. 428; Ins. Co. v. Com. Bank, 68 Ill. 348.

[10] Female Acad. v. Sullivan, 116 Ill. 375–90.

OUTLINE OF TITLE TO REAL PROPERTY.*

Of Title.

- *By Descent — Intestate Succession.*
- *By Purchase.*
  1. By feoffment, *i. e.*, delivery of possession with intent to transfer ownership.
  2. By grant.
     1. Deeds.
     2. Covenant to stand seized.
     3. Lease.
     4. Release.
     5. Parol partition.
  3. By devise.
  4. By accretion.
  5. By operation of law and act of party.
     1. Prescription.
     2. Dedication.
     3. Estoppel.

ELEMENTS OF A TRANSFER BY DEED.

Anatomy of a Deed.

- *Premises.*
  - Names of parties.
  - Inducement,
    I. e., recital of any matters leading up to conveyance.
  - Recital of consideration.
- *Granting Clause.*
  - Description of estate granted.
  - Description of land in which it is granted.
- *Covenants.*
  - Seizin and title.
  - Warranty and quiet enjoyment.
  - Stipulative covenants.
    - Reserving easements, etc.
    - Restricting use.
- *Conditions and Provisos.*
- *Habendum and Tenendum.*
- *Attestation Clause* (reciting signing, sealing and delivery).
- *Formalities of Execution.*
  - Signing.
  - Sealing.
  - Acknowledgment.
  - Delivery and acceptance.
- *Registration of Title.*

* See page 954.

others than lineal *descendants*, although giving these the preference.

The policy of our law is to keep property in the hands of private owners so long as kindred can be found in descendant or ascendant lines, including even the collateral, and in the case of failure of heirs to allow the spouse to take as an *heir*,[1] in this manner postponing to the remotest time the escheat of land.

The law of descent then consists in those canons of descent by which the degrees of consanguinity are computed which obtain in the state where the land is situated. The former are adopted from either the civil law or the canon law, and are in every state modified by the statutes.[2]

By Purchase is meant every mode of transfer other than by descent.[3]

In England there were recognized ten formal modes, namely: feoffment, grant, fine, common recovery,[4] exchange, release and confirmation, grant of reversion with attornment, bargain and sale, and by devise (will). Other collateral modes of transfer obtaining title are also recognized, viz.: accretion,[5] prescription, dedication, estoppel, partition, and by judgment; but each of these in some way constitutes, or is incidental to, some or other of the direct modes of transfer to be mentioned.

Feoffment.— In England all conveyances by act of the party operated either as a feoffment or a grant, *i. e.*, all conveyances were grants, as we would understand it, but the one termed a feoffment was more than a grant. It was a grant either by

[1] Lockwood v. Moffett, 177 Ill. 49.

[2] See an exhaustive presentation of the canons of descent as modified by statutes of the various states, where the details are minutely examined, *sub.* In re Ingram, 78 Cal. 586; 12 Am. St. Rep. 80, note.

Descent of Personalty by Common Law.— One-third to heirs or lineal descendants, one-third to wife, one-third could be demised. If he died without a wife, he could dispose of one-half; the other half went to his children. If he had no children, the wife was entitled to one-half, and he might bequeath the other. If he had neither wife nor issue, the whole was at his own disposal. Magoun v. Ill. Trust & S. B., 170 U. S. 290. See also In re Ingram, *supra.*

[3] 2 Cooley's Blk. (4th ed.) 204, 242, note.

[4] Lyle v. Richards, 9 S. & R. (Pa.) 430.

[5] *Accretion*, for example, is an alluvial deposit cast up by water, and does not transfer title. It but adds to the extent of the land and expands the bounds otherwise indefinite. Saulet v. Shepherd, 4 Wall. 502.

oral declaration, or reduced to writing accompanied with the actual or symbolical delivery of possession called livery of seizin; *the grant, i. e.*, the declaration of intent to convey, and the delivery, constituted a feoffment. The policy of the registration acts and the statute of frauds render it very doubtful if any title can be perfected, except through a trust, without paper color of title, unless the possession shall continue for the period of limitation.[1]

A grant was the same, without delivery of possession, and was introduced to transfer interests incapable of delivery.

Prescription — Adverse Possession.— Under the old law it was held that any person in possession of the land, rightfully or wrongfully, could pass a fee simple by investing an innocent purchaser with the same possession.[2] Our law will not admit of this.

A bare intruder cannot, without reference to time, acquire and transmit a title. His possession must be adverse with a claim of ownership,[3] and to this must be added what is called prescription, *i. e.*, a holding for such a length of time as presupposes a grant, usually fixed by statute at twenty years.[4]

Nor will the possession of an intruder extend beyond his visible occupation, and by construction to a larger tract included within the prior title with that actually occupied.[5]

Color of Title.— An adversary possession creates no right until this time of prescription elapses, saving only that a grant, irrespective of the title of the grantor, constitutes color of title, and under the statutes of the states will generally, in connection with payment of taxes, ripen into a good title in a shorter period than by prescription.[6]

[1] Lessees of Lindsly v. Coats, 1 Ohio, 243; 1 Washb. R. P. (4th ed.), p. 60, ch. 11, sec. 67; Clark v. Graham, 6 Wheat. 577. A mere parol gift of land without consideration accompanied with possession will not bind the giver. Temple v. Janner, 71 Ill. 13. But if full consideration is paid, some courts will decree a specific performance. Such a possession is adverse. Schafer v. Hauser, 111 Mich. 622. *Cf.* 1 Washb. R. P. (5th ed.), p. 60.

[2] Taylor v. Horde, 1 Burr. 60; 2 Sm. Ld. Cas. 644; Fort Dearborn Lodge v. Kline, 115 Ill. 177.

[3] See Knight v. Knight, 178 Ill. 553, and citation; Post v. Pearsall, 22 Wend. 450.

[4] Id. See reasoning in latter case.

[5] See Gowett v. Ramsey, 26 W. Va. 375. It may begin under void transfer. Schafer v. Hauser, 111 Mich. 622.

[6] *Fines and common recoveries* may be thrown out of contemplation as being obsolete. *Exchange, like ex-*

Dedication is one mode of indicating the intent to devote a particular piece of land to the use of the public. To constitute a dedication, such intent must appear and also acceptance by the public.[1] It may be by express act or declaration and take effect at once;[2] or by written grant, or shown by long user;[3] or arise by estoppel shown by negligently allowing the public to use.[4] These are all by acts *in pais*, but there are modes pointed out by statutes, generally by platting and subdividing land with parts of it marked for public use. These pass the title in the same manner as any other conveyance.[5]

A release is the extinguishment or relinquishment of any contingent or executory interest, as, for example, a contingent remainder. The release can be only to an owner of an interest in the estate.[6]

A confirmation is rendering complete and absolute a title which was conditional, determinable or executory.[7]

Bargain and sale indicates the purchase and transfer of land *for a valuable consideration*, which must be present.[8]

Devise.— A will, or, as it is called, *a testament*, is the act of one who is living making testamentary disposition of his property to take effect after his death.[9]

Before speaking particularly of the modes of conveyance appropriate to the transfer of particular estates, mention may be made of two provisions of the law regulating the formalities which must accompany transfer of estates, namely, the

changes of goods and chattels, would be what we call trading of farms; the only difference is in the consideration, while the devolution of title must be as in other cases. Clark v. Graham, 6 Wheat. 577. *Parol exchanges* are not valid here. Berry v. Sewall, 65 Fed. Rep. 742.

[1] Coburn v. San Mateo Co., 75 Fed. Rep. 520; McKay v. Hyde Park, 134 U. S. 84; County of Yolo v. Barney, 79 Cal. 375; 12 Am. St. Rep. 152.

[2] 1 Dillon, Mun. Cor., sec. 105; In the Matter of Thirty-second Street, 19 Wend. 130.

[3] Marcy v. Taylor, 19 Ill. 636.

[4] Wilder v. St. Paul, 12 Minn. 192. The intent is the important thing. Quinn v. State, 49 Ala. 353.

[5] People v. Holliday, 93 Cal. 24; 27 Am. St. Rep. 195, note.

[6] Beddoe's Ex'r v. Wadsworth, 21 Wend. 120; Williams v. Esten, 179 Ill. 267.

[7] Id.

[8] See *post*, p. 1020.

[9] *The grant of a reversion with attornment* indicates that the owner of the reversion grants it, and those possessing the immediate estates acknowledge the paramount ownership in the grantee. It is not in use here, where the feudal idea of tenure is abolished.

statute of frauds, and particularly that *rule of property* which affixes a positive inflexible meaning to certain words when used in certain connections, which, however technical it may seem, appears incapable of legislative annihilation — the rule in Shelley's case.

As to Parol Partition.— The ancient law was that two tenants in common may make partition by parol, and execute the same in severalty by livery;[1] but for the statute of frauds this would now be the rule.[2]

It is clear that such a fixing of portions of land in which several tenants had an equal right is not in strictness the same as an original mode of creating an estate in land. It rather dissolves the unity before existing, and assigns to each his own share in a common estate in severalty. Such a proceeding does not decide title or create any new title. It leaves the title as it was, except to locate such rights as the party may have in distinct parts of the premises.[3]

Such a proceeding is nevertheless within the statute of frauds, and so to complete the transfer without deed the possession must continue for the period of prescription.[4]

The Rule in Shelley's Case.[5]— In this connection it will be convenient to explain this *rule of property* and the signification of certain technical words essential to understand in order to comprehend the reasoning of decisions or know the law at the present time.

It should be remembered that *grants* came into use subsequent to the original mode of transfer by feoffment.

The Rule Stated.— "When the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or convey-

[1] Berry v. Seawall, 65 Fed. Rep. 742.

[2] *Disputed boundaries* stand perhaps on a somewhat different but analogous principle. There is here no pretense of exchange or yielding of ownership, but fixing a fact, and if the line is *bona fide* in dispute, an agreement fairly made without fraud or mistake will, if followed by possession, bind without regard to time. Vosburgh v. Teator, 32 N. Y. 561; Turner v. Baker, 64 Mo. 218; Proprietors v. Prescott, 7 Allen, 496; Cutler v. Callison, 72 Ill. 113.

[3] Tabler v. Wiseman, 2 Ohio St. 207–211.

[4] See the whole subject discussed in Berry v. Seawall, 65 Fed. Rep. 742; also Nave v. Smith, 95 Mo. 596; 6 Am. St. Rep. 79.

[5] For elaborate discussion, decision and explanation, see Perrin v. Blake, 4 Burr. 2579, and Jesson v. Wright, 2 Bligh, 1; re-reported in 10 Eng. Rul. Cas. 689–757, English and American notes; also 21 Revised Rep. 1.

ance an estate is limited either mediately or immediately to his heirs in fee or in tail, always in such cases the word 'heir' is a word of limitation of the estate, and not a word of purchase."[1]

At the time when this rule was formulated, a grant to a grantee, by his name simply, vested only a life estate, but if the words "and to his heirs" were added, the question arose, did the heirs take a remainder or did it enlarge his estate?

The technical effect of the use of the word "heirs" was to enlarge the duration of the estate from a life estate to a fee, and a fee could not be passed in a grant without the use of the word "heirs."

A grant to a man and to his heirs was at one time regarded as conveying to him only a life estate, and as creating a vested estate in those who would be heirs as purchasers.[2]

Meaning of Words and Phrases Used in the Rule.— *A purchaser* is one to whom an estate is granted.

A limitation is a marking out of the *extent and duration* of the estate.

Heirs, used simply, were the heirs general, without limitation or qualification, and, although sounding in the plural, technically meant but one, and under the rule of primogeniture[3] designated the eldest male, and if there were no males the daughters took as one in coparcenary.

Heirs could never designate persons living while the ancestor still lived, because no living person could have heirs (*nemo est hæres viventis*).[4]

Mediately or Immediately.— By *immediately* the rule means where the grantor grants to the grantee and to his heirs, without any other estate being granted to any other person, the words "to his heirs," etc., following directly after the grantee's name. "Or *mediately*" means that between the estate granted to the ancestor and that in remainder *apparently* granted to the heirs, or heirs of his body, there intervenes another estate (or estates) less than a fee simple granted to a third person.

[1] See exhaustive note *sub.* Carpenter v. Van Olinder, 127 Ill. 42, in 11 Am. St. Rep. 99.

[2] Williams, R. P. (17th ed., by Hutch.), 73, 75.

[3] Tucker v. Adams, 14 Ga. 551. The lord chancellor, in Jesson v. Wright, says "heirs of the body" mean one person at any given time, and they comprehend all the posterity of the donee in succession. 2 Bligh, 1; 21 Rev. Rep. 38; 10 Eng. Rul. Cas. 719; 2 Cooley's Blk. (4th ed.), pp. 212–16.

[4] Broom's Max. 522.

This form of limitation is called a *remainder over*, and the words limiting or describing the remainder are remote from the first mention of the grantee.

The rule is stated in a way perhaps the best calculated to confuse a novice, although not particularly intricate to a person familiar with the institutions of the time and the language of conveyancing.

The reason for the broad scope of the rule as formulated is that it was intended to embrace every case that would be likely to occur, and to announce that there was no difference whether there was an intervening estate or not.

Bearing in mind the distinction between fee simple and fee tail, if the limitation was to the heirs of a man's body, these indicated not his general heirs, but his children; whereas, to constitute a fee simple, the expression must include all heirs in general.[1]

The effect of the rule is that those designated as heirs do not take any estate under the conveyance, but the words "heirs, etc.," indicate the quantity or duration of the estate granted to the grantee named; that is, such words, "heirs, etc.," are words *of limitation* and not words of purchase.[2]

How to Avoid the Rule.— If it is intended that the grantee shall have a life estate only, the deed must not say "to have and

[1] "In a limitation to a man and his heirs," says Fearne, "the words 'his heirs' operate to vest in him another and further estate than he would have taken without them, viz.: the fee which they superinduce upon the estate for life, given him by that part of the limitation which is expressly directed to himself. This is well exemplified by Mr. Justice Blackstone in his opinion in Perrin v. Blake, 4 Burr. 2579, where he says 'that the creation of an estate in fee or in tail, by a gift to A. and his heirs forever, or to A. and to the heirs of his body begotten, the first words (to A.) create an estate for life; the latter (to his heirs or the heirs of his body) create a remainder in fee or in tail, and then by the conjunction of the two estates, or the merger of the less in the greater, he becomes tenant in fee or tenant in possession.'" Fearne, Cont. Rem., p. 104.

[2] So Fearne says: "In truth the only substantial difference between a limitation to A. and his heirs, and a limitation to him for life, remainder to B. in tail, remainder to the right heirs of A., appears to be, that in the first instance A. takes the entire estate in fee, and in the other he takes it (*i. e.*, the estate) divided by and subject to the estate tail in B. The words 'his heirs,' in either case, operate equally as words of limitation, viz.: words giving the estate imported by them not originally to the express objects of the description, but extending the ancestor's estate *immediately* in the one case, and *mediately* in the other, to them by

to hold to his heirs," but apt words are, "to have and to hold during natural life." These words, like the word "heirs," limit the estate.

In Shelley's specific case the word "heirs," immediately after his name, was not used, but the estate was granted to Edward Shelley for life; then followed intervening estates for life, with remainder to the use of *the heirs male of the body* of said Edward Shelley lawfully begotten, so that the phrase was a long one, embracing several generations; but it will be observed that these superadded words after the words "male of the body of Edward" added nothing to the ancient meaning of the word "heirs," each expression keeping within the time-honored lineal heirs of the family of Shelley, so that the superadded words were consistent with the first one.[1]

All that is necessary, then, to get without the rule, and convey to children or kinsmen, is to add to words applicable to those persons who in the natural course of events will become heirs, a designation broader or narrower than express an estate tail or in fee, say children, sons, etc.[2]

Deeds.[3]—A deed, broadly speaking, is any contract in writing conveying a continuing right, even though it be a right personal in its nature,[4] but as a deed of conveyance is a written instrument purporting to convey an interest in land. The words purporting to transfer the estate constitute the grant, but a deed usually contains other matters beside a bare grant, *e. g.*, recital of consideration, the usual covenants, unusual covenants, particular covenants, the *habendum* clause, describing how the estate granted is to be held, etc.[5]

descent, and limiting the ultimate bounds of the estate which he is to take." Fearne, Cont. Rem., p. 106.

[1] *Ante*, p. 1012. See 1 Prest. on Est. 247 et seq.; Harrison v. Harrison, 7 M. & G. 938; 49 E. C. L. 938.

[2] Jesson v. Wright, 2 Bligh, 1; 21 Revised Rep. 1; also 10 Eng. Rul. Cas. 719. See Tucker v. Adams, 14 Ga. 548, for many instances of English cases where the superadded words are held to overcome the technical meaning of the word "heirs." See also writer's note, 2 Cooley's Blk. (4th ed.) 242.

[3] A quitclaim deed resembles a release, but it grants and quitclaims, and consequently will pass title.

A quitclaim merely conveys and quitclaims all *present* interest. It will not operate upon after-acquired title, or contingent or executory interests; for these a deed of grant and warranty or a release should be used. See full explanation in Williams v. Esten, 179 Ill. 267.

[4] Worrell v. Munn, 5 N. Y. 229; Baum v. Parkhurst, 26 Ill. App. 128.

[5] Statutes defining the import of short-form grants materially modify the ancient common law.

A deed may be a very simple document, although in ancient times frequently couched in the most formal language.[1]

The Parts of a Deed.— The recital of the parties, the grant or demise (if it be a lease), designation of the estate in the granting clause, the description of the land,— these are the essentials of the grant.[2]

Appropriate Collateral Provisions.— *The habendum clause* is that part of a deed which more fully describes the estate granted.[3] If there is inconsistency the granting clause controls.[4]

Covenants.— It was usual to insert at large in deeds all covenants whether of the character to be implied or not.[5]

Covenant of title was implied in the very act of granting or demising,[6] but it was common formerly to recite that the grantor had a good right to convey and was seized of the estate conveyed.[7]

Covenant of Warranty.— It was anciently implied that the grantor would defend his tenant, but it is now common to add a covenant that the grantor will forever defend it against the lawful claims of all persons whatsoever.[8] It is more than a covenant of title, and reaches to possession disturbed by paramount right, and is not broken till ouster.[9]

[1] A deed in the following form would no doubt be sufficient to pass any estate in possession: "I hereby grant to John Jones the following described lands," followed by the signature under seal. It would pass a life estate. If to John Jones and *his heirs*, it would pass *a fee simple*. If to him and *the heirs of his body*, a fee tail, modified, of course, by the statute.

[2] Signing, etc., relate to formality of execution.

[3] Cooper v. Cooper, 76 Ill. 57.

[4] Id.; Bodine's Adm'r v. Arthur, 91 Ky. 53; 34 Am. St. Rep. 162, note.

[5] Modern covenants are merely contracts. Lake v. Tyree, 90 Va. 719. Breach of covenant is not failure of consideration. Whitney v. Lewis, 21 Wend. 134.

[6] Scott v. Rutherford, 92 U. S. 107; Grannis v. Clark, 3 Cow. 36; Holden v. Taylor, Hob. 12. *Implied covenants* attach naturally to grants of property which is valuable only for a special use in connection with other property of the grantor; *e. g.*, grant of water-power implies covenant to keep dam, flumes, race, etc., in repair. Sterling Hyd. Co. v. Williams, 66 Ill. 393.

[7] This covenant is practically the covenant of seizin and does not run with the land. Carter v. Denman, 3 Zab. 260.

[8] This has the effect to pass all title subsequently acquired by the grantor. Williams v. Esten, 179 Ill. 267.

[9] Beddoe's Ex'r v. Wadsworth, 21 Wend. 120. There are general warranties and special warranties, *i. e.*, against some particular matter; and covenants sometimes mingle in one clause several features. *E. g.*, Carter

Quiet enjoyment is much the same as the covenant of warranty, and is that the grantee shall quietly enjoy the possession.[1]

Covenants against incumbrances are also added.[2]

All the above covenants in some way depend upon the character of the grantor's estate or the condition of his title at the time of the grant, but some of them specify present conditions, while others relate to contingencies which can only happen afterward; so that some may be broken when made, others will not be broken till some subsequent time and the happening of the contingency, which may or may not take place during the holding of the grantee.

It is a general rule that covenants which are broken when made do not run with the land, that is, cannot be sued upon by any one except the covenantee;[3] and further, that a broken covenant does not run, whether it be a real covenant or not.[5]

Restrictive covenants or conditions[4] — that is, contracts between the parties in reference to the manner in which the property shall be used, or against particular uses of it — have gradually worked themselves into deeds.

The validity of such restrictive agreements, as between the parties, depends upon whether they are repugnant to the estate granted or contrary to the policy of the law.[6]

v. Denman, 23 N. J. 260. Special warranty may be against the claims of heirs direct or collateral. Oliver v. Piatt, 3 How. 333. A covenant of warranty does not refer to fraudulent representation. Lake v. Tyree, 90 Va. 719.

[1] Whitney v. Lewis, 21 Wend. 130; 3 Washb. (5th ed.) 662.

[2] An easement for public highway is not an incumbrance. Whitbeck v. Cook, 15 Johns. 482. But see 2 Cooley's Blk. (4th ed.) 304. A contract to deliver a good and marketable title clear of all incumbrances cannot be performed if there exist restrictive covenants running with the land. Batley v. Fowderer, 162 Pa. St. 460.

[3] The leading case on covenants running with the land is Spencer's Case, 1 Sm. Lead. Cas. 145, where extensive notes are given. See cases *infra;* Blydenburgh v. Cotheal, 1 Duer, 197; Beddoe's Ex'r v. Wadsworth, 21 Wend. 120; Sterling Hyd. Co. v. Williams, 66 Ill. 393.

[4] Id.

[5] See *ante*, pp. 752–55. It is very important to determine whether the stipulation is a mere covenant for which an action will lie, either for its breach or for damages, or whether it is a condition or provision which will defeat the estate. See Cowell v. Springs Co., 100 U. S. 55.

[6] Reilly v. Otto, 108 Mich. 330. The use of particular parts may be regulated. Buck v. Adams, 18 Stew. (N. J.) 552. A general scheme for using a tract which is being divided (De Gray v. Monmouth Beach Co., 5 Dick. 329); or the building line may

E. g., as we have seen, a covenant that the party shall not use the land at all, or a grant of a fee simple providing for a rent service and forfeiture for non-payment, is void.

The most serious question arises as to how far such restrictive covenants attach themselves to the title and bind persons who are not parties to it, excepting by way of succeeding to the estate; and although such persons are commonly said to be *not in privity* to the original agreement, it seems quite rational that a person who voluntarily purchases a piece of property, with knowledge of the existence of such a contract, may be said to voluntarily make himself a privy to it. But where the land devolves by operation of law, by descent, or through judicial sales on execution, or through proceedings in administration, bankruptcy or insolvent laws, a question of greater difficulty arises, although the voluntary purchaser, even in these cases, has the opportunity to assent directly, and in the case of heirs, their rights to inherit resting upon municipal law, they cannot be said to be injured if that law requires them to be bound by covenants which the law recognizes; and such covenants run with the land or not, according to their nature.[1]

The formalities of execution are signing, sealing, acknowledgment and delivery.[2]

be fixed (Winfield v. Henry, 6 C. E. Green, 188; Eckhart v. Irons, 18 Ill. App. 173); or certain lines of business may be prohibited (Reilly v. Otto, *supra;* Graves v. Deterling, 120 N. Y. 448); and these will bind and are enforceable in equity, with some discretion in the court in case of changed circumstances, or estoppel by common disregard of the covenants.

[1] The questions are: Is the stipulation of a nature that it may run? and Did the parties intend to bind future owners? Conduit v. Ross, 102 Ind. 166; 2 Gray's Cas. Prop. 474. Professor Gray has here collected the leading cases on this subject.

[2] *Statute of Frauds.*— The following paraphrase of the sections of the statute of frauds applicable to real property is only intended to convey the general idea. There are important differences in the statute as adopted in particular states, and nice discrimination which can only be appreciated by a minute study of the words of the particular act under consideration.

Sec. I. All leases, estates, interests of freehold or terms of years, or any uncertain interests therein, shall be put in writing, otherwise to have the effect of leases or estates at will only.

Sec. II excepts from the above all leases not exceeding the term of three years (sometimes reduced to one year from date of bargain).

Sec. III. Assignments, grants or surrenders of any lease, estate or interest, either of freehold or term of years, shall be in writing.

Signing may be by the name or making a mark, or by an agent; and where one's name appears as grantor and he delivers the deed, it is doubtful whether his signature need be affixed at all.[1]

Sealing was formerly necessary for a document of that dignity, but cannot be said to be an absolute requisite at the present time.[2]

Acknowledgment before a magistrate is not an absolute essential to proof of the due execution of a deed,[3] but it is the only safe way.

Delivery and acceptance are absolutely essential,[4] and consists in placing the deed either actually or constructively out of the control of the grantor and under the control of the grantee;[5] or the delivery may be *in escrow*, *i. e.*, to a third person to hold for the grantee.[6]

Sec. V. All devises (wills) of lands or tenements shall be in writing.

Sec. VI. No will or devise in writing shall be revocable otherwise than (*a*) by some other will or codicil in writing, (*b*) or by burning (*c*) or tearing the same by the testator or in his presence, or by his direction and consent.

Sec. VII. All declarations or creations of trusts or confidences of any lands, tenements or hereditaments shall be *manifested and proved* (not created) by some writing signed by the party declaring such trust.

Sec. VIII excepts from above resulting or constructive trusts.

Sec. IX. All grants and assignments of trusts shall be in writing, signed by the grantor.

Sec. X subjects trust property to execution against the *cestui que trust.*

Sec. XI. The obligations of a deceased *cestui que trust* shall be made a charge on the estates of his heir, other than to such trust estate.

Sec. XII. An estate *pur auter vie* may be devisable by will in writing signed by the devisor and properly witnessed; and if not devised, such an estate to be a charge in the hands of the heir, if it comes to him as special occupant, in the same manner as assets by descent; but where there is no special occupant thereof, it shall go to the executor or administrators, and shall be assets in their hands.

Sec. XXIII excepts from the operation of the above soldiers and seamen following their vocations.

Sec. XXIV provides what courts shall have charge of probate matters.

Sec. XXV excepts from the operation of the statute the estates of *femes covert* dying intestate.

[1] Dundy v. Chambers, 23 Ill. 369; Clark v. Graham, 6 Wheat. 577.

[2] Id.

[3] Id.

[4] Where there is a near relationship, acceptance will be presumed. Guggenheimer v. Lockridge, 39 W. Va. 457.

[5] Colee v. Colee, 122 Ind. 109; 17 Am. St. Rep. 345, note. After delivery, a destruction or redelivery does not reconvey. The only case to the contrary is Thompson v. Ward, 1 N. H. 1.

[6] Such a delivery may be to take effect upon a future event, as the death of the grantor. McCalla v. Bare, 5 Fed. Rep. 828; Weisinger v. Cock, 67 Miss. 511; Smiley v. Smiley,

Registration of title is the means prescribed by the state to make known to the public the ownership of land and protect purchasers and creditors, and is an essential provision to any system of law permitting the transfer of estates by grant.[1]

The possession of the land is important and is notice to the world of whatever right the occupant may possess.[2]

This rule proceeds upon the idea that a purchaser must not only acquaint himself with the recorded title,[3] but the actual condition of the land.

Description of Boundaries.— The granting clause of a deed must not only designate with certainty the estate in the land, but must describe the parcel with such certainty that its boundary may be ascertained and marked upon the land.

This, under the system of land surveys and the modes of subdivision of urban property, is not generally a difficult task, but there are yet situations where boundaries cannot rest in absolute visible designation by natural objects, or, as they are called, monuments.[4]

The subject of most dispute in the law of boundaries is that relating to lands adjacent to water, and here there is a recognized distinction between land bordering on the seas and bays with headlands, in which there is a tide,[7] and land bordering on lakes where there is no tide,[8] and land constituting the bank

114 Ind. 258; Shultz v. Shultz, 159 Ill. 654.

[1] As to the so-called Torrens acts, see People v. Simons, 176 Ill. 165; State v. Guilbert, 56 Ohio St. 791.

[2] Leneve v. Leneve, 3 Atk. 646; 1 Ves. 64; Ld. Eq. Cases, 109; Groff v. State Bank, 50 Minn. 348. See Judge Cooley's suggestions on investigating a title. 1 Cooley's Blk., Int., xviii; Fair v. Stevenot, 29 Cal. 486; 11 Mor. Min. Rep. 11.

[3] Id.; Knapp v. Bailey, 79 Me. 195; 1 Am. St. Rep. 295.

[4] See Prof. Warvelle's Treatise on Real Property, which on the subject of conveyancing is more thorough and clear than any other modern treatise.

[7] The boundary is high tide or high-water mark. Coburn v. San Mateo Co., 75 Fed. Rep. 520; Shiveley v. Bowlby, 152 U. S. 1; Hardin v. Jordan, 140 U. S. 371; Revelle v. People, 177 Ill. 486.

[8] In New England the size of the lake or pond is important. If it is larger than ten acres the boundary is high water. Watuppa Co. v. Fall River, 147 Mass. 548; Auburn v. U. W. Co., 90 Me. 576. But generally the same rule as applies to the sea governs. Revelle v. People, 177 Ill. 486 (Lake Michigan); Sloan v. Beemiller, 34 Ohio St. 492. *Non-navigable lakes* or ponds do not constitute boundaries. Lembeck v. Nye, 47 Ohio St. 336. But it is a disputed question whether the lines of the fractional subdivisions project directly into the lake, or diverge at the rim and meet at the center. Both contentions find

of running streams. In the sea and its arms, and navigable lakes of such magnitude as to be recognized as navigable waters, the bed of the lake below *high-water mark* is regarded as held in trust by the state for the purpose of navigation, and the adjacent owner has therein no greater right than any other citizen.[1]

The rule of the common law has been departed from in many of the states in the Union, and the test of navigability in these cases is whether the stream is navigable in fact,[2] and irrespective of the question of tide. Where the stream is susceptible of practical navigation the owner's boundary extends to low-water mark only.[3]

In all other cases of running streams the rule is that riparian owners take to the center thread of the stream.[4]

Meander lines are not the boundary unless so expressly designated, but are lines run by the government surveyors for the purpose of ascertaining approximately the amount of land in fractional subdivisions which are prevented from being full sections or quarter-sections by the presence of water or running streams.[5]

Devise, Will and Testament are the different names for the disposition of land to take effect on the death of the maker.[6]

The validity and effect of wills depend on the law of the *situs* of the property.[7]

The granting clause is to all intents and purposes like a granting clause in a deed. There is a greater latitude taken by the courts in construing a will, and more of an effort is

support, but the weight is with the latter. See Hardin v. Jordan, 140 U. S. 371.

[1] On this subject of water boundaries, see Goff v. Congle (Mich.), 42 L. R. A. 161, where will be found a thorough and exhaustive note showing the various rules.

[2] Lamprey v. State, 52 Minn. 181; 38 Am. St. Rep. 541.

[3] Chicago v. Van Ingen, 152 Ill. 624; 43 Am. St. Rep. 285; Hardin v. Jordan, 140 U. S. 371.

[4] Id.; Eberts v. Eberts, 42 Mich. 409; Com. v. McClure, 167 Ill. 23.

[5] Water Co. v. Com., 168 U. S. 371; Goff v. Congle, *supra*, note.

[6] Catlin Coal Co. v. Loyd, 180 Ill. 199.

[7] Id.

A holograph will is one that is entirely written, dated, and signed by the testator. Wherever valid they require no attestation. Perkins v. Jones, 84 Va. 358; Harrison v. Weatherby, 180 Ill. 418.

A nuncupative will is the declaration of the testator *in extremis, i. e.*, in contemplation of immediate dissolution, before a sufficient number of witnesses, and afterwards reduced to writing. Scaife v. Emmons, 84 Ga. 619; 20 Am. St. Rep. 383.

Revocation.—Marriage revokes a will. Hulett's Estate, 66 Minn. 327.

made to carry out the intention of the maker; but the rule in Shelley's case has been constantly applied by the courts, except where modified by statute, although it is admitted that the intent was generally thereby defeated.

A will of course never presents a covenant. All such clauses are called provisos or conditions, and, as in the case of a grant by deed, the conditions affixed must not be altogether against public policy; and an heir who would take an estate if there were no conditions is not bound by conditions in a will of which he has no notice.[1]

Election.— In case of parties who take beneficially in the estate by operation of law, and are given an estate by will which is inconsistent with that taken by operation of law, such persons should be advised of the provisions of the will, and their rights under these provisions, before they are put to an election as to which estate they will take.[2]

It sometimes happens that a devisor grants an *estate* in land, or land in which he has no estate whatever, and in the same grant makes a bequest or devise of his own property to the owner of this estate or property, and this act, after being made known to the real owner of the land, drives him to an election either to reclaim his own and renounce under the will, or to affirm the provisions of the will and abide by it. After such an act the title to his property has passed without any act on his part, and in such a case it would be advisable for the devisee of such other property to procure a release or quitclaim deed from the prior owner, otherwise he would be left to a circuitous mode of proof. The will constitutes, however, color of title.[3]

Executory Devises.—Executory interests, however created, are such as take effect at some time in the future, measuring from the time when the document takes effect.

An executory devise is a *devise*[4] of an estate which shall not vest at the time of the death of the devisor, *i. e.*, when the will

[1] Shackleford v. Hall, 19 Ill. 216.

[2] Haverland v. Willetts, 141 N. Y. 35. The burden is on those who affirm an election. Cox v. Rogers, 77 Pa. St. 165; Ward v. Ward, 134 Ill. 417.

[3] Cowdrey v. Hitchcock, 103 Ill. 262; Adsit v. Adsit, 2 John. Ch. 448; 1 Lawy. Ed. 447; Bispham's Prin. Eq., sec. 304.

[4] It must be in a will, and the same things are not allowed by deed which are permitted in wills. 2 Cooley's Blk. (4th ed.) 172.

becomes operative,[1] but in this particular it is identical with a remainder; and, as we have seen, a remainder, whether it be contingent or vested, must follow a freehold estate, and that at all events must vest at the termination of that estate, and every estate which has both these features must be a remainder. Any other permissible estate under the rules against creating estates to begin in the future[2] (perpetuity) must have some distinctive feature or features which distinguish it from a remainder.

So, an executory devise is sometimes defined as a limitation by will of a future estate or interest in land which cannot, consistently with the rules of law, take effect as a remainder.[3]

But this is a mere negative definition. The same author, however, furnishes a definition really descriptive of the nature and essentials of this estate.

"It follows that every devise of a future interest which is not preceded by an estate of freehold created by the same will (whether consisting of one or more testamentary papers), or which, being so preceded, is limited to take effect *before* or *after*, and not *at*, the expiration of such prior estate or freehold, is an executory devise."[4] The devise will be held a remainder if possible.

Title by Administration.— Administration is sometimes spoken of as a means of transferring title, but the title is not transferred by administration or probate proceedings.

Title vests upon death by operation of the law of descent; by *devise*, by virtue of the will.

Administration and probate are judicial proceedings having for their purpose and sole function the distribution of the estate according to the terms of the title, whether that be intestate or testate, subject to the rights of third persons who may be interested or have claims against the estate.[5]

[1] McArthur v. Scott, 113 U. S. 359.

[2] Pennington v. Pennington, 70 Md. 418.

[3] Jarman on Wills (5th ed.), 483.

[4] Id. The happening of the contingency or event upon which the vesting of the executory devise depends operates upon existing vested estates as does a conditional limitation. Pennington v. Pennington, 70 Md. 418.

[5] The proceedings are wholly statutory, and each state has its own peculiar practice. Only in a few instances are they closely similar, and almost every state has a local book on the procedure. The subject will receive only such treatment as is required to point out the distinctive features of the law of jurisdiction and procedure.

PART III.

THE LAW OF ACTIONS.

COURTS, REMEDIES AND PROCEDURE.

CHAPTER XXXI.

LAW OF ACTIONS.

"Experience has shown that the liberty of the subject, with which we are intrusted, is involved in the accuracy in point of form of legal proceedings. For that reason accuracy is required; and, in that view of it, it is no paradox to say that *form becomes substance.*" — COLERIDGE.[1]

SEC. 642. *Scope of the Subject.*— The next subject in natural order is "The Law of Actions," embracing within this great topic the judicial department with its various branches of jurisdiction; the elements of causes of action; the established forms of actions; the proper parties to them; the methods of allegation; the rules of evidence, and the modes of procedure.

Manner of Treatment.— It is proposed in this part of the book to present the underlying principles of the subject, constituting an introduction to the law of procedure, together with a mere outline of its various branches, it being the intent to treat these subjects more at large in separate volumes.[2]

The Importance of Private Rights.— The immense volume of commerce; the huge corporations which combine a multitude of natural energies in one artificial being; the vast system of government; the great affairs of state, tend to obscure the real end and aim of government, and lead some to suppose that the most important maxim in the law is that which is so frequently opposed to the struggle for individual right, *salus populi suprema lex.*[3]

So in a proper and enlarged sense it is; but "the blessings of liberty" can be enjoyed only by natural persons (sometimes

[1] Howard v. Gossett, 10 Adol. & El. 382; 59 E. C. L. 358.

[2] In the meantime any topic can be studied in the works on Equity (Merwin, Bigelow, Bispham, Adams, Story, etc.), and much of it the author has presented in his edition of Stephen's Pleading (Andrews' Stephen's Pleading).

[3] That regard be had to the public welfare is the highest law. Broom's Legal Max. 1. "Sir William Blackstone said: 'So great is the regard of the law for private property that it will not authorize the least violation of it, no, not even *for the general good of the whole community. Besides, the public good is in nothing more essentially interested than in the protection of every individual's private rights as modeled by the municipal law.*'" 1 Blk. Com. 139, quoted by Comstock, J., in Wyneheimer v. People, 13 N. Y. 387.

filtered through corporate franchises); and if the rights of individuals are ignored or made subordinate to anything else, the order of things is reversed and the principal end of the constitution lost sight of.[1]

Sec. 643. *The Remedial a Branch of Constitutional Law.*[2]— The fundamental principle of our jurisprudence, obligating the individual to make reparation and the public authority to furnish protection and reparation, rests upon the ancient precepts of organized society, "to live honestly, to injure no one, to *render every one his due.*"[3]

The latter clause of this maxim applies not only to the individual, but constitutes one of the fundamental maxims of distributive justice.[4]

The reciprocal obligation between the government and the governed rests upon like principles of natural reason, and is expressed in the ancient precept, "*protectio trahit subjectionem, et subjectio protectionem*" (protection draws with it subjection, and subjection protection),[5] a maxim which, although recognized, never became securely established in our system of government until the Fourteenth Amendment extended to *all persons* equal protection of the law.

It is now restored to our system as a rule of conduct, restraining magistrates and people alike, and protecting the humblest

[1] Sharswood's Blk. 127, note; 1 Cooley's Blk. (4th ed.) 126, note; State v. Cunningham, 81 Wis. 499.

[2] This aspect of the case is not generally made prominent. Here is treated the judicial branch of government and the protection of civil liberty.

[3] Inst. 1, 1, 3; Sandars' Jus. 68, sec. 3. "It has been well said that the liability to make reparation for injury rests not upon the consideration of any reciprocal obligation, but upon an original moral duty enjoined upon every person so to conduct himself, or exercise his own rights, as not to injure another. Kerwhacker v. C., C. & C. R. Co., 3 Ohio St. 172; 62 Am. Dec. 246. Whatever its origin, such legal duty is uniformly recognized, and has been constantly applied as the foundation of actions for wrongs; and it rests upon and grows out of the relations which men bear to each other in the framework of organized society." Rich v. N. Y. Cent. & H. R. R. Co., 87 N. Y. 399.

[4] *Justitia est constans et perpetua voluntas jus suum cuique tribuendi*— justice is the constant and perpetual wish to render every one his due. Inst. 1, 1, 1; Sandars' Jus. 67, sec. 1; Holden v. Hardy, 169 U. S. 388.

[5] Calvin's Case, 7 Co. 5; Broom's Max. 78. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection." Marshall, C. J., in Marbury v. Madison, 1 Cranch, 163.

person against the greatest state, or any or all departments thereof.[1]

A corollary of these great fundamental obligations is the maxim enjoining the action of the court, *ubi jus ibi remedium* (there is no right without a remedy), the sense of which is better expressed in our language, the right is not perfect unless the means for its protection is also perfect;[2] and it is the duty of courts to devise the means of redressing wrongs.[3]

The end of the constitution to establish justice is accomplished if an enlightened spirit guides the court in the application of these maxims; and no man is required to be, nor allowed, except in a limited degree,[4] to be his own protector and avenger, lest anarchy destroy organized society;[5] and it follows that tribunals must be established for this purpose.

The Nature of Judicial Power.— A proper conception of the nature of judicial authority is an essential prerequisite to an understanding of the law of actions and procedure.

Judicial power presupposes the existence of a system of law and an established government of which the judicial branch is a part.[6]

It recognizes the province of the legislature to make the law, and that its function is fulfilled in construing, interpreting, ascertaining and applying existing law.[7]

Judicial power is understood to be such as is exercised according to the ordinary methods of courts of justice, and includes the power to hear the matter, render judgment and award an execution.[8]

[1] Hurtado v. California, 110 U. S. 536; Hovey v. Elliott, 167 U. S. 409.

[2] Ewell v. Dagg, 108 U. S. 149. See State of Georgia v. Brailsford, 2 Dall. 402; Marbury v. Madison, 1 Cranch, 137.

[3] Broom's Max. 79; Edwards v. Kearzey, 96 U. S. 565.

[4] Recaption, redress by act of party.

[5] Int. St. Com. Com. v. Brimson, 154 U. S. 487.

[6] Luther v. Borden, 7 How. 1; *ante*, ch. XII.

[7] Merrill v. Sherburne, 1 N. H. 199; Galesburg v. Hawkins, 75 Ill. 148. The present supreme bench of Illinois seems to have been unconscious of this ancient principle, abrogating a rule of law which had been uniformly applied by that court for half a century with the remark, "The doctrine of comparative negligence is no longer the law of this court." Lanark v. Dougherty, 153 Ill. 163–65.

[8] Int. St. Com. Com. v. Brimson, 154 U. S. 447–484. The courts cannot exercise, nor be compelled to exercise, any other power than judicial. See illustrations. Id.; State of Georgia v. Brailsford, 2 Dall. 403; Lawy. Ed., note.

A thorough understanding of the principles of separation, and a complete application of them, did not follow immediately upon the adoption of the federal constitution, and several very striking instances of the exercise of what would now be termed purely judicial power by the legislature have been sanctioned because practiced from time immemorial.[1]

The change was brought about slowly, but may now be said to be thoroughly established, and the doctrine that the legislature may exercise judicial power in ordinary matters has no place in American jurisprudence.[2]

A definite and orderly procedure is clearly essential to any action properly judicial, and to the idea of due process of law.

It was the doctrine of the common law that "the judges are appointed to administer, not to make, the law, and that the jurisdiction with which they were intrusted has been defined and marked out by the common law or acts of Parliament. It is moreover a principle consonant to the spirit of our constitution, and which may be traced as pervading the whole body of our jurisprudence, that *optima est lex quæ minimum relinquit arbitrio judicis, optimus judex qui minimum sibi*" (that system of law is best which confides as little as possible to the discretion of the judge, that judge the best who relies as little as possible on his own opinion).[3]

A definite issue, that is, matters of fact alleged on one side and admitted or denied on the other, or wholly unanswered, is also essential, whether the proceeding is at law or in equity, under any form of procedure recognized in the United States.[4]

A written record is essential to a valid judgment or decree, or, in other words, to due process. No right can be based upon judicial action not evidenced by a record.[5]

[1] Calder v. Bull, 3 Dall. 386; Livingston v. Moore, 7 Pet. 547.

[2] Commonwealth v. Warwick, 172 Pa. St. 140.

[3] "Further, be it remembered, that 'there is no court in England which is intrusted with the power of administering justice without restraint. . . . The proceedings of *all* courts must take a defined course, and be administered according to a certain uniform system of law." Broom's Max. (8th ed.) 84; Master v. Miller, 6 Term R. 344. See Hagar v. Reclamation Dist., 111 U. S. 707; Hovey v. Elliott, 167 U. S. 409; Holden v. Hardy, 169 U. S. 389, 390.

[4] Reynolds v. Stockton, 140 U. S. 254; Windsor v. McVeigh, 93 U. S. 274; N. O. W. Co. v. N. O., 164 U. S. 471.

[5] Munday v. Vail, 34 N. J. L. 418.

Changes in Procedure.— The courts and the legislature may change the mode of procedure, provided existing cases are not prejudicially affected, and provided also there is preserved a fixed and orderly method conformable to the spirit of our constitution.[1]

Changing the constitution of the court is also within the authorized power of the legislature, and existing causes must be submitted to the new tribunal.[2]

So it may be said that, with some few exceptions recognized by immemorial customs of our people, nothing is due process except it be judicial process, and nothing is judicial process which does not involve a deliberate hearing after due notice and opportunity to be heard, and according to regular rules of procedure.[3] It may be a summary proceeding if sanctioned by long usage.[4]

Independent Tribunals — Courts [*Ante*, ch. XII].—Blackstone defines a court to be *a place* where justice is judicially administered, but it is our endeavor to emphasize the idea that a court is not completely described unless you embrace a view of the tribunal, the place of sitting, and procedure judicial in nature.

It was provided in Magna Carta that the common pleas, which was then the great court for ordinary actions, should not follow the person of the king, but should be holden in some certain place.

No process would now be considered regular which did not designate either a court having a fixed and definite place of sitting or the place where the tribunal appointed by law would enter upon the hearing of the matter, and no hearing, except after due assembling at that place, can be regarded as regular.[5]

Notice of hearing or process, as it is called, either actual or constructive, is, at least in all adversary actions, absolutely essential. Without it all action is void.[6]

[1] Iowa Cent. Ry. Co. v. Iowa, 160 U. S. 389.

[2] Duncan v. Missouri, 152 U. S. 377.

[3] Leeper v. Texas, 139 U. S. 462; Iowa Cent. Ry. Co. v. Iowa, 160 U. S. 393; Murray v. Hoboken L. Co., 18 How. 274; County of Santa Clara v. Pacific R. Co., 18 Fed. Rep. 420.

[4] In re Clark (Conn.), 28 L. R. A. 242.

[5] Thatcher v. Powell, 6 Wheat. 125; Iowa Cent. Ry. Co. v. Iowa, 160 U. S. 389; Holden v. Hardy, 169 U. S. 388.

[6] But the service of notice cannot, in all cases, *e. g.*, probate proceedings, be said to be jurisdictional. Mohr

Sec. 644. *Constitution and Functions of Courts.*— It is quite commonly said that it is the business of the courts to dispense justice, but this is true only in a limited sense.

The courts are not authorized to seek out causes of action and institute proceedings.

They cannot set themselves in motion, and can only act when a case or controversy is submitted to them in the method provided by law.[1]

Constitution of Court.— A court may be composed of a single individual or of several officers. No efficacious court has all the remedial powers which may be invoked by a suitor conferred upon a single individual.

There are in them all at least two officers exercising different classes of powers.

The judicial magistrate, called the judge, presides over the court proper, and in the courts of general jurisdiction exercises only functions strictly judicial.

The ministerial power is exercised either by the magistrate himself, as in the case of justices of the peace, issuing process and keeping his record, or by a separate officer called the clerk of the court.

In the exercise of these ministerial duties little or no discretion is contemplated.

The duty of the clerk is to issue process and to perform his duties when the conditions contemplated by the law exist.

The clerk of the court is not a collector. He is not authorized to accept money in satisfaction of judgments.[2] His duty is to issue process and preserve the records of his court.

The executive branch of the court is filled by officers termed sheriffs, deputy sheriffs, bailiffs, and, in magistrates' courts, constables.

The sheriff is no longer a judicial officer, although incident to his office are still preserved duties judicial in their nature.

Attorneys and Counselors.— Besides these officers, directly and necessarily a part of the court, there have been from time

v. Manierre, 101 U. S. 417. *Cf.* Mohr v. Tulip, 40 Wis. 60; and a judgment may be authorized fixing the status of property which will bind unborn parties. Loring v. Hildreth, 170 Mass. 328; McArthur v. Scott, 113 U. S. 340.

[1] State v. Stanton, 6 Wall. 50; Int. State Com. Com. v. Brimson, 154 U. S. 457.

[2] Seymour v. Haines, 104 Ill. 557.

immemorial admitted to participate in the transaction of judicial business, men supposed to be specially learned in the law, and for that reason able to assist the court and the parties in the orderly administration of justice. These are termed, as a class, lawyers, of which there are many species — attorneys, solicitors, barristers, advocates, proctors in admiralty, etc.[1]

A strong presumption favors their authority to act, as they have acted *on the record.*[2]

The relation of attorney and client is one having peculiar ethics as between the counsel and the court,[3] and between the counsel and the client.[4]

One holding himself out as counsel impliedly represents that he is ordinarily learned and skilful in the profession.

An action lies against him if he fails in this regard, or is guilty of negligence or fraud in the discharge of his duty.

He has no right to have any personal interest which may conflict with the rights and interests of his client.

So jealous is the law of the integrity of counsel, and so important is it deemed to preserve the rights of the client, that every transaction between the attorney and client, outside of the original contract of retainer, which gives to the attorney

[1] Their offices are considered as in the nature of property rights, which cannot be taken away without due process of law. See In re Sergeants at Law, 6 Bing. N. C. 187; 37 E. C. L. 338; Garland, Ex parte, 4 Wall. 333. For an elaborate discussion of the grounds for disbarment of attorneys, and the proceedings in such cases, see In re Wall, 12 Fed. Rep. 814, note; also State v. Beattie, 137 Ill. 553.

[2] Where the record fails to show that an attorney had no express authority to enter a consent decree, by which a definite fee was given him, his authority will be presumed. Schmidt v. Oregon Gold Mining Co. 28 Oreg. 9. But this presumption may be rebutted. Great West. M. Co. v. Woodmas, etc. Co., 12 Colo. 46; 13 Am. St. Rep. 204.

[3] In the Matter of Aiken, 4 Barn. & Ald. 47. The court has plenary power over counsel as to their conduct in cases actually pending. Anderson v. Bosworth, 15 R. I. 443; 2 Am. St. Rep. 910.

[4] State v. Coste, 36 Mo. 437; Stewart v. Flowers, 44 Miss. 513; 7 Am. Rep. 707. Clients cannot substitute attorney without leave of court. Chicago Pub. Stock Ex. v. McClaughry, 50 Ill. App. 358. Attorneys have liens in proper cases upon the fruits of their labor. Stewart v. Flowers, 44 Miss. 513; 7 Am. Rep. 707. They may provide for a contingent fee (Wylie v. Coxe, 15 How. 415; McPherson v. Cox, 96 U. S. 416), and secure it by an assignment of a portion of the cause of action. North Chi. St. Ry. v. Ackley, 171 Ill. 100. A contract which secures to an attorney his fee is good, but a clause providing that no settlement shall be made except with attorney's consent is void. Id.; Boardman v. Thompson, 25 Iowa, 505; Key v. Vattier, 1 Ohio, 132.

any interest in the matter upon which he is consulted, is presumed to be voidable,[1] and the burden is cast upon the attorney to prove the fairness of the contract and the adequacy of the consideration.

Sec. 645. *Classification of Courts — Of Record and Not of Record.*— Courts were originally classified into courts of record and courts not of record, but the classification at the present time is of little if any practical utility, for the reason that there is no court which is classed among the courts that is not obliged to keep a record of its proceedings; and the record of any court, whether of general or special jurisdiction, imports verity.[2]

A justice court is commonly said not to be a court of record, but for many purposes it is to all intents and purposes as much a court of record as any court.[3]

Commissioners of highways, boards of supervisors and many other special tribunals exercise judicial power and are embraced within the general term "courts." These are not courts of record, though a record of their proceedings is a necessary foundation to a judgment or finding, the principle being that a public or official act must be of record.[4]

General and Special Jurisdiction.— By Blackstone and most other English writers of an early date, courts were classified as superior and inferior.[5]

This was logical enough when taken in connection with the reason for classifying magistrates into superior and inferior, the latter being those who derived their jurisdiction from the former; but no such classification is allowable in this country, where the source of all jurisdiction is the same, and the only sense in which one court can be said to be superior and the other inferior is that the law has invested the so-called superior court with appellate or supervisory jurisdiction.

The classification does not suggest the most important principle which marks the distinction between courts.

The true classification of courts in the United States is into

[1] Boardman v. Thompson, 25 Iowa, 505; Key v. Vattier, 1 Ohio, 132; Wylie v. Coxe, 15 How. 415; Hutchinson v. Worthington (Court of App., D. C.).

[2] 3 Cooley's Blk. (4th ed.) 24; Folger v. Col. Ins. Co., 99 Mass. 267; 3 Am. Corp. Cas. 367.

[3] Hendrick v. Whittemore, 105 Mass. 28; Ellsworth v. Learned, 21 Vt. 537; Andrews' Steph. Pl. 234.

[4] Chaplin v. Com., 126 Ill. 264.

[5] Crepps v. Durden, 2 Sm. Ld. Cas. 1107.

those of *general jurisdiction* and those of *special, limited* jurisdiction.[1]

The real reason and the important distinction between the two classes of courts consists in the presumption in favor of jurisdiction in the one class of courts;[2] that is, a court of general jurisdiction is presumed to have acquired jurisdiction from the fact of acting.[3]

In the application of this principle the judgments of courts of general jurisdiction cannot be questioned collaterally except for fraud; and when it is shown that the tribunal of special jurisdiction has actually acquired jurisdiction, the same presumptions are indulged in favor of all subsequent proceedings. The jurisdiction here intended, when speaking of general or special jurisdiction, is that of the subject-matter of the suit;[4] and the jurisdiction intended when the presumption is indulged is jurisdiction of the person. The former depends upon the law, the latter upon the fact of regular proceedings as to notice.

A court which as to its ordinary business is a court of general jurisdiction may be given a special statutory jurisdiction, and in such cases the general business of the court is immaterial, but regard is had to the nature of the jurisdiction exercised.[5]

As to whether a justice of the peace is a court of general or special jurisdiction within the meaning above explained, there is a difference of decision in different states, and the only safe course is to determine the state of decision in the particular state,[6] having reference also to the nature of the act in question.

A justice of the peace exercises his jurisdiction largely according to the course of the common law, and simply because he does not have jurisdiction over all matters is no reason for

[1] Obert v. Hammel, 18 N. J. L. 73; Kempe's Lessee v. Kennedy, 5 Cranch, 173; Von Kettler v. Johnson, 57 Ill. 110.

[2] Grignon v. Astor, 2 How. 319, 341.

[3] The United States circuit courts have not general jurisdiction. Kendall v. United States, 12 Pet., at p. 616.

[4] Harvey v. Tyler, 2 Wall. 329; Grignon v. Astor, *supra;* McPherson v. Cunliff, 11 Serg. & R. 422; 14 Am. Dec. 643; Harris v. Lester, 80 Ill. 318; Van Dorn v. Horton, 1 Dutch. 208.

[5] G. & C. N. Ry. Co. v. Pound, 22 Ill. 399. See Harvey v. Tyler, 2 Wall. 328.

[6] That such a court is not one of special jurisdiction, see Obert v. Hammel, 18 N. J. L. 75; Russell v. Work, 35 N. J. L. 316; Hall v. Cole, 23 N. J. L. 125; McCormick v. Sullivant, 10 Wheat. 192; Grignon v. Astor, 2 How. 341; Williams v. Ball, 52 Tex. 603; 36 Am. Dec. 730; Morrow v. Weed, 4 Iowa, 77.

classifying these courts as those of inferior or special jurisdiction.[1]

Presumptions as to Jurisdiction.— Such courts as are regarded as courts of general jurisdiction are favored with the presumption, *prima facie* at least, from the mere fact of acting, that they have jurisdiction of the person proceeded against.[2]

When the record is silent as to the steps taken to bring the parties into court, the question of jurisdiction is open for allegation and proof;[3] but when the record contains a recital of the facts relating to the service of process, or there is a specific finding of due service, etc., it is then a matter of some doubt as to whether this recital may be contradicted in a collateral proceeding.

The opinion is quite general that, coupled with an allegation of fraud, the recitals may be contradicted, and there seems to be a growing tendency to allow the fact to be shown that the party was not actually brought within the jurisdiction of the court, irrespective of a specific finding of jurisdiction.[4]

Jurisdiction is the power and authority of a tribunal to hear and determine the matter in dispute between parties, of the character and residence of the disputants, and to afford the relief asked.

Jurisdiction has relation to (1) the subject-matter of the litigation, (2) the parties litigant, and (3) the particular process,[5] *i. e.*, character of relief asked.

While jurisdiction of the process may fall within the general bounds of the subject-matter, it is not without utility to distinguish between the general subject-matter and jurisdiction of the particular relief asked.[6]

[1] Hendrick v. Whittemore, 105 Mass. 28; Ellsworth v. Learned, 21 Vt. 537; Andrews' Steph. Pl. 234. A judgment of a justice of the peace is *prima facie* evidence of jurisdiction. Shumway v. Stillman, 4 Cow. 292; Id., 6 Wend. 447. Contrary, that the court is a mere creature of statute and its mode of acquiring jurisdiction must be strictly followed, Robinson v. Harlan, 1 Scam. 237; Oakley v. Aspinwall, 3 N. Y. 563. And it has been said that a justice of the peace has no civil jurisdiction by the common law. Meek v. Pearce, 19 Wis. 300.

[2] Ferguson v. Crawford, 70 N. Y. 283; 26 Am. Rep. 589; Cooper v. Sunderland, 3 Iowa, 123; 66 Am. Dec. 152.

[3] Ferguson v. Crawford, *supra*. Compare Cook v. Darling, 18 Pick. 393; 35 Conn. 190.

[4] Cooper v. Sunderland, *supra*.

[5] Cooper v. Reynolds, 10 Wall. 308.

[6] Grummon v. Raymond, 1 Conn. 40; Gurnee v. Tubbs, 37 Me. 133.

Original and Appellate Jurisdiction.— The supreme court of the United States and of all the states have, by the constitution and statutes, original and appellate jurisdiction, and the system of judicature in all the states allows an appeal from the lower court to the circuit courts, or courts of common pleas, and from thence to the appellate tribunals, and so on, according to the nature of the subject-matter and the question involved, so that the most trifling property or personal right may find its way from the justice of the peace to the supreme court of the United States.[1]

Original and appellate jurisdiction are not always clearly distinguished.

The authority to take original cognizance of a case is clearly enough an original jurisdiction, but a case may appear to be one brought for the first time, and outwardly, to all intents and purposes, seem a new suit, while in fact the jurisdiction is not original but appellate, and hence, perhaps, may arise some confusion.[2]

The true distinction seems to be in this: that a suit is properly original when its object is to take cognizance of a disputed matter, hear and determine the respective rights of the parties, and enter a judgment and execute the same without reference to the action of any other tribunal; whereas a suit which has for its object a direct interference with the further proceedings by another court[3] or magistrate in reference to a matter in which he is proceeding, or which is supervisory of such action, or has for its object the correction of alleged errors therein, is in its nature appellate, and this irrespective of the form the action may take.

[1] Recently a case involving the right to tax a dog began before the magistrate in New Orleans, and illumines the reports of the supreme court of the United States. So the Dred Scott case had its inception before a magistrate.

[2] "Appellate" is a technical term derived from the civil law. Federalist, No. 81; Wiscat v. Danehy, 3 Dall. 327; Justices v. Murray, 9 Wall. 274. Appellate jurisdiction in its largest sense includes the right of superintending inferior tribunals. See Marbury v. Madison, 1 Cranch, 137 (*habeas corpus*); Ex parte Siebold, 100 U. S. 374; Ex parte Virginia, id. 339 (*prohibition*); In re Chetwood, 165 U. S. 461; People v. Horton, 169 Ill. 201.

[3] The apparent exception to this language, which is furnished by the jurisdiction of a court of equity to enjoin the further prosecution of a suit, is not in fact an exception, because the injunction is not against the court proceeding any further, but against the party, and is strictly original and not appellate.

Sec. 646. *Subjects of Judicial Action.— A Case, Controversy, or Proceeding.*— A cause *for action* by the court arises when a case, or controversy, or subject-matter, of which the court is authorized by law to take cognizance, is submitted to the court for its action in the manner provided by law.[1]

The cause of action which belongs to the party is sometimes said to be one relating to a mere private, personal or property right;[2] but this is no longer the rule, as the controversy need not be one of rights of property or proprietary rights, but may relate to the political rights of the citizen or the integrity of the system of government in which the citizen has an interest.[3]

Classes of Action.— Causes of action may be classified from several different standpoints, as on account of the relief to be attained, the subject-matter of the suit, the character of the person prosecuting, or the person or thing proceeded against.

Actions in Personam.—The most common action is one where one person, natural or artificial, brings suit against another person, either for the recovery of some specific thing or right, or for damages. Such an action is both *adversary* and *in personam*, as distinguished from another class, which are called proceedings *in rem*.[4]

Proceedings in rem are generally non-adversary, but not always so, and this is not the distinguishing feature. In these latter, the suit, although ultimately affecting the rights of persons in the subject-matter of the proceeding, is primarily to determine the status of the subject-matter, be it of a person or of a thing, or to subject specific property to an obligation with no attempt to recover a personal judgment.[5]

[1] State v. Cunningham, 81 Wis. 499; Int. St. Com. Com. v. Brimson, 154 U. S. 457.

[2] Id.; Ashby v. White, Ld. Raym. 938; 1 Sm. Ld. Cas. 473; Blair v. Ridgeley, 41 Mo. 63; Wells v. Bain, 75 Pa. St. 39. See Davenport v. Cloverport, 72 Fed. Rep. 689.

[3] Even the highest courts indulge in expressions much too broad, and which will mislead the tyro. In In re Sawyer, 124 U. S. 213, it is said, quoting Sheridan v. Colvin, 78 Ill. 237, which latter case quotes Kerr on Inj., that equity only deals with property and civil rights. Manifestly the jurisdiction over divorce and the *parens patria* are overlooked. Aymer v. Roff, 3 John. Ch. 49.

[4] Woodruff v. Taylor, 20 Vt. 65.

[5] Administration of estates. Scott v. McNeal, 154 U. S. 34. Probate of wills. McArthur v. Scott, 113 U. S. 340. Attachment of property. Woodruff v. Taylor, 20 Vt. 65; Cooper v. Reynolds, 10 Wall. 308. Divorce proceedings are both adversary and *in*

In a non-adversary action or proceeding *in rem*, jurisdiction of the court is obtained by acquiring jurisdiction over the thing by petition or document requiring the court to act on the subject-matter; and notice to the parties interested is not jurisdictional, but an exercise of jurisdiction, and is not of the same vital importance as is the notice or process by which jurisdiction is obtained to render a judgment against a particular person.

The elements of a cause of action are the deprivation or infringement of a right, and a detriment or damage to the plaintiff.

Mere damage by the act of another is not of itself sufficient generally to sustain an action, but there should be an omission of duty in connection with the damage. A mere accident is not the basis of a suit, for, unless there is fault, an injury must lie where it falls.[1]

Under the constitutional provision that private property shall not be taken for public use except on just compensation, the obligation to compensate is violated *by the mere failure* to compensate when the damage is done; and it is no answer to an action of this character that the damage was authorized — that all the proceedings which resulted in the damages were taken in strict compliance with law.

It is not necessary that the extent or amount of the injury can be measured or compensated in money. The law does not measure amounts where a right is infringed, and in such matters the maxim *de minimis non curat lex* has no application.[2]

Sec. 647. *Equitable Jurisdiction and Remedies.*[3] — From the remotest time a distinction has been taken between two meth-

rem. In re Kimball, 155 N. Y. 62. See Interstate Divorce. A state necessarily has power to regulate the status of property within its jurisdiction. Woodruff v. Taylor, *supra;* Lutz v. Kelley, 47 Iowa, 309; Arndt v. Griggs, 134 U. S. 316; Pennoyer v. Neff, 95 U. S. 714.

[1] Pasley v. Freeman, 3 T. R. 55; Chasemore v. Richards, 7 H. L. Cas. 349; Big. Ld. Cas. Torts, 524. It is sometimes said that the act causing the injury must be unlawful (Gov. etc. Co. v. Meredith, 4 Term, 794), but this is exploded. Eaton v. B. & C. Ry., 51 N. H. 405; 12 Am. St. Rep. 147; Rigney v. Chicago, 102 Ill. 64. A court cannot, because of individual hardship, enforce mere moral obligations (Gard v. Gard, 108 Cal. 19), unless mingled in some way with legal rights. Rich v. N. Y. C. & H. R. Ry., 87 N. Y. 382; Andrews' Steph. Pl. 29; Bank v. Waterman, 26 Conn. 324.

[2] Ashby v. White, Ld. Ray. 938; Blair v. Ridgeley, 41 Mo. 43.

[3] The classification of remedies into those by the act of the party and by

ods granting relief and protection to suitors applying to the sovereign power, the one termed equitable and the other legal. In no system of jurisprudence prior to the British was there so complete a separation as was attained at one period of the English law. The conception and definition of equity once adopted in the English law was that given by Aristotle: "*Æquitas est correctio justæ legis, qua parte deficit quod generatim lata est*" (equity is the correction of that wherein the law by reason of its universality is deficient);[1] but this definition no longer conveys the idea of equity or equity procedure.

Equity was then considered as a reservation of authority or jurisdiction not embraced within the law promulgated, and hence the ancient idea that law and equity were separate systems.[2]

Formerly equity exhausted itself by directing a defendant to do this or do that, without any power to execute in case of a refusal or failure on the part of the party. So it became a maxim that equity acts *in personam*,[3] and that equity cannot affect legal titles;[4] and these maxims survive to the present day, modified only to the extent that courts of equity will administer the relief by executing the order of the court in case of refusal; and equity may now award damages, while formerly it could not.

The law court, on the other hand, did not seek directly to

operation of law is not of great utility. *Recaption*, re-entry and abatement of nuisance, and self-defense, are samples of the former; and while these *rights* of the party are not to be ignored or overlooked, they are not in strictness a part of the law of remedies, actions or procedure. See 3 Cooley's Blk. (4th ed.), 3–5, n. One may enter the inclosure of another to retake his own, provided it is peaceably done (Richardson v. Anthony, 12 Vt. 273), and subject to his liability to make good the damages. Gardiner v. Rowland, 2 Ired. (N. C.) 247; Sheldon v. Sherman, 42 N. Y. 484; 1 Addison, Torts, § 375.

[1] Stowel v. Zouch, 1 Plowd. 375.

[2] To administer it (equity jurisdiction) through the ordinary powers of a common-law court is impracticable, and hence, where there exists no provision in the jurisprudence of a country for its full exercise, the consequence must ever be that after the common-law courts have engrafted into their practice as much as can there be assumed, the legislature is compelled to exercise the rest, or leave a large space for the appropriate field of judicial action unoccupied." Livingston v. Moore, 7 Pet., at p. 517.

[3] See Andrews' Steph. Pl. 20; Gardner v. Ogden, 22 N. Y. 327; Hart v. Sansum, 110 U. S. 151.

[4] See In re Sawyer, 124 U. S. 200.

compel the party, but adjudicated the title, placed the claimant in possession, or awarded damages and issued execution against the person and property of the defendant; and while all legal actions of this nature were *in personam*, the process was not exhausted upon the person.

Equity Older than Law — Equity the Germ of Judicial Action.— From the fact that in England the law courts were established and had adopted a regular procedure before the creation of a separate court of chancery, an impression obtains that law is older than equity, but the reverse is the actual order of things.[1]

Lord Bacon affirms, "You shall find the observation true, and almost general in all states, that their law-givers were long after their first kings, who governed for a time by natural equity without law."

Equity as a Law Maker.— A great many of the positive rules of law are first worked out by equity. Wilson expresses this idea very clearly:[2]

"In rude ages the first decisions of judges arose probably from their immediate feelings; in other words, from considerations of equity.[3] In the course of their business many similar cases would occur; upon these similar decisions would naturally be given. A number of precedents thus introduced would, from the power of custom, acquire authority and respect. General rules would gradually be formed, and the utility of establishing them would become an object of attention. Those rules, however, upon a little further experience, would be found at times too narrow, at other times too broad. To adhere rig-

[1] Pollock and Maitland, writing of the time of Bracton, say: "Of equity as of a set of rules which can be put beside the rules of law, or of courts whose proper function is the administration, not of law, but of equity, we shall hear nothing for a long time to come." But that a contrast between equities and *rigor juris* was then recognized, and the king's court by tradition empowered to do whatever equity might be required, was asserted by the Frankish kings and since the Conquest, say these historians. So of equitable jurisdiction exercised in the chancery, nothing was heard; the king's justices still believing that they could do what equity required. At this time the chancellor would often sit among the justices. Hist. Eng. Law, pp. 168, 175. In The Case of the Mines, Plowden, 320, it is said that equity was a part of the jurisdiction of the court of exchequer.

[2] 2 Wilson's Works (Andrews' ed., 1896). 124 et seq.

[3] Id. 135.

idly to them at all times would be to commit injustice under the sanction of the law. To avoid an evil so alarming it would be thought advisable, upon extraordinary occasions, to recede from the general maxims and to decide, as originally, according to the immediate sentiments of justice. In this manner the distinction between equity and strict law was probably introduced; the former comprehended the established rules, the latter comprised their exceptions.

"But when the exceptions became numerous, many of them also would be found to be similar, and consequently to require a similar decision. Those similar decisions would in turn produce a new rule, and this new rule would in its turn give birth to new exceptions.

"If this account of the matter is just, and it seems to be natural, law and equity are in a state of continual progression, one occupying incessantly the ground which the other in its advancement has left. The posts now possessed by strict law were formerly possessed by equity, and the posts now possessed by equity will hereafter be possessed by strict law.[1]

"In this view of the subject — and it is an interesting one — *equity may well be deemed the conductor of law towards a state of refinement and perfection.*

"In this view of the subject we can find no difficulty in pronouncing that every court of law ought also to be a court of equity; for every institution should contain in it the seeds of its perfection as well as of its preservation.

"In this view of the subject we shall find as little difficulty in pronouncing *that every court of equity will gradually become a court of law*,[2] for its decisions, at first discretionary, will gradually be directed by general principles and rules. Thus, in England, the court of chancery has gradually divested itself of its original and arbitrary character, and has become in that respect one of the courts of the common law. Thus again, in England, the courts of common law, animated lately with the spirit of improvement inspired by a liberal age, have enlarged

[1] See also 1 Spence, Eq. Jur. 325, note C.

[2] This is now actually accomplished, for the jurisdiction has changed completely from the idea of an exercise of grace, and the courts no longer pretend to modify the rigor of the law. The old definition of equity is obsolete.

their powers of just decision, and have advanced within the precincts of equity. The particulars, in which they still differ, are indeed of importance; but I see no reason why the separate powers of chancery, placed there very properly indeed, should be thought incommunicable to the courts of common law"[1]

Ancient Equity.— If the mind is kept fixed on the jurisdiction to administer equity rather than the tribunals which administer it, little difficulty will be experienced in comprehending the distinct jurisdiction exercised by the same court and frequently in the same cases. There is no doubt that equity was administered in the Saxon courts not in name, but in fact. Perhaps it was the controlling power, although there was no system of equity.[2]

After the Conquest.— We have spoken of the new idea of jurisdiction introduced by the Norman conquest.[3] The councils of the Saxons from the highest to the lowest were assemblages of freemen — councils of the nation, and not mere councils of the king.[4]

The great council of the Norman king, the *aula regis*, was modeled after the *cour de roy* of the French kings and the *aulic council* of the German emperors;[5] and in this council was centered the whole legislative and judicial power, saving only a remnant reserved to the county court and folk moot, which

[1] 2 Wilson's Works, 136. The reference is doubtless to the extension of the action of *assumpsit*, which is likened to a bill in chancery. See remarks of Buller, J., in Straton v. Rastol, 2 T. R. 366.

[2] Maine's Anglo-Saxon Law, 24; Lessees of Livingston v. Moore, 7 Pet. 547. See reference to Pollock and Maitland Hist., note *supra*. Crabb, in his History of the Common Law, says that the equitable jurisdiction of the chancery is supposed to have been suggested by the Romans, whose praetors were authorized to pronounce equitable decrees, not to the extent of abrogating laws, but to the extent of tempering them with equity; and says that the power of the chancellor was none other than what our kings had exercised in an early day, who had been used to moderate the judgments of other courts by their equitable decisions. Crabb's Hist. Com. Law, 340.

The king, in council with his great barons, after the dissolution of the *curi regis* and before the creation of the chancery as a court, decided causes *ex equo et bono* upon principles of equity and justice. 1 Reeve's Hist. Eng. Law, 283. It seems also that none of the courts doubted their right to do equity.

[3] *Ante*, p. 30.

[4] White's Outlines English Law, 8.

[5] Id.; 2 Wilson's Works, 82.

were left in existence.[1] To the king, however, by the new constitution, the prerogative of administering justice was given, and the *aula regis* was in theory a council of the king.[2]

The ancient Saxon courts with their remnant of jurisdiction form an exception,[3] but the new courts followed the king until Magna Carta fixed the place of the common pleas.[4]

Equity has always been held to be a part of the common law,[5] though its exercise has not always been delegated to the courts, but some portion thereof at least reserved by the sovereign power,[6] meaning by sovereign power in this connection the parliament.

Equity as a Separate Jurisdiction.— The separation of equity from common-law jurisdiction is peculiar to the English system of procedure, and those modeled after it having the trial by jury. The common-law system with the trial by jury is not well adapted to hear and determine all matters properly cognizable in the courts, and experience has shown the need of another department better fitted to cope with the residue.

Equity as an essential branch of jurisdiction or judicial power is acknowledged to have existed everywhere; and wherever an established court of equity jurisdiction does not exist, the power is retained in the legislative branch,[7] or is exercised in the ordinary form of actions.

[1] 1 Spence's Eq., ch. 13; 3 Cooley's Blk., ch. 4.

[2] Hale's Outlines Eng. Law, sec. 3.

[3] 1 Reeve's Hist. 268; Crabb's Hist. 47.

[4] 1 Spence's Eq. 119.

[5] 1 Story, Eq. 41. Hobart declares "all kingdoms in their constitutions are with the power of justice, both according to law and equity; both of which, being in the king as sovereign, were afterwards settled in several courts. . . . But that part of equity being opposed to regular law, and in a manner an arbitrary disposition, is still administered by the king himself and his chancellor in his name *ab initio* as a special trust committed to the king, and not by him committed to any other; and it is true that the one is bound to rules, the other absolute and unlimited, though out of discretion they observe some forms which they may justly leave in special cases." Martin v. Marshall, Hobart, 63.

[6] Id., sec. 49; Livingston v. Moore, 7 Pet. 547.

[7] Livingston v. Moore, 7 Pet. 547 (1833). Palgrave makes one of his characters say: "At present (Tempo Ed. 1) a great part of our law business is cheaply, expeditiously and equitably dispatched in the *folk moot* or courts of the hundred or shire, which go on regularly by immemorial usage without any writ or other sanction from the king. These tribunals we derive from our ancestors. We had laws before we had

Rise of the Chancery Court — *The Ancient Chancellor.*— An officer called chancellor, and closely connected with the king, has existed from the earliest times,[1] but anciently he seems to have been lower in rank than the chief justiciar or earlderman, who was next to the king,[2] and who acted as viceroy in his absence and might issue writs running in his own name.[3]

The chief justiciar presided as chief judge in the court of exchequer. Subsequently he was divested of his power as viceroy, and the office itself seems to have been merged into the regular judiciary.[4] It was then that the dignity and influence of the chancellor arose.

The Original Writ.— Upon the creation of the three great courts — the king's bench, the exchequer, and the common pleas — the fundamental principle of jurisdiction of these courts was insisted upon.

No suitor could begin an action in one or the other of these courts, as he saw fit, or as his opinion was as to the jurisdiction, but he was compelled to apply for a writ, and no judge of these courts could take cognizance of a suit excepting upon the presentation of what was termed an original writ.[5] This original writ generally issued out of the office of and under the seal of the chancellor,[6] and this duty of the chancellor was merely ministerial.[7]

The Chancellor's Ordinary Judicial Authority.— Besides business of a ministerial character there are many other matters directly between the king and his subjects of which it was the principal function of the chancellor to take cognizance. As nothing could pass from the king excepting under his seal, so the validity of claims based on these grants might always be questioned. It was accordingly a part of the ordinary business

prerogative, and folk moot before we had kings. A writ is often long in coming, and suitors find that a golden cup placed in the king's wardrobe or a bay stallion sent to the royal stables has a great effect in driving the chaplain quill." Palgrave's Hist. of Anglo-Saxon, Pref.

[1] Selden gives the earliest historical evidence of the office as about the year 920. 1 Woodson's Lect. 161, 162.

[2] Crabb's Hist. Eng. Law, 100. See Sullivan's Lect., p. 415.

[3] 1 Spence's Eq. Jur. 100.

[4] Sullivan's Law Lect. 415; Reeve's Hist. Eng. Law, 264, 265; 1 Spence's Eq. Jur. 100–106.

[5] Andrews' Steph. Pl., § 38.

[6] Id.

[7] 2 Wilson's Works, 226; 1 Pollock and Maitland, Hist. 175.

of the chancellor to bring to account any one claiming under charter or grant from the king; also to determine matters of escheat, and inquisition into offices in the nature of *quo warranto*. Such matters could be heard and determined by the chancellor, excepting where there was a real *issue of fact*, when the practice was to make up a definite issue and submit it to the king's bench, where a jury was summoned; *i. e.*, they formed an issue out of chancery to be tried in the law court.[1]

In such matters, if the subject was the mover, he obtained no writ to any other court, but was heard by the chancellor.[2]

A vast volume of the ordinary business of the chancellor's office was no doubt the framing of the writs necessary to bring ordinary suits between private persons,[3] which was an important matter because it determined to what court the suitor should be sent for trial.

It will thus be seen that the chancellor, or chancery, had, as a court, a well defined jurisdiction, in no sense analogous to what is in modern times called equity.[4]

Lausatt presents this ordinary jurisdiction under three heads: His *common-law* jurisdiction; his *delegated* jurisdiction; his *statutory* jurisdiction. To the former he ascribes the power of issuing writs in cases between subjects, and deciding cases between the subject and the crown.[5]

A delegated jurisdiction includes his powers as representative of the king in his capacity of *parens patriæ*,[6] the visitorial power over charities.[7] *The statutory jurisdiction* embraced

[1] Sullivan's Lect. 417, citing 4 Inst., pp. 79, 80. "Chancery, which beside that it dealeth with matters of conscience, and moderating the strictness of the common law by an absolute power, dealeth also *in ordinary course* of law in divers cases, especially in suits concerning the king, as petitions, *scire facias*, to repeal his patents, etc., and so *it is a court of law and of record*, where the judge is the chancellor, having the custody of the great seal of England, under which pass all writs out of the chancery with *teste meipso* (witness ourself), and also the king's grants, being therefore called letters patents, though it be of things which he hath in his natural capacity, as by descent from his mother, etc., and are entered of record in this court." Finch's Law, p. 238.

[2] Chisholm v. Georgia, 4 Dall. 416; 1 Spence, Eq. Jur. 355.

[3] 1 Spence, Eq. 238.

[4] 1 Spence, Eq. 236.

[5] In Equity in Penn., 1825; Fonblanque's Eq.

[6] Dodge v. Cole, 97 Ill. 354.

[7] But not over corporations in general, which was in the king's bench. Attorney-General v. Utica Ins. Co., 2 John. Ch. 371; Lawy. Ed., vol. 2, p. 412.

such subjects only as were committed by parliament to the chancellor, as was formerly the subject of bankruptcy and charitable trusts.

The extraordinary or equitable jurisdiction of the king and his chancellor, which finally gave rise to the creation of a new court called chancery, is not always so clearly contrasted with the ordinary jurisdiction as to make plain the fact that equity is not of necessity committed to a distinct tribunal. It was because of the peculiar theory of jurisdiction that the law courts were confined, as to the causes of which they could take cognizance, to those described in the original writs sent from the chancellor.

It is quite plain that with the development of society there would arise many matters which the clerks of the chancery would find not within the terms of any of the writs of which their books contained a precedent. In such cases there was nothing to do but to refer the suitor's petition back to the king or council, and, the matter being by the king delegated to the chancellor, he heard the cause and gave suitable relief.

This was *an exercise* by specific delegation of what was afterwards the regular equitable or extraordinary jurisdiction of the chancellor.[1] The chancellor's extraordinary jurisdiction was the power subsequently acquired to hear a cause and give relief without sending a petition to the king or council and awaiting their express delegation.

It was not until this jurisdiction was established that we see the rise of the chancery court.[2] King Edward III., being unable to attend to the numerous petitions, *by a general writ or ordinance* given in the twenty-second year of his reign (1349), referred all such matters as were *of grace* to be dispatched by the chancellor or by the keeper of the privy seal.

This was a general authority to hear and determine in all *matters of grace*, and differed essentially from a special delegation in a specific matter, or the narrow specific authority

[1] 1 Spence, Eq. 335.

[2] "*The Chancery Court.*— Cancellaria, ae, f. Chancery is the Court of Equity and Conscience, moderating the rigour of other Courts that are more straightly tyed to the Letter of the Law, whereof the Lord Chancellor of *England* is the Chief Judge. Cromp., Jurisdict., fol. 41, or else the Lord Keeper of the Great Seal since the Statute 5 Eliz., cap. 18." Old Dictionary by F. O. (1701).

contained in an original writ to try and determine a specific issue.[1]

Final Establishment of the Chancery as a Separate Court.— It is a common impression, based upon a *dictum* of Blackstone, that but for the illiberality of the judges of the common-law courts no separate court of chancery would have arisen.[2]

But it is difficult to perceive how the judges appointed by the king to preside over courts created by him, and exercising jurisdiction by virtue of a writ or warrant of authority under his seal, defining with particularity the issue they were to make up for trial by a jury, could be expected to extend their jurisdiction to matters which, time out of mind, had been deemed, in the eye of the law, matters of the king's grace and favor.

With the common-law judges it was a question of jurisdiction, not of discretion. That the common-law judges could and did apply equitable principles to the matters within their cognizance is well established, and, though a different thing from extending their jurisdiction, is as much as their authority warranted.[3]

The reasons for the separation are not hard to discover, and are both based upon the demand of the English people for due process of law. They really reach down or up to the constitution. The first is based upon the right of every man to have his legal rights tried by a jury of his peers, according to the course of the common law;[4] the second anciently permitted

[1] 1 Spence, Eq. 337; Langdell, Sum. Eq., xix.

[2] This is clearly erroneous. In fact the earliest resorts to chancery were not because the law provided no remedy, but because the law judges could not enforce their jurisdiction.

The earliest bills are given in 1 Law Intelligencer, p. 191. See Story, Eq., §§ 40–47; 1 Spence, Eq. 242, 243. Mr. Spence says: "The course of justice itself was interrupted, and all these provisions were rendered in a great degree ineffectual by the lawless spirit of the times."

[3] This matter is very clearly explained by Stephen. Andrews' Steph. Pl. 64.

[4] The right of trial by jury is the *one peculiar* feature wherein the British constitution differed from that of all other European countries. Blackstone speaks of this as the peculiar glory of that constitution, and adds that the author who predicted that, because Sparta and Rome had lost their liberty, so, too, would England, should have recollected that these countries were strangers to the trial by jury. 3 Cooley's Blk. (4th ed.) 379, n. See observations of Johnson, J., in Lessees of Livingston v. Moore, 7 Pet., at p. 547. It is beyond the power of the legislature to take away the right by calling an action equitable. Ward v. Farwell, 97 Ill.

a residuum of grace to remain in the sovereign, and later appeared in that discretionary form of equity long obsolete.

The second reason, in modern times conforming to the necessity for a more elastic procedure to adjust complex transactions, but yielding to the demand of the British people that they be governed by law and not by prerogative, led to a settled form of procedure for the administration of equity, which, like forms of action at law, became in time due process of law.[1]

This is the rock which wrecked the so-called reform based upon the idea of abolishing the distinction between legal and equitable actions.[2]

SEC. 648. *Establishment of Forms of Action, Legal and Equitable.*—These are nothing more nor less than the established regular method of pursuing a remedy.

Their origin is plain. They are simply the recognition of recurring causes coming to the courts for redress,[3] differing from each other in certain typical elements, and may best be handled by separating them into classes.[4]

In the original writs the cause was definitely described, and the nature of the action determined the jurisdiction of the

612. So the right to an account may require a jury trial, in which case the chancery sends the question to a law court for trial. Selectmen v. Boylston, 4 Mass. 313.

[1] A jury trial has never been made or recognized as one of the instruments of courts of equity; hence one may readily see why the courts decline to try legal titles. Keith v. Henkleman, 173 Ill. 137. The doctrine was recognized that those forms and courses of proceeding based upon well-recognized principles in force before and at the time of the adoption of our national constitution would be "due process of law." San Mateo Co. v. So. Pac. Ry. Co., 13 Fed. Rep. 147, 722; Keith v. Henkleman, *supra;* County of Santa Clara v. So. P. Ry. Co., 18 Fed. Rep. 418.

[2] All the cases in the code states holding that the forms must be followed rest on this principle; so also the Pennsylvania cases. *Post*, p. 1058, note 1.

[3] Andrews' Steph. Pl. 63–65; 1 Chitty, Pl., ch. II.

[4] *E. g.*, the recital that the defendant sprang upon, *i. e.*, assaulted, struck, beat and bruised the plaintiff, whereby he was injured, is totally different from the statement that the defendant negligently kept a vicious horse, which, escaping, bit the plaintiff; and these both differ from a statement that the defendant agreed to pay the plaintiff $100 for goods sold and delivered, and, though often requested to pay, has not done so. Experience soon made it plain that such occurences would recur again and again, and that the dispatch of business and certainty of the record would be aided by the use of set forms.

court to try the case. Stephen says: "These writs differ from each other in their tenor, according to the nature of the plaintiff's complaint, and are conceived in fixed and certain forms."[1]

Now, the more ancient writs had provided for the most common kinds of wrongs, but, in the progress of society, cases of injury arose, new in their circumstances, so as not to be included within any of these writs.[2]

Only Parliament Could Create a New Jurisdiction.— The power of the chancellor and his clerks as to the framing of these writs of jurisdiction was never discretionary, but restrained within definite limits. The duty was merely ministerial.[3]

It was an established principle that new courts might be erected by the king, but it was equally fundamental that a new jurisdiction could only be created by parliament; and the devising of a writ which was new in principle was the same as the creating of a new jurisdiction.[4]

In the year 1258, at a council of parliament held at Oxford, it had been provided that the chancellor should not issue any writs otherwise than by command of the king or his council. The natural effect of this was to crowd the king's council with petitions. So burdensome did this become that in the eighth year of Edward I. (1280) an ordinance was passed requiring that all petitions should be presented to the chancellor, and that matters touching the seal should be *decided by him;* that those which concerned the exchequer should be sent to the exchequer court; and that if the matter should be so much of grace, it should be taken to the king, so that the petitions must come by the hand of the chancellor.[5]

It frequently happened that, as to matters not falling within any of the above, the chancery clerks had no writ or form of action to fit the cause of complaint. Hence a statute (13 Edw. I.) was passed providing: "That as often as it shall happen in the chancery that in one case a writ is found, and

[1] Andrews' Steph. Pl. 64.

[2] 1 Chitty, Pl., ch. II.

[3] 1 Poll. & Mait. Hist. Eng. L. 175.

[4] 1 Spence's Eq. 239, note *f*, citing 9 Co. Rep., Pref. xxviii, per Ashurst, J.; Pasley v. Freeman, 3 T. R. 51. See particularly Andrews' Steph. Pl. 64; 1 Chitty, Pl. 95, 96.

[5] A translation of this ordinance is given in 1 Story's Eq. Jur., sec. 44, note. It is quoted by Iredell, J., in Chisholm v. Georgia, 2 Dall. 419–41.

in a *like case* (*in consimili casu*), falling under the same right and requiring like remedy, no writ is to be found, the clerks of the chancery shall agree in making a writ, or adjourn the complaint to the next parliament, and write the cases in which they cannot agree and refer them to the next parliament," etc.[1]

Trespass on the Case.— This statute did not sanction the framing of new writs for cases new in principle,[2] but it allowed the clerks in chancery only to devise a new species of an old form of action, *i. e.*,[3] frame a writ *in consimili casu* (a like case to some old case), falling under a like law and requiring a like remedy;[4] nor does this statute afford relief in cases falling within the old writs, such as covenant, debt or detinue, which were at that time the only suits for a breach of an executory contract.[5] In these cases the defendant might resort to compurgation, and by waging his law defeat justice.[6]

To prevent this fraudulent use of compurgation and waging of law, resort was continually had to chancery, where relief was given, and thereby a tendency was encouraged to draw to the chancery court a class of cases purely legal.[7] This was counteracted somewhat by framing writs *on the case* for misfeasance and malfeasance.[8]

The Origin of Assumpsit.— At one time there had been no legal remedy for non-performance of a simple executory contract, but actions on the case for consequential damages on account of *malfeasance* or *misfeasance*, or what we would call actions on the case, were recognized. An essential element of the cause of action on the case must be *the doing* of what the defendant ought not to have done, or *the doing, in an improper manner*, of what he should have done, *i. e.*, malfeasance or misfeasance.

A different idea is involved in the *non-performance* of an

[1] Andrews' Steph. Pl. 62; 1 Chitty, Pl., ch. II.

[2] 1 Spence's Eq. 239, note *f*; Andrews' Steph. Pl. 64.

[3] Andrews' Steph. Pl. 85.

[4] See Andrews' Steph. Pl. 64, 65.

[5] See Parol Contracts Prior to Assumpsit, by J. B. Ames, 8 Harv. L. Rev. 252.

[6] Spence's Eq. 242; Rudder v. Price, *infra*.

[7] 3 Blk. 52; 3 Reeve's Hist. Eng. Law, 242; Dutton v. Poole, 1 Free. 471.

[8] This action on the case is much like a case in equity, for in it, says Coke, a man may declare his case as it really is, and he shall have a remedy for such part as legally requires a remedy. Slade's Case, 10 Co. Rep. 130; 1 Spence's Eq. Jur. 243; 1 Chitty, Pl. 96.

agreement, and for a time the judges of the law courts, which had the power and duty to pass on the validity of original writs, dismissed the writs which were founded upon such causes of action;[1] but finally it was held that an action on the case would lie in such cases as for a non-feasance; and hence, says Spence, the origin of the modern action of *assumpsit;*[2] and hence, of course, its name, trespass on the case, on the promise.

The Writ of Subpœna in Chancery.— It was essential to the jurisdiction of the person that the defendant be notified of the pendency of the suit. This writ of process or notice in chancery is called a subpœna, and corresponds to the summons or mesne process which issued in a common-law action.[3]

Rise of Chancery Practice.— The invention of the subpœna marks the establishing of a fixed tribunal assuming to exercise an original jurisdiction,[4] and was followed in due course of time by the invention and adoption of settled modes of procedure; so that in the natural evolution, the chancellor, as the keeper of the seal and of the king's conscience, gradually became the instrument of administering the law in the special class of cases, and that which was at first arbitrary and casual became customary and regular, and gradually developed a system of rules and a regular method of procedure, so that in time equity procedure became as well settled and certain as any other part of the law.

Chancery Practice.— The method of procedure on the chancery side of the court adapts itself to the investigation of the rights and interests of many parties in a single transaction, or several matters which had been involved in a connected transaction, and to the adjustment of the rights of a multitude of parties, so that, for illustration, it may be said that *the parties at law are arrayed against each other on opposite sides of an issue joined*, while *the parties in a chancery suit may mingle*

[1] 1 Spence's Eq. 243, and cases cited. Lord Coke's account, in Stade's case, of the action of *assumpsit* is pronounced by Lord Loughborough to be incorrect. Rudder v. Price, 1 H. Blk. 550 (1791); 1 Chitty, Pl. 99; 3 Cooley's Blk. (4th ed.) 52.

[2] Id.

[3] In modern times, process out of either court is called indiscriminately a summons; while the subpœna is used as a means of summoning witnesses.

[4] For the earliest resorts to equity, see The Law Intelligencer, p. 191; 1 Story, Eq., § 47; 1 Spence, Eq. 343. There were in these no allegation that there was no remedy at law.

a diversity of interest in a common subject and are parties complainant or defendant, not simply because of an opposition of interest, but because one has or claims some interest, and will not join as a party complainant.[1]

Equity in America.— The judicial establishments of the colonies depended largely upon the provisions of their charters in reference thereto and the closeness with which the colonists adhered to them, and naturally differed according to circumstances surrounding the people.

The New England colonists were never very close adherents to the contracts they made in their charters, and the *general courts* at an early date exercised both legislative and judicial authority, in time creating subordinate magistrates; but in Connecticut never until long after the national constitution was adopted was the equitable power taken away from the general assembly. Equity as a branch of jurisdiction was well understood and constantly exercised in all the colonies, but in some of them the governor and council took the place of the court of chancery in England.

An explanation of the colonial judicial establishment of New York will convey sufficient idea of the partition of the jurisdiction.[2]

[1] Andrews' Steph. Pl., pp. 39–46; Brinkerhoff v. Brown, 6 John. Ch. 139; N. Y. & N. H. Ry. Co. v. Schuyler, 17 N. Y. 592.

[2] "*An Account of all Establishments of Jurisdictions within this Province.*

"*Single Justice.*— Every Justice of the Peace hath power to determine any suite or controversy to the value of forty shillings.

"*Quarter Sessions.*— The Justices of the Peace in Quarter Sessions have all such powers and authorities as are granted in a Commission of ye Peace in England.

"*County Court.*—The County Court or Common Pleas hath cognizance of civil Accôns to any value, excepting what concerns title of land, and noe Accôn can be removed from this court if the damage be under twenty pounds.

"*Mayor and Aldermen.*— The Court of Mayor and Aldermen hath the same power with the County Courts.

"*Supreme Court.*— The Supreme Court hath the powers of Kings Bench, Common Pleas & Exchequer in England, & noe accôn can be removed from this court if under £100.

"*Chancery.*— The Governour and Councill are a court of Chancery and have the powers of the Chancery in England, from whose sentence or decree nothing can be removed under £300.

"*Prerogative Court.*— The Governour discharges the place of Ordinary in granting Administracôns and proveing Wills, &c. The Secretary is Register. The Governour is about to appoint Delegates in the remoter parts of the Government, with Supervisors for looking after

A separate jurisdiction in equity was abandoned in New York after the retirement of the English governor-general, and was not thoroughly re-established until early in the present century; and notwithstanding the idea which took possession of the people about thirty years later, the jurists of Massachusetts supposed that they suffered for the lack of a separate chancery court, wherein equitable remedies might be administered under a form of action better adapted to the nature of the cause of action.[1]

Pennsylvania Procedure.— A system of procedure which combines the administration of equity and law in a single form had existed in Pennsylvania long before there was any thought of a code of civil procedure.

Before leaving England to plant a colony in America, Penn and his associates agreed to what may be called their constitution, "that in all courts all persons of all persuasions may freely appear in their own way, and according to their own manner, and there personally plead their own case themselves, or if unable, by their friends. . . . That all pleadings, processes and records in court shall be short and in English, and in an ordinary and plain character, that they may be understood and justice speedily administered."[2] The spirit of this

intestates estates & providing for orphans.

"*Court Martial.*— The Governor hath established a Court Martial at Albany whereof Major Ingoldesby is President & Robert Livingston Judge Advocate who with the other cômmissionated Captains at Albany have power to exercise Martial Law, being a frontear Garrison and in actuall warr.

"*Admiralty.*— Their Majesties reserve the appointment of a Judge Register, and Marshall." Documentary Hist. of New York, vol. 1, p. 317.

[1] In 1819 the Massachusetts court says: "This is one of the numerous cases which are constantly occurring which show the necessity of a court of chancery for the complete distribution of justice among the people. It is the boast of the common law that it permits no wrong without furnishing a remedy; but this is true only when there are courts competent to exercise all the judicial powers which that law requires for its due administration. A court of chancery exercises a most important part of those judicial powers. Its duty is not to establish new rules unknown to the common law for the conduct of the people, or the regulation of their property, but to apply and enforce those principles of the common law which cannot be enforced by the other courts." Vose v. Grant, 15 Mass. 521.

[2] If the student will pay particular attention to the Pennsylvania procedure, the idea of code reform will seem clearer. Lyle v. Richards, 9 S. & R. 340, opinion of Duncan, J., p. 355; Pa. Bar Ass'n Rep., p. 5.

compact seems to have clung to the procedure in Pennsylvania to a degree almost amounting to a prejudice.[1]

But irrespective of the forms of procedure, equity as a *jurisdiction* and a mode of procedure has been recognized from the earliest times in this and all the other states.[2]

There are two ordinary modes of procedure in Pennsylvania, which, for convenience, may be called law and equity.

Prior to 1836 all proceedings were at law. In 1836, and subsequently from time to time, proceedings in equity were provided for by the legislature. The courts decided that this legislation did not interfere with the right, as it existed previously, to proceed at law. Therefore, as well since 1836 as before, all proceedings may be at law; all cases that come within the constitutional provision that "trial by jury shall be as heretofore" must be at law; those that come within the scope of the legislation of 1836, and later, *may* be in equity or at law.[3]

There are, however, many cases, rather than a class or classes of cases, in which it would be difficult, if not impossible, to obtain at law the full measure of relief sought, so that, in fact, they are begun in equity. This is because the forms in equity are more applicable than at law. In either form the cases would be decided according to law; for, as was said by Justice Lowrie in *Stockdale v. Ullery:*[4] "Equity is so much a part of our law that the word 'law' means both law and equity, or either."[5]

[1] I am indebted to Mr. Justice Simonton, judge of the twelfth judicial district of Pennsylvania, for valuable suggestions with reference to Pennsylvania practice. See his address as president of Penn. Bar Ass'n, vol. 1, Rep.

[2] Pollard v. Shaaffer, 1 Dall. 211; Wikoff v. Core, 1 Yeates, 358.

[3] Mr. Justice Green, therefore, seems mistaken when he says in Johnson v. Price, 172 Pa. St. 427, a case involving a proceeding to settle partnership accounts, that beyond all question a bill in equity was not only the proper but the exclusive remedy for the plaintiffs. The proposition that under the modern practice in Pennsylvania a case of pure equitable remedy cannot be conducted as a law case seems to find support in an expression in Germanic Am. T. & T. Co. v. Shallcross, 147 Pa. St. 485.

[4] 37 Pa. St. 486.

[5] Equity jurisdiction in Pennsylvania does not depend upon the want of a common-law remedy alone, but may be sustained on the ground that it is the most convenient remedy. Johnson v. Price, 172 Pa. St. 427. Because *assumpsit* will lie it does not follow that the chancery side of the court has no jurisdiction. Jurisdiction depends not so much on the want of a common-law remedy as on its adequacy. Bierbower's Appeal, 107 Pa. St. 14. Or, if the remedy in chancery is more convenient, that of

The distinctions as to procedure between some of the common-law actions have been abolished, but not between all.[1]

The Nature of Modern Equity.— Whatever the ancient idea was in reference to equity being a distinct system of law which might modify the harshness and rigor of the ordinary body of the law, it is certain that this idea does not correspond to what is meant by equity in modern jurisprudence.

Equity, as now understood, is not a system borrowed from the Roman law, but one built up with infinite pains and labor by jurists, whereby logical principles are made the basis of fixed rules, and whereby the ancient idea of a discretionary power in the emperor, or prætor, analogous to the royal prerogative, has no part or place.[2]

On the contrary, the system of equity both in England and America is a settled, organized system, controlled by well-known rules, and bound down by precedents from which they do not depart.[3] Not that they may not act where there is no precedent, but that they will not act in the face of one.[4] But this is equally true of the law courts in the use of the action on the case.

The ancient system which passed under the name of "Equity" could scarcely be termed judicial.[5] The modern system is strictly so.

Utility of Settled Forms of Action— Unsettling the Practice by Codification.— "'*Sapientissima res tempus*,' says the profound Lord Bacon, in one of his aphorisms. Time is the wisest of things. If the qualities of the parent may, in any instance, be expected in the offspring, the common law, one of the noblest births of time, may be pronounced the wisest of laws."

There seems to be nothing but experience which will demon-

itself is sufficient. Brush Electric Co.'s Appeal, 114 Pa. St. 574.

[1] Brightly's Purdon, Dig. (12th ed.) 1782.

[2] 3 Hammond's Blk. 601. The principles of equity, as administered in Great Britain, were never intended to create a *new law*, but were introduced for the purpose of assisting and giving effect to the general laws of the realm. Equity follows the law, but does not control it. The office of equity is to protect and support the common law, and carry it into *practical* effect. 3 Blk. Com. 429–431; Beal v. Fox, Ex'rs, 4 Ga. 424, 425.

[3] Bonn v. Hopkins, 1 Sch. & Lef. 428; Burgess v. Wheaton, 1 Wm. Blk. 123; Manning v. Manning, 1 Johns. Ch. 530; 3 Cooley's Blk. (4th ed.) 432.

[4] Dodge v. Cole, 97 Ill. 354.

[5] 1 P. & M. Hist. Com. Law, 172

strate the feasibility or impracticability of proposed reforms in politics or legal procedure.

Objects of Codification.— Happily what in former times rested in opinion is now susceptible of demonstration. The crucible of time has tested the practicability of these experiments which were to revolutionize and simplify the procedure in our courts of justice, and to render the obtaining of justice speedy, certain and inexpensive.[1]

Test of Practicability.— A brief reference to the facts, now matters of history, may be of utility in enabling the students

[1] How far the achievements of reformers have fallen short of their intent may be judged by the following, which is really only a just, conservative observation. Mr. William H. Hornblower, of the New York bar, said in a recent speech at a dinner of the Hudson Co. (N. J.) Bar Association:

"Do not be led astray by specious arguments in favor of reformed procedure. Be content to let well enough alone. You have the state of New York before you as a terrible example of the effects of riotous and excessive codification. I believe our practice to-day is infinitely more technical than that in New Jersey. Even the attempt to abolish *forms of action*, and especially the attempt to abolish the *distinction between law and equity practice*, have been dismal failures.

"The distinction between trover and *assumpsit* is to-day even more rigidly maintained than under the common-law practice. *It is impossible to amend upon a trial from trover to assumpsit, or vice versa.*

"If the plaintiff sues for conversion when he should have sued on contract, or *vice versa*, he is nonsuited at the trial with relentless certainty.

"In the absence, however, of any outward or visible distinction in the process, or outward or visible label upon the complaint, the court is forced to construe each complaint as it comes before it, in order to determine whether it is in tort or on contract, and we are frequently obliged to go to the court of appeals to find out, and even there the court is frequently divided in opinion.

"The assimilation of legal and equitable actions has also proved a delusion and a snare. The distinction between the two classes of actions still remains in point of fact, and must remain so long as the right of trial by jury prevails as to common-law actions, while trial by the court, without a jury, prevails in equity actions.

"It is not a little singular that the result of the so-called reformed practice has been quite the contrary to that expected by its framers. It was anticipated that, by assimilating the practice in law and equity, our whole system of jurisprudence would be liberalized and the principles of equity carried gradually into the common-law courts.

"On the contrary, the effect has been to rigidify and harden the practice in equity, to assimilate it more and more to the common-law practice, to make the judges more and more disposed to *follow precedents* and less disposed to strike out upon original lines of equitable jurisprudence."

of law, the jurists who administer it, and the legislators who reform and change it, the better to comprehend the real elements involved in attempts to abolish a settled procedure and to substitute a new one.

In view of the fact that it is regarded as an essential to due process of law in our American constitutions that a regularly settled procedure be established, it may be wise to view the subject as a constitutional as well as a utilitarian question.

The attempt must take into account the right of trial by jury *according to the course of the common law;* not simply a common-law jury, but proceedings conforming to the ancient principles of a definite issue.[1]

A jury trial is in many cases not desirable, and in many of these a jury trial has never been allowed; for these another mode of presentation has from time immemorial been allowed, and these cases called equitable have been classified, and lawyers and jurists have formulated and established forms for the statement of each of the various causes of action, which by frequent recurrence had been recognized as likely to recur constantly. These are the equity causes of action and equity forms of action.

Resumé of Reforms in Procedure.— Starting with the rise of a separate chancery court in England, which began under the idea that it was the exercise of the king's prerogative, with a general power, restrained and controlled by law, but at the same time tempered by grace, until the time of Lord Bacon and Lord Ellesmere, when the chancery was a distinct court, and chancery practice a settled, formal system, there gained an impression that such a court, regulated and moulded into a settled and regular procedure, was a useful institution, and so we find it acknowledged and established in every state in the national union after about the year 1836.

Early English Efforts.— Procedure in law and chancery had in England become quite technical and cumbersome, and in 1828 a decided effort was made in parliament to reform and simplify legal procedure; but there was no thought in this or in later attempts of abolishing the distinction between legal

[1] On the same principle one is entitled to have an equitable cause of action tried in accordance with due process of law in such cases.

and equitable forms of action, or between law and equity, or of abolishing forms of action.

On the contrary, Lord Brougham professed that he would make use of these ancient principles. This effort resulted in the Hilary rules of 1834, which brought in so many important changes in legal procedure that it necessitated a rewriting of the great book upon common-law pleading by Chitty.

The New York Code.— In New York, about the year 1848, a reform in procedure was instituted, based upon two principal ideas. First, the abolition of the distinction between legal and equitable actions; and second, the substitution of a single form of action for all cases; the idea being to administer law and equity in a single action, precisely as it was practiced in Pennsylvania until a comparatively recent date. The difference between the two systems was that in Pennsylvania the common-law forms were preserved, and equity was administered under these forms, while in New York the distinction between legal and equitable forms, as well as all forms of action, was abolished.

The effect which it was supposed would follow these sweeping enactments was that the distinction between law and equity would be lost sight of; that that system of allegation which was noted for its precision, and technically termed common-law pleading, would be wiped out of existence, and be replaced by the chancery mode of stating causes; and that the remedies in courts would become more speedy, more certain, and less expensive. The result of that attempt at abolition is the code of civil procedure.

Judicial Construction of the Code.—As soon as the code went into operation its application and construction fell into the hands of the lawyers and judges; that is, the judicial department of the state. From the domain of legislative theory it passed into the field of judicial practice and fell into the crucible of experience. These tribunals very promptly decided that the distinction between law and equity was inherent, and was not abrogated,[1] and that the nature of the cause of action must clearly appear from the pleading. To pass by the evolutions and changes of decades by which the New York code

[1] Booth v. Farmers' Bank, 65 Barb. 457.

has developed into a vast mass, and the practice in that state has become chaotic, the conclusion may be stated with perfect confidence that the distinction between legal and equitable actions is as clearly marked in New York to-day as it was before the code went into effect; and that a cause of action which is properly equitable in its nature and would not have been cognizable in a court of law before the code, must, under the code as construed by the courts, be presented and tried in accordance with the rules of the court of equity, and *vice versa* of a common-law action; and that if there is an erroneous choice of forms, the case must be dismissed, no matter how far it has proceeded.[1]

In England the reforms of 1834 were followed by additional reforms in 1853 and 1860. In 1873 the judicature acts, based upon similar principles of the New York code, were enacted. Perhaps the most useful information which an elementary treatise of this character can give on this subject is to call attention directly to how this new idea has worked in actual practice, and this, perhaps, can best be done by reproducing the opinions of distinguished jurists and by citing a few legal decisions as an example.[2]

[1] The principle is that if the case is one of which law or equity had at common law exclusive jurisdiction, that form must still be pursued. Met. El. Ry. Co. v. Johnson, 84 Hun, 83; Ketcham v. Depew, 81 Hun, 271; citing Bradley v. Aldrich, 40 N. Y. 504; Dudley v. Congregation, 138 N. Y. 451; Hawes v. Dobbs, 137 N. Y. 465. See E. S. T. Co. v. Bickford, 142 N. Y. 244.

[2] Sir Frederick Pollock said in 1893: "Twenty years ago the authors of our judicature acts in England, men of the highest eminence, but trained exclusively in the *chancery system*, went about to engraft considerable parts of that system on the practice of the courts of the common law. *What came of their good intentions?* Instead of the simplicity and substantial equity which they looked for, the new birth of justice was found to be *perplexed practice*, uncertainty, vexatious interlocutory proceedings, and multiplication of appeals (delay) and costs (expense), so that for several years the latter state of the suitor was worse than the former." Perhaps the most pertinent expression is the very late one contained in the opinion in Clydesdale Bank v. Paton, 74 Law T. R. 738 [1898], an appeal from Scotland. The lord chancellor of England in his opinion says: "By the precision of the Scotch pleading there is still a necessity to set out the real cause of action, which is capable of definite and precise statement, which *I regret to say is no longer the case in English pleadings.* I therefore speak with some degree of envy when I say that at all events the Scotch jurisprudence has *preserved something like a system* in which a definite and precise allegation of the cause of action is required to be set out before a

Unless these learned jurists are entirely at fault, the reform has not attained the goal, either as to certainty, simplicity, speed or expense, and the abolition of forms of action has not been attended with a more perfect procedure.

Experience in America has been equally long, and a few opinions of great lawyers and judges will be sufficient to justify the position that well-settled forms of action are essential to any orderly procedure, and that any attempt to abolish them is an attempt away from simplicity and certainty, and tends only to delay, confusion and expense,[1] and may extend to such a limit as to violate the spirit of the constitution and destroy the rights of the people as expressed by Magna Carta.

Uniformity is not to be desired; distinctions should not be ignored. "The difference between having several and having but one form of action is, as Prof. Pomeroy says (in note to sec. 40, p. 33, Eq. Jur.), 'wholly superficial,' or, differently expressed, the *uniformity sought by having only one is imaginary rather than real.* It is simply uniformity in name and not in fact. The difference between a complaint in an action for damages for maintaining a nuisance, and a complaint in an action to recover possession of personal property, or damages for its detention, in code procedure, is as great as between our statement in the one case and simplified common-law declaration in the other; and it is quite as short to say 'an action of replevin' as to say 'an action to recover possession of personal property.'"[2]

litigant is allowed to incur *considerable expense* in proving what may after all turn out to be no cause of action at all."

[1] Mr. Leonard A. Jones, in an address before the Virginia Bar Association, says: "Cases in the New York courts are surrounded with so many technical rules of practice that it is difficult for the lawyer to avoid the pitfalls of these technicalities and bring his case before the court upon its merits. The thousands of decisions in that state upon matters of practice under this code, enough to fill a great number of volumes of reports, attest the trouble the code has been to the courts, the vexation it has been to lawyers, and the *great cost* and *delay* it has wrought *to suitors.* It is therefore not a suprise to find the president of the New York State Bar Association, J. Newton Fiero, Esq., in his address at the annual meeting for this year, declaring: 'I am satisfied that the time has fully arrived when the profession should protect itself in this matter by insisting upon revision, condensation and simplification of the code of procedure.'"

[2] The above is a substantial representation of a communication from Judge Simonton of Pennsylvania.

SEC. 649. *Forms of Action Essential.— A Distinct and Definite Theory Must be Adopted.*— The primary rule under every form of procedure, code or common law, applied to all forms of action, legal or equitable, is that *the parties must adopt and adhere to a definite and distinct theory of action and defense.*[1]

This, under the common law, was expressed by the rule that there should be no departure in pleading and that the declaration must conform to the writ, which was merely a corollary of forms of action.[2]

[1] Phillips' Code Pl., sec. 202. See Arms Co. v. Railway Co., Appendix, *post.* "Pleading and a distinct issue are essential in every system of jurisprudence, and there can be no orderly administration of justice without them. If a party can allege one cause of action and then recover upon another, his complaint will serve no useful purpose, but rather to ensnare and mislead his adversary." Romeyn v. Sickles, 108 N. Y. 650; Supervisors v. Decker, 30 Wis. 624. Judge Phillips, in his excellent treatise on code pleading, has stated this rule and explained it in a clear and simple manner. Phillips' Code Pl., secs 202, 354. In Winchester Arms Co. v. New York & N. H. Ry. Co. (Superior Ct., New Haven County, see Appendix), Judge Prentice presents one of the clearest expositions of the doctrine of the text, as applied to the Connecticut practice act. He quotes Phillips' Code Pl., sec. 31.

(a) *Code Rule.*— Ætna Power Co. v. Hildebrand, 137 Ind. 462; Logansport v. Uhl, 99 Ind. 531; 50 Am. Rep. 99; Welsbeck v. Glass, 46 Mo. App. 209.

(b) *Common Law.*— Wilson v. Johnson (N. J.), 29 Atl. Rep. 419; T., W. & W. Ry. Co. v. McLaughlin, 63 Ill. 389; Longyear v. Minnesota L. Co., 108 Mich. 645. In Smith v. Rumsey, 33 Mich. 144, it was said: "The proposition that the court is bound to adjudge according to the case shown and issues raised by the pleadings is so evident, and has so repeatedly been expounded and applied in this state, that anything beyond a reference to it would be scarcely excusable." Reed v. Jourdan, 109 Mich. 128. The decree must conform to the claims in the pleading. Id.

(c) *Equity.*—Jeffries v. Robbins, 167 Ill. 375; Ogden v. Moore, 95 Mich. 290. It is sometimes said that the ground of action cannot be changed, but this must be taken in a qualified sense. The rule only requires that the original cause be adhered to. Strang v. Judge, 108 Mich. 229; Smith v. Missouri Pac. Ry. Co., 56 Mo. 458; Insurance Co. v. Judge, 77 Mich. 231. The rule in chancery cases is that, beside answering the complainant's case as made by the bill, the defendant must state to the court in his answer all the circumstances of which he intends to avail himself by way of defense; for it is a rule that the defendant is bound to apprise the complainant by his answer of the nature of the case he intends to set up, and that he cannot avail himself of any matters which are not stated in his answer, even though it should appear in his evidence. Reed v. Jourdan, 109 Mich. 128; 1 Barb. Ch. Prac. 137; Fostick v. Van Husan, 21 Mich. 573; Higman v. Stewart, 38 Mich. 519.

[2] The late Austin Abbott, in an article commenting on the case of U. P. Ry. v. Wyler, 158 U. S. 285, stated quite justly that under the common-law procedure the theory

Change of theory by amendment is allowed on just terms, even to the extent of bringing in a new form of action;[1] but such a change cannot introduce a new cause of action either to increase the recovery or to save from the bar of a statute, even

relied upon is indicated by naming the form of action, and he adds that the code has made more confusion in this matter than it has cured. 2 University Law Rev., No. 8, p. 269. See Arms Co. v. Railway Co., Appendix, *post*. "Accuracy and technical precision have no terrors except for the careless and the incompetent, and the act of 1887 was not intended to do away with them. As to all matters of substance, completeness, accuracy and precision are as necessary now to a statement as they were before to a declaration in the settled and time-honored forms." Fritz v. Hathaway, 135 Pa. St. 280.

[1] Snyder v. Harper, 24 W. Va. 206; Mahan v. Smitherman, 71 Ala. 563.

The statute of amendments and jeofails is without doubt the greatest reform which was ever devised. Liberally construed and intelligently applied, it cannot fail to save the party from snares and pitfalls. Cures by its own force defects of form (Holmes v. Preston, 70 Miss. 152), and enables the court to promote the ends of justice at all stages before final judgment in the court of last resort. In Illinois the courts have gone to the extreme of enlightened liberality. C. & P. Ry. Co. v. Stein, 75 Ill. 41; Gas Co. v. Granger, 118 Ill. 266. See, for full treatment, Andrews' Steph. Pl. 473. Compare with these Illinois cases, Harold v. Jones, 98 Ala. 348; Aultman Co. v. Goldsmith, 84 Ind. 547. The law of amendments is not intended to unsettle the rules of practice requiring the adoption of a definite theory of proceeding or defense, nor to vest in the judges an unlimited discretion over established methods of procedure. The substantial nature of the action begun must be preserved. Flanders v. Cobb, 88 Me. 488. Amendment does not mean substitution. See note, 51 Am. St. Rep. 414. Regard must be had for the rights of the opposite party, and so the stage of proceedings is important.

There are at least six stages which require a difference in discretion: Before issue joined; after issue and before trial; on trial; before judgment by the trial court; after judgment; in the appellate court.

Before issue joined the court may, under New York code, allow a change in cause of action, but of course no judgment by default should be allowed except after notice. Deyo v. Moss, 144 N. Y. 216; Hoys v. Dickins, 28 Pittsb. L. J. 180.

On the trial the cause may not be changed. Freeman v. Grant, 132 N. Y. 22; Phelps v. Railway Co., 94 Ill. 584; Dexter v. Innes, 133 N. Y. 551.

In trial court while the case is on appeal. World's Col. Exp. v. Scala, 55 Ill. App. 207.

In appellate court, where proof has been allowed, without objection, relating to the transaction alleged in the pleadings, the court may order amendments, to accomplish justice, without remanding the case. Reeder v. Sayre, 70 N. Y. 180; 26 Am. Rep. 567; Phalen v. Lawler, 102 N. Y. 228; Nichols v. Drew, 94 N. Y. 22; Romeyn v. Sickles, *supra*.

Substituted Issues.— The doctrine of implied substituted issue has been upheld, but it is submitted that it is a dangerous practice. Frear v. Sweet, 118 N. Y. 454. The authority of the appellate court to direct amendments extends only to causes where

though it is so intimately connected with the transaction stated in the original pleadings as to be distinguishable only by elements not of fact in the popular sense, but of the nature of the obligation relied on.[1]

Sec. 650. *Election of Remedies.*— A choice of forms of action is quite frequently allowed.[2] These actions always arise out of transactions or by reason of tortious conduct. The transactions may be conducted by means of express agreements, and, besides these, the relation arising from the nature of the transaction may give rise to an obligation imposed by law, *e. g.*, the obligation of a carrier, or innkeeper, or bailee; and in such cases, although an action *on the contract* may lie for negligent omissions or wilful acts, the law allows the injured person to base his action on the obligation arising by operation of law.[3] Again, a contract to perform some service or furnish some article at a given price, or with no price fixed, when fully performed will be the ground of an action of *special assumpsit on the contract;* but here again the law allows a special action on the legal obligation to pay for the benefit, called *special assumpsit.*[4] The conduct of one may be such, whether it be associated with a transaction or contract, or wholly independent of it, as to allow the choice of several remedies; or one may convert the property of another by theft or otherwise. The law permits the complainant to choose either to sue in form as for the tort or wrong, or to sue as on an implied promise to pay. In these and many other cases the law permits a choice of one, but will not permit both to be pursued; and this is the doctrine of election of remedies.[5] It is in fact nothing but a choice of the form of action preferred by the injured party. The codes introduced much uncertainty in this matter, but

the trial court had that power. Reeder v. Sayre, *supra;* Harris v. Tumbridge, 83 N. Y. 92.

[1] That is, a common-law obligation as distinguished from an express contract or a statutory liability. Nat. Stove Co. v. Sheahan, 122 N. Y. 461; U. P. Ry. Co. v. Wyler, 158 U. S. 285; C., B. & Q. Ry. Co. v. Jones, 149 Ill. 361; Andrews' Steph. Pl. 477, and cases; Miller v. Bealer, 100 Pa. St. 583. The form and theory are here the substance.

[2] This is the subject of chapter 2, Andrews' Steph. Pl.

[3] See Andrews' Steph. Pl. 57, 58; Brown v. C., M. & St. P. Ry., 54 Wis. 343; 41 Am. Rep. 41.

[4] Andrews' Steph. Pl. 59.

[5] Id.; Terry v. Monger, 121 N. Y. 162.

the courts have required practically the same tests as are furnished by the common law.[1]

Sec. 651. *The Classification of Actions.*—It was a rule of the common law that no one pleading should present more than one cause of action or one defense.[2] This fault was called in law cases duplicity;[3] in chancery, multifariousness.[4] In suits at law, although several causes may be joined in one suit, each cause must have a separate count, and this count must be single.[5] Two causes cannot be joined in one bill in chancery.

The codes eliminate these apt designations and provide for the same thing, viz.: that where two or more actions are joined in one complaint they must be separately stated.[6]

The same principles forbid the uniting in one bill, count or statement a legal and also an equitable cause of action.[7]

It is obvious, then, that under whatever form of procedure the case may be prosecuted, it is essential to its proper presentation in the pleading that the pleader shall be able to distinguish each known cause of action from every other.

It is not to be expected that mathematical exactness can be attained in marking distinctions between classes or causes of action.[8] And so the rule is that, however multifarious the facts may be, if they constitute but one connected transaction or entire cause, they do not violate the rule of singleness.[9]

The classification into legal and equitable actions has been sufficiently discussed.

[1] Here again the utility of definite forms is seen; for, as Prof. Pomeroy fairly admits, "How shall the complainant indicate that he has elected? *Under the old (common-law) system no such question could arise.* The election was disclosed by the form of action itself." Pom. Code Rem., §§ 558, 572.

[2] Andrews' Steph. Pl. 300.

[3] Id.

[4] Merwin's Eq., p. 526; Story, Eq. Pl., § 271; Walker v. Powers, 104 U. S. 245; Davis v. Peabody, 49 N. E. Rep. 750. Multifariousness by reason of improper parties is not here intended. Boyd v. Hoyt, 5 Paige, 65.

[5] Clearwater v. Meredith, 1 Wall. 26; Andrews' Steph. Pl. 302.

[6] Phillips' Code Pl., § 202; Craft's Ref. Co. v. Brewing Co., 63 Conn. 551. And usually it is also required that each statement of a cause must be numbered. Id.

[7] Hunt v. Hollingsworth, 100 U. S. 100; Cherokee Nation v. Railway Co., 135 U. S. 641.

[8] See Craft's Ref. Co. v. Brewing Co., 63 Conn. 551.

[9] Andrews' Steph. Pl. 307. The last above case is in harmony. Phillips' Code Pl., § 31. See Arms Co. v. N. Y. & N. H. Ry. Co., reported *post*, Appendix.

Classification of Equitable Causes of Action.— Having seen that the old and the reformed procedures require, in the administration of remedies, that a separation of causes of action be made, and each cause treated as only one, however many the rules allow to be disposed of in a single suit, it follows logically that equitable as well as legal actions must in practice be classified according to the nature of the cause of action.

The cause of action, says Phillips, is "*a formal statement of the operative facts that give rise*" to the right of action,[1] and these formal statements are very clearly distinguished from each other.[2] And in this matter it is essential to distinguish between the grounds of action, the cause of action, and the transaction in which and out of which these arise.[3]

Classification of equitable actions is attended with more difficulty than is encountered in any other branch of the law.[4] This is because of the peculiar nature of equitable causes; for while one case may consist of facts constituting the elements of a typical action of a certain kind, *e. g.*, accounting, in another case there may be a plurality of subjects, partaking of a different nature, involved in one connected transaction, and allowing the exercise of several different species of remedies, either all at once or successively, as the case progresses. Thus, a single bill in chancery may pray for a discovery, for an injunction to stay the action of the defendant during the progress of the suit,[5] a *ne exeat*, possibly, against his departure from the juris-

[1] Code Pl., § 31.

[2] The practitioner must determine this at his peril. The question is frequently one of jurisdiction, and waiver by the parties will not always cure the defect. The court will raise the question and may dismiss the suit, though the federal courts have in some instances ordered the pleadings reformed and the case redocketed. McConnell v. Prov. Sav. & L. Ass'n, 69 Fed. Rep. 113. Also in Ark. L. R. Gas Co. v. Shall, 59 Ark. 409. So in Massachusetts by statute.

[3] Judge Phillips has rendered the profession a great service by making clearer than ever before the distinctions between the right of action, the transaction out of which it grows, and the cause of action which one may choose to state. Phillips' Code Pl., 31, 202. Judge Prentice, in Arms Co. v. Railway Co., approves of Judge Phillips' treatment, and has added so much to the subject, and distinguished these matters from the *transaction* which gives rise to both the cause of action and the right of action, that I have inserted the report of the case in the Appendix. Mr. Justice Baldwin, in Craft's Ref. Co. v. Brewing Co., notices the origin and meaning of "the transaction," which accord with *ante*, pp. 75, 76. The three discussions add a new chapter to the law of procedure.

[4] See remarks of Prentice, J., in Arms Co. v. Railway Co., Appendix.

[5] State v. Brailsford, 2 Dall. 402.

diction of the court, the reformation of a contract, the accounting of transactions under it, and the specific enforcement of the real agreement, by the making of deeds resulting in a transfer of title; or, as may be readily comprehended, mingling in a multitude of differing circumstances many species of equitable relief, but all growing out of a connected transaction or single general subject.

There will, however, in almost every case be a preponderating subject which constitutes the main cause of action, and to which other subjects are but incidents. The relief is a thing distinct from the cause of action and really no part of it.[1]

Legal actions are classified according to the nature of the cause of action, and these, usually being simple, are generally quite clearly of a definite character.[2]

These observations account for the fact that books upon equity do not furnish as definite and clear an arrangement of the matter treated as is found in many other branches of the law, and, so far as the author's observation has gone, no two authors agree in their analysis and outline.[3]

Classification Based on Distinction Between Causes of Action.— There are at least three points of view from which the subject may be treated, or three grounds of classification, namely: 1. *The heads of equity jurisdiction*, as noticed below. 2. *The character of the relief asked;* and 3. The difference between the nature of the cause of action or subject-matter of the suit.[4]

[1] Arms Co. v. Railway Co., Appendix.

[2] The case of Rich v. N. Y. Cent. & H. R. Ry., 87 N. Y. 382, presents an example of the difficulty which may attend such cases.

[3] Compare Smith's Manual of Equity with Adams', Fonblanque's or Willard's Treatise. Among the more modern works on equity, still less attempt at order is made. Compare Merwin's with Beach's Modern Equity, or Bigelow's Equity.

[4] The usual classification is away from the matter of practical utility. Smith's classification is as follows:

Of the Division of Equity.—"The subject of equity jurisprudence may be conveniently, and perhaps most properly, treated under the following heads, designated according to the more *distinctive characteristics of the relief afforded*, or the *general objects* sought to be effected:

I. Of Remedial Equity, specifically so termed.
II. Of Executive Equity.
III. Of Adjustive Equity.
IV. Of Protective Equity, irrespective of disability.
V. Of Protective Equity, in favor of persons under disability.
VI. Of Auxiliary Equity."

It will be observed that the "gen-

The accompanying outline presents the recognized equitable suits, classified according to the nature of the cause of action.[1]

Sec. 652. *The Subjects of Equity Jurisdiction.— Property Rights.*—Equity acts *in personam* and does not assume to directly adjudicate legal titles;[2] its peculiar province in reference to legal titles being rather to determine the relative rights of several persons differently interested in a single subject, and to frame a decree which will give variant and unequal relief to all the parties as their interests may appear, settling in one suit a dispute which may have many branches, and which may concern a multitude of parties.[3]

Personal Rights.— It is sometimes said that the jurisdiction of a court of equity, unless enlarged by statute, is limited to the protection of property rights.[4] In modern times the jurisdiction is not confined to such narrow limits, but has been extended to the protection of civil rights, and rights strictly personal;[5] and it must be further enlarged by the jurisdiction below referred to as *parens patriæ*. It protects the interests of infants and persons under disability.[6]

Sec. 653. *Heads of Equity Jurisdiction.*— It is common to ascribe to equitable jurisdiction the peculiar cognizance of *accident, fraud, mistake* and *trust.*

As to trusts, because a fiduciary relation exists between persons in reference to a trust of property, the situation is not the subject of an issue for trial in a court of law; and the very relationship itself, being first recognized and made the subject of definite rules by courts of chancery, may be said to be peculiarly a subject of equity jurisdiction;[7] but as to accident, fraud and mistake the same cannot be said.

eral object" sought to be effected is not the same as the subject of the suit, but is another way of expressing the *character of relief* afforded; *i. e.*, the disjunctive "or" does not introduce a new basis of classification, but is another way of putting the one already stated.

[1] *Post*, p. 1073.

[2] Swan Land Co. v. Frank, 148 U. S. 603.

[3] A striking example is Kilburn v. Sunderland, 130 U. S. 505.

[4] In re Sawyer, 124 U. S. 213; Fletcher v. Tuttle, 151 Ill. 41.

[5] See Davenport v. Cloverport, 72 Fed. Rep. 689. The courts are very cautious in assuming the jurisdiction. See Corliss v. Walker Co., 57 Fed. Rep. 434; 31 L. R. A. 283; Chappel v. Stewart, 82 Md. 323; 37 L. R. A. 283.

[6] Aymer v. Roff, 5 Johns. Ch. 49; 1 Lawy. Ed. 538.

[7] Yet even this must not be taken too broadly, because the action for

It is not claimed by writers who divide the subject of equity jurisdiction into these several heads that equity has exclusive jurisdiction, but only that it has a peculiar jurisdiction in reference to these matters. This is confusing the different effects which accident, fraud and mistake will have on a transaction (for it always appears *ex contractu*) in equity from what it has in law. A court of law cannot rescind, cancel or reform contracts. It is this power which is *peculiar*, and not the jurisdiction over these heads.

It is a rule of law as well as of equity that mere accident will not relieve one from his obligations; and it is a rule of law that a loss must lie where it falls unless there is some supervening circumstance which carries the liability back to another.

As to Fraud.—A distinction is made as to the effect of fraud in law and in equity, and that which may constitute the ground of an action for fraud and deceit in law will not always defeat a suit in that court, although quite sufficient to support an action for rescission in a court of equity.[1] It being the *peculiar province* of a court of equity to relieve against unconscionable actions, it is the proper forum in which to bring a suit to set aside a contract which was entered into through accident and which the defendant refuses to cancel, *the ground for the jurisdiction* being the nature of the remedy sought rather than anything in the subject-matter.

Fraud has in equity a broader meaning than at law. It arises

money had and received *to the use* of the plaintiff is based on the fiction of a trust. See the subject of Trust, below.

[1] *Effect of Fraud—Different in Law and Equity* (*ante*, pp. 723, 725).—The distinction between fraud in the consideration and fraud in the execution of the contract must be borne in mind. "The rule is familiar, wherever the distinction between law and equity is preserved, that, in a trial at law, fraud in the execution of a deed may be given in evidence; as that through misreading, or by the substitution of one paper for another, or by other device and trickery, he was induced to seal it, believing at the time that he was sealing something else; but it cannot be proved that the transactions which preceded and induced the execution of the deed were fraudulent. Where a party knowingly and voluntarily signs a deed, although he do so in violation of his duty and of the laws, or be induced thereto by the fraudulent contrivances of others, yet if it be such upon its face as will convey title, it can only be impeached and set aside, and parol evidence be received for that purpose, in a court of equity." Todd v. Mitchell, 67 Ill. 84–88; State v. Jones (Mo.), 33 S. W. Rep. 23; Burrows v. Alter, 7 Mo. 424; George v. Tate, 102 U. S. 564; Windett v. Hurlbut, 115 Ill. 403.

very frequently in connection with fiduciary relations where good faith is required, and *uberrima fides*, the utmost good faith, is exacted; and any falling short comes within the general term "fraud" without regard to real intent. Of this *peculiar fraud* equity has *peculiar cognizance*, and as to such relations the rule is that morality and equity are one and the same, and that it is in these matters that equity is a court of conscience.[1]

Nothing is more common than for the courts of law to entertain an action for damages for fraud and deceit in procuring contracts; but the jurisdiction of the courts stops at the awarding of damages.

A defense of fraud is just as available at law as in equity, but the fraud must be such as shows that there was in law no real mental assent to the contract.

Mistake, in its effect upon contracts, has been discussed in connection with contracts. It is equally a ground of defense in law and in equity, because it shows there was no contract in fact. The same observation in reference to a remedy applies to this head as well as to accident and fraud. Mistake, if unaccompanied with negligence, is equally efficacious as fraud and is ground for relief from all obligations.

Misrepresentation, being similar to fraud, differing from it in the intent with which the false statement is made, falls equally within the principle just mentioned.[2]

Besides these heads, or grounds, of jurisdiction, there are other grounds peculiarly the subject of equity.

Through the *parens patriæ*, by which is meant the care, oversight and fatherly supervision extended to all persons under natural disabilities, lunatics, infants, married women and spendthrifts are the peculiar charge of the court of chancery, which in this respect exercises a jurisdiction somewhat different from pure equity, and takes the place of the personal sovereign. As has been shown, it is the duty of the personal sovereign to

[1] Hovenden v. Lord Annesley, 2 Sch. & Lef. 634; Condit v. Blackwell, 22 N. J. Eq. 481; Michoud v. Girod, 4 How. 552; Turnpike Co. v. Field, 3 Mass. 201; Snodgrass v. Bank, 25 Ala. 161; 60 Am. Dec. 505; Buckner v. Calcote, 28 Miss. 466.

[2] *Inadequacy of the legal remedy* as a ground of equity jurisdiction includes not merely the inaptitude of legal remedies, but poverty or inability to proceed at law. 1 Story, p. 25, n.; Gaines v. New Orleans, 17 Fed. Rep. 16–20; Worthy v. Tate, 44 Ga. 152; Frederick v. Groshon, 30 Md. 436; Clouston v. Sherer, 99 Mass. 209.

furnish protection to all those who are able to exercise volition and to give him their allegiance and support, and also to those, his natural subjects, whom misfortune and Providence have deprived of power and volition. The latter are thus within the supervising care of the government, to which they would owe allegiance were they *sui juris*.

Sec. 654. *Conditions of Relief.*— Nothing can call a court of equity into action but conscience, good faith and reasonable diligence.[1] A court of equity will not enforce a manifestly unconscionable claim, no matter how evidenced, but will leave the parties to their remedy at law. Granting relief by affirmative action is a different thing from an affirmative suit to rescind or cancel a contract.[2]

The maxim is that *he who comes into equity must come with clean hands*. The court is not open to one guilty in any degree of fraud in the transaction involved in the suit.[3]

Diligence.— Laches is neglect of the diligence and oversight of one's affairs which is essential in order to have a right to ask the court to relieve against action which due care would probably have prevented;[4] but the term implies a knowledge of one's rights and a failure to act after such knowledge.[5]

Laches is the negligent omission of ordinary prudence. But where a fiduciary relationship exists between the complaining party and the party complained against, which justifies reliance by the one upon the other, and requires strict good faith (*uberrima fides*) and complete information from the latter, the mere omission of all oversight and diligence by the one entitled to information cannot, under such circumstances, be termed laches.[6]

[1] Hammond v. Hopkins, 143 U. S. 224.

[2] Wadhams v. Gay, 73 Ill. 415; Gay v. Parpart, 106 U. S. 699; Jenkins v. Int. Bank, 111 Ill. 462.

[3] Johns v. Norris, 7 C. E. Green, 102; Pomeroy, Eq. Jur. 397; Brown v. Brown, 66 Conn. 499.

[4] Coffey v. Emigh, 15 Colo. 184; 10 L. R. A. 125, and note; Hammond v. Hopkins, *supra*.

[5] Massey v. Heiskell, 80 Va. 583.

[6] Bank v. Forster, 8 Watts, 12; Vigus v. O'Bannon, 118 Ill. 334; Jackson v. Lynch, 129 Ill. 72; Farwell v. Gt. W. etc. Co., 161 Ill. 522; Halsted v. Grinnan, 152 U. S. 412; McIntire v. Pryor, 173 U. S. 53. In strictness, laches is an equitable defense and depends upon various circumstances. Halsted v. Grinnan, 152 U. S. 412. It has no application between a trustee and a *cestui que trust*, and from the mere fact of delay, because

There is a maxim of equity bearing upon the subject of diligence, viz.: "Equity aids the vigilant, not the slothful."[1] He who sleeps upon his rights is not likely to get relief from courts of chancery.

Limitation, Laches, and Acquiescence.— Laches is frequently spoken of as a defense in equity analogous to acquiescence and limitations. In point of fact, diligence, if not an element of the complainant's cause of action, is an essential ground of his claim for the interposition of a court of equity; and while these subjects may, for convenience of treatment, be grouped, they are essentially different.

Laches is passiveness after knowledge; and where a considerable delay intervenes between the committing of the wrongs complained of and the filing of a bill in chancery, especially where no fiduciary relation is shown,[2] it is an imperative requirement of the federal courts, and a common requirement of the state courts, that the bill should account for this delay.[3]

Sec. 655. *Where Jurisdiction Attaches Equity Will Administer Complete Relief.*— It is a fundamental rule of equity procedure that where the court obtains jurisdiction for any purpose it will, so far as consistent with the preservation of the right of trial by jury, do full and complete justice, even to the extent of awarding damages, entering a personal judgment and directing an execution.[4] Where a transaction warrants the ad-

there is no duty of inquiry and there is a duty of full disclosure. Jackson v. Lynch, 129 Ill. 72–84; 2 Story, Eq., sec. 1520; Perry on Trusts (2d ed.), 850; 1 Pom. Eq. Jur., sec. 418, note 1, p. 460. Time is not so important as the circumstances. McIntire v. Pryor, 173 U. S. 38.

[1] *Vigilantibus, non dormientibus æquitas subvenit.*

[2] See above, § 653.

Limitation.— A person standing in a fiduciary relation is not allowed to set up the statute of limitation to a charge of fraud. Hovenden v. Annesley, 2 Sch. & Lef. 634; Turnpike Co. v. Field, 3 Mass. 201; Snodgrass v. Bank, 25 Ala. 161; Farwell v. Gt. W. T. Co., 161 Ill. 595.

Laches may bar in equity in less time than would outlaw the case at law. Pom. Eq. Jur. 917.

Acquiescence is affirmative and is only shown by proof of conduct indicating an intention to confirm a transaction. Hoffman v. Cumberland C. Co., 16 Md. 456; G., C. & S. Ry. Co. v. Kelly, 77 Ill. 426; Badger v. Badger, 2 Wall. 90.

[3] Bailey v. Glover, 21 Wall. 342; Rosenthal v. Walker, 111 U. S. 190; Henry Co. v. Drainage Dist., 52 Ill. 299.

[4] It has power to adjudicate the rights as they exist at the time of the decree. Loaby v. Redmond, 66 Conn. 444. A recent case in Virginia shows the tendency to ignore the an-

ministration of equitable relief of any character, the court will determine all issues involved, determine legal rights and grant legal remedies, which would, but for the equitable circumstances, be beyond the power of the court to grant. The justification of the jurisdiction is in the equitable circumstances; the justification of the broad exercise of power is the prevention of a multiplicity of suits.[1]

Sec. 656. *Jurisdiction, how Contested.*—In cases where courts of law and equity have concurrent jurisdiction, while the court in its discretion may, *ex mero motu*, at the hearing dismiss a bill, because it is not properly within the jurisdiction of equity courts according to the ordinary rules guiding such courts, yet, if the defendant submits to the jurisdiction and does not raise the objection by demurrer, he cannot insist upon the impropriety of the exercise of the jurisdiction.[2]

In order to allow a defendant to take advantage of a defective jurisdiction after it has been exercised, the defect must be one which shows the court wholly incompetent to grant the relief sought by the bill.[3] If, however, the case is one wholly beyond the jurisdiction, no laches of the defendant can avail to confer jurisdiction, and he may raise the point at any stage, or the court will dismiss the suit of its own motion.[4]

cient formulas which bound courts of chancery. In the case mentioned the court entered a personal decree for the purchase-money of land precisely as a court of law would award damages, ordered the land sold, and directed that execution be withheld until after the sale. The editor of the Virginia Law Register points out the apparent departure from the ancient rules of procedure and that the case really rests upon no exact precedent. Being an extreme case, it serves not only to illustrate the principle involved, but also shows the tendency of courts of equity to take short cuts to justice irrespective of precedent. The case is Fayette Land Co. v. L. & N. Ry. Co., 93 Va. Sup. Ct. of Appeals, 274 (1896), 2 Va. Law Reg. 357. So in Michigan it has recently been held that where in a suit for accounting in regard to partnership property, it appears that there is no property, but that the complainant is entitled to a personal judgment, the chancery court gave such a judgment. McLean v. McLean, 109 Mich. 258. See Smith v. Brittenham, 109 Ill. 540.

[1] Keith v. Henkleman, 173 Ill. 137; Wells v. Yates, 44 N. Y. 525; 1 Pom. Eq. Jur., § 181. This is a well-settled rule common to code and common-law states. Tunesma v. Schuttler, 114 Ill. 156.

[2] Seymour v. Long Dock Co., 20 N. J. Eq. 396; Kilbourn v. Sunderland, 130 U. S. 505.

[3] Seymour v. Long Dock Co., 20 N. J. Eq. 396; Grandin v. Le Roy, 2 Paige's Ch. 508; 2 Lawy. Ed. 1009.

[4] Hipp v. Babin, 19 How. 271; Bowen v. Johnson, 12 Ga. 9.

It sometimes happens that a defendant who is sued at law is desirous of having the case tried in a court of equity. If the case is one which is properly cognizable either in law or in equity, and the suit has been begun at law, a court of equity will only interfere when the bill makes a plain case of such a character, showing the inadaptability of a court of law to properly hear and determine the case.

There are many cases in which a court of equity will entertain jurisdiction in matters of account in the first instance, where, if the suit had proceeded at law, the same court would not withdraw the matter from legal jurisdiction by injunction.[1]

Sec. 657. *The Forms of Equitable Actions.*— Suits in equity having a similarity of nature and object may be separated into several species; and some of these will present several distinct kinds of bills so well known as to have definite forms to fit them, varying somewhat, of course, to suit the circumstances of each case, but yet sufficient to constitute a useful guide in drawing the complaint. The knowledge of the distinction between these various classes and the elements of each individual action is indispensable to the successful practitioner. Codes do not dispense with the utility of carefully prepared forms of pleading suited to the nature of particular cases.[2]

Much of the mystery which surrounds chancery practice and which causes the young practitioner to dread to enter the portals of equity unattended is due to the lack of a clear understanding of the practice. The best service which can be done him is to remove the veil of mystery which envelops this subject.

There are at least sixteen species of suits, differing essentially in the subject-matter of the cause of action. Without attempting to treat these in detail, the distinctive features of each may be pointed out in such a way as to distinguish them from each other and from similar actions at law.

[1] Crane v. Ely, 37 N. J. Eq. 564.

[2] Judge Maxwell, in his Code Pleading, gives four hundred and sixty-six forms of petition complaint. Each of these is, of course, different from the rest. He gives one hundred and twenty-six forms of answer. Boone on Code Pleading has six hundred and four forms; while the book of forms and precedents in pleading under the code by the late Austin Abbott now makes three large volumes.

FORMS OF ACTION IN EQUITY.

1. Suits to collect money.
   - Accounting.
     - Between persons in fiduciary relationship.
     - Against persons under legal obligation to account.
     - Rents and profits.
   - Creditors' suits.
   - Bills to foreclose mortgages.
   - Bills to enforce contribution and subrogation.
2. Suits relating to enforcement of contracts.
   - Specific performance.
   - Injunction.
     - Against breach of personal contract.
     - Against breach of contracts and covenants in deeds.
3. Suits to relieve from obligations.
   - Of contracts.
     - Rescission.
     - Cancellation.
     - Reformation.
   - Of judgments.
     - Correcting.
     - Setting aside.
     - Enjoining collection.
     - Bill of review.
   - Dissolution of marriage.
   - Divorce.
   - Separate maintenance.
4. Bills *quia timet;* suits providing for future contingencies and protecting executory interests.
   - Bills to remove clouds.
   - Interpleader.
   - Bill of peace.
   - Against waste.
5. Bills relating to trusts.
   - Pure trusts.
   - Arising from fiduciary relationship.
   - Tracing trust funds.
   - Charities.
6. Suits relating to wills.
   - To set aside.
   - To establish.
   - To construe.
   - To permit elections under.
7. Administration of estates.
8. Bills relating to dower and curtesy.
9. Dissolution of partnership.
10. Suits to restrain collection of taxes.
11. Bills of revivor.
12. Bills to prevent torts.
    - Enjoining nuisance.
    - Preventing trespass.
    - Publication of libel.
    - Strikes and boycotts.
13. Bills to establish and enforce liens.
    - Bailees.
    - Mechanics.
    - Vendors.
14. Bills to protect personal rights.
    - Privacy.
    - Infants and *non compos* persons.
15. Bills to partition land.
16. Bills of discovery.

Suits to collect money are very common on the law side of the courts, but these are, except in the action of account, always based on a state of facts showing an indebtedness and a promise to pay, and all proceed on the idea of recovering damages for breach of the promise to pay.

No Suit in Equity Ever Proceeds on the Theory of Directly Awarding Damages.— In all these it will be observed that,

though the end sought is the collection of the money, there is intervening between the right to have the money and the collection of it the real cause of action; for example, in accounting, the obligation to account; in creditors' bills, the removal of fraudulent conveyances or liens; in foreclosure, the lien of the mortgage giving the right to sell; in bills to enforce contribution and subrogation, where proper, the obligation to contribute; and in bills for rents and profits, the obligation to account therefor.[1] So that in all cases *the equity* is not the obligation to pay, but conduct or a relation, *which is more* than the mere relation of debtor and creditor. In many cases there is a convenient remedy both in law and in equity.[2]

The Suit for Accounting.[3]—The theory of the action of account, whether legal or equitable, is based upon either an express agreement to account, or a positive obligation to that effect, or upon the assumption that the several demands involved are in some manner so connected with each other, either by contract or by a course of dealing, that the only thing which either party contemplated and can equitably claim is the balance due. In such a case neither party could equitably sue for the whole account, but should first demand an accounting [4] and claim the balance,—and both legal and equitable tribunals will enforce this obligation.[5]

There are cases which seem to be anomalous, where an accounting will be taken in equity, seemingly based upon the complication of the account; but generally these are cases of mutual dealing, or of fiduciary relations; or there is some other ground for equitable jurisdiction than mere complexity.

If the relation of debtor and creditor in fact exists, the old action of account would not lie, nor will the modern suit in

[1] Gaines v. New Orleans, 17 Fed. Rep. 16.

[2] "It is true that the common law gave in certain cases an action of account in which the judgment was *quod computet*, and thereupon an account was to be made between the parties. But this antiquated action at common law has been supplanted by the more beneficial powers of a court of equity, whereby not only production of books and an account can be compelled, but also answer on oath can be required and a decree had for the sum due from the defendant." Neal v. Keel's Ex'rs, 5 T. B. Mon. 163.

[3] See Andrews' Steph. Pl., pp. 78, 79.

[4] Torry v. Bryant, 16 Pick. 528; Edmonston v. Hartshorn, 19 N. Y. 9.

[5] Wilson v. Mallett, 4 Sandf. 112. See also Eldridge v. Smith, 144 Mass. 35.

equity lie, because the very purpose of the action of account and of the suit for accounting is to ascertain which party is indebted, and to fix the amount.[1]

Against Whom the Action Lies.— The common-law action of account was an appropriate action against any defendant under legal obligation to account to the plaintiff. It lay against a guardian[2] in socage, a bailiff, a receiver, or between two merchants, tenants in common,[3] or partners.[4] It was originally confined in its scope as to parties, strictly to suits between the parties interested in the transaction, and would not lie at the suit of representatives or others beneficially interested;[5] but at the same time, before the statutes mentioned below, *a suit in equity* would lie against representatives.[6] It did not formerly lie in partnership cases where there are more than two partners.[7]

The object of the suit was to compel the delinquent party to account.[8]

Basis of the Obligation to Account.— Prof. Langdell is of the opinion that the obligation to render an account is not founded upon contract.[9] This seems, however, to be but a difference in the manner of expression rather than in substance. While the obligation to render an account is not necessarily founded upon an express contract, the implied contract may rest upon the duty to account growing out of the circumstances of the case.

[1] In this sense the expression that an action of account at law or in equity is between debtor and creditor is erroneous, and especially misleading to a student, because it tends to obliterate the distinctions between the subject-matter of the legal actions of *assumpsit* and debt, the suits called creditors' bills and the suit for accounting, properly so called. Of a like confusing tendency is the attempt of Professor Langdell to introduce a new nomenclature and a new species of suit which he calls *bills of equitable assumpsit.* Harvard Law Review, 237.

[2] Blk. Com. 461–464; Bertine v. Varian, 1 Ed. Ch. 343; 6 Lawy. Ed. 165.

[3] Park v. McGowen, 64 Vt. 173; Duncan v. Lyon, 3 Johns. Ch. 351. See note to this case, 6 Lawy. Ed. 645.

[4] Both at common law and by statute an action of account may be prosecuted between partners. The remedy by bill in equity is nothing more than a concurrent remedy. Atwater v. Fowler, 1 Edw. Ch. 417; 6 Lawy. Ed. 193; Southgate v. Montgomery, 1 Paige Ch. 41; 2 Lawy. Ed. 554.

[5] 3 Cooley's Blk. (3d ed.) 163.

[6] Fonblanque's Eq., Bk. 2, ch. 7, § 6; Willard, Eq. Jur. *85.

[7] Park v. McGowen, 64 Vt. 173. *Cf.* McMurray v. Rawson, 3 Hill. 59.

[8] Bracken v. Kennedy, 3 Scam. 558; Haynes' Outline of Equity, 231; Duncan v. Lyon, 3 Johns. Ch. 351.

[9] Harvard Law Review, vol. 2, p. 243.

The better opinion is that the action, except when statutory, is based upon a contract, and that a relation of privity is strictly regarded,[1] so much so that formerly the action would not lie against representatives, but only against bailiffs, receivers and guardians in socage, all of which stood, if not in the situation of trustees, at least in a *quasi*-fiduciary relation to the beneficial owner of the property in their hands.[2]

The reason why the common-law action of account was allowed between merchants was an arbitrary one for the encouragement of trade, and was based upon the assumption that their mutual course of dealing contemplated the rendering of accounts and the payment of balances only.[3]

Creditors' Bills.— Creditors' bills, as the name implies, are suits by creditors. They are but a means of subjecting a defendant's property to the payment of his debts, where the ordinary processes will not reach it.[4] The natural inquiry arises, Why does equity take jurisdiction? Ordinarily equity will not take jurisdiction until the relation of debtor and creditor is established by a judgment, since that would be to try a legal

[1] Monk v. Harper, 3 Edw. Ch. 109; S. C., 6 Lawy. Ed. 590. In a note to this case in the Lawyers' Edition it is said: Where the claim does not arise *ex contractu*, and sounds wholly in damages, asking no discovery or injunction, equity will not have jurisdiction. Citing Planters' Ass'n v. Hanes, 52 Miss. 474; Teft v. Stewart, 31 Mich. 372. See also Fonblanque's Eq., Bk. 2, ch. 7, § 6.

[2] Mr. Chief Justice Shaw, in Whitwell v. Willard, 1 Metc. 216, says: "Primarily, the idea of account, *computatio*, whether we look to the proceedings of courts of law or equity, is the same matter of debt and credit between the parties. It implies that one is responsible to another for moneys or some other things, either upon the score of contracts or of some fiduciary relation."

[3] McMurray v. Rawson, 3 Hill, 59; Haynes' Outline of Equity, 230; Wilson v. Mallett, 4 Sandf. 112; Rensselaer Glass Factory v. Reid, 5 Cow. 587; Nelson v. Commissioners, 105 Ind. 287; Watson v. Penn, 108 Ind. 25.

[4] Boyd v. Hoyt, 5 Paige Ch. 65; S. C., 3 Lawy. Ed. 631.

Creditors' Bills Against Stockholders.— There are suits called creditors' bills, which seek to look beyond the real debtor, which is a corporation, and to reach those stockholders who are equitably liable to pay, but between whom and the creditor there is no privity. These suits may rest on statutes; but, independent of statutes, stockholders who are indebted to the corporation, or have obtained the funds of the corporation in fraud of the rights of creditors, may be reached by a suit similar in nature to a creditor's bill. These suits, however, must be distinguished from a pure creditor's bill, where a corporation is a party; and from a bill to wind up a corporation, which is statutory. See Swan L. & C. Co. v. Frank, 148 U. S. 603; Hollins v. Brierfield Coal Co., 150 U. S. 371.

right.[1] It must ordinarily be shown that the legal remedy is exhausted by a *bona fide* effort to collect the judgment, or that the effort will be unavailing.[2] Creditors' bills are brought to remove an obstacle, which has been created by fraud, to the enforcement of the complainant's rights by ordinary legal process.[3]

By this equitable proceeding, every species of property of a debtor, including debts, choses in action and equitable rights, may be reached.[4]

All creditors in like situation may become parties to the bill.[5]

Foreclosure Suits.— When mortgages came to be recognized merely as securities the equity courts were active to prevent forfeitures.[6] All sales were liable to be opened by equity and a right to redeem granted the debtor.[7] It followed naturally that the safest course for all parties was a bill to foreclose the equity of redemption;[8] that is, to order that the property be sold and the debt paid, the debtor to redeem within a fixed

[1] N. Y. Ice Co. v. N. W. Ins. Co., 23 N. Y. 360; Riverside Iron Works v. Judges, 100 Mich. 124; Scheubert v. Honel, 152 Ill. 315.

[2] So if execution is returned by order of plaintiff, it will not be sufficient. Scheubert v. Honel, *supra;* Hollins v. Coal Co., 150 U. S. 371. *But the judgment and fruitless execution are only evidence that his legal remedies have been exhausted,* or that he is without remedy at law. Where it appears that a judgment would be unavailing and the obtaining of it a useless thing, it is not required. Case v. Beauregard, 101 U. S. 688; Nat. Tube Works v. Ballou, 146 U. S. 517. Mere absconding from the state will not sanction a creditor's bill. Austin v. Bruner, 65 Ill. App. 301.

[3] Wehrman v. Conklin, 155 U. S. 328. This case combines the elements of a creditor's bill and a bill *quia timet* to remove a cloud.

[4] Edmeston v. Lyde, 1 Paige, 637.

[5] Myers v. Fenn, 5 Wall. 205. "The fundamental principle upon which bills of this kind are maintained is equality of benefit and burden among a numerous class of persons similarly situated in respect to a particular fund. The principle that *equality* is *equity* has its foundations deeply laid in equity law, and is one of the most fruitful sources of equity jurisdiction." Tunesma v. Schuttler, 114 Ill. 165.

[6] Barrett v. Hinckley, 124 Ill. 32. A power of sale without suit does not prevent a foreclosure in equity. Martin v. Ward, 60 Ark. 510.

[7] Where the transaction takes the form of an absolute sale, the form of action to prevent a forfeiture is a bill by the mortgagor to redeem. Eames v. Hardin, 111 Ill. 635. And where the day of payment in a formal mortgage passes, and the mortgagee does not bring suit, the only way to clear the title is by a bill to redeem. Merwin, Eq., §§ 93, 677; Barrett v. Hinckley, 124 Ill. 32.

[8] 2 Cooley's Blk. (4th ed.) 159, note; Adams, Eq. 113; Merwin, Eq., § 678.

time or to be forever barred.[1] A strict foreclosure is one giving a fixed time to pay, in default of which a sale without redemption is allowed.[2]

Contribution and subrogation are rights similar in nature, but different in form, and sometimes both appear in a single transaction. Where two are liable and one pays the whole, the latter may have an action at law for the *pro rata* share; and if securities are held by one, equity will take jurisdiction to apply them to the benefit of all.[3] Subrogation, on the other hand, is where one, being under a secondary obligation by contract,[4] as, for example, a surety, pays the debt; here he is entitled to stand in the shoes of the creditor, and equity will prevent the canceling of securities by the creditor.[5] Again, where several are so interested in property that one, in order to protect himself, must pay another's debt, he is entitled to be subrogated to the right of the creditor paid.[6] This doctrine comes from the civil law, and the first class of subrogation is called conventional, the latter legal, subrogation.[7]

Suits to enforce contracts by specific performance are only cognizable in courts of equity, and are there entertained only in special cases, where the thing stipulated to be done, when it relates to property rights, is certain, and requires merely a simple act of conveyance to complete it.[8] Where an action of damages is not adequate to do complete justice,[9] and

[1] The mortgaging of railroads and foreclosure of these mortgages gives rise to rules and procedure peculiar to this class of foreclosure. See Railway Co. v. Fosdick, 100 U. S. 68.

[2] 2 Cooley's Blk. (4th ed.) 159, note.

[3] See index, Contribution. Courts will not enforce contribution between wrong-doers who are *in pari delicto* (in equal fault). Selz v. Unna, 6 Wall. 336; Lowell v. B. & L. Ry. Co., 23 Pick. 24.

[4] An insurance company which has paid a loss has a right to enjoin the settlement of a suit by the insured against a person wrongfully causing the loss, and to compel their right of subrogation. Pennell v. Hartford Ins. Co., 2 Ill. App. 609.

[5] Kratz v. Mousinger, 110 Ill. 372. See Principal and Surety. Equity requires that all securities shall be kept alive and marshaled, *i. e.*, assembled for the benefit of a person in any way liable on or postponed by them. Ocobock v. Baker, 52 Nev. 447; 66 Am. St. Rep. 519.

[6] Barnes v. Carnack, 1 Barb. 396; Hayes v. Ward, 4 John. Ch. 123; note in Lawy. Ed., vol. 1, p. 786; Home Sav. Bank v. Bierstadt, 168 Ill. 618; 61 Am. St. Rep. 146, note.

[7] Home Sav. Bank v. Bierstadt, *supra.*

[8] It is seldom that a contract other than one relating to land will be specifically enforced. Clark v. White, 12 Pet. 178.

[9] Penn v. Lord Baltimore, 1 Ves. 441, a suit to compel the execution of

the thing stipulated to be done requires the personal talent of the promisor,[1] the remedy is by injunction against breach in the first case and by an order to perform. In both the jurisdiction is purely *in personam*, and the locality of the property to be affected, or the place of performance, is immaterial, provided the jurisdiction of the person is within the court.[2]

Suits to Relieve from Obligations, Contracts and Conveyances.—The nature of the suits enumerated under this head is easily understood by any one who has read in former pages of the book the treatment of the subjects involved. The jurisdiction of the court is clearly proper because of the inability of a court of law to act. A court of law may refuse to enforce when a contract is wanting in elemental facts or is procured by fraud;[3] but it cannot act affirmatively to relieve by rescission, cancellation or reformation.

Where the document is a conveyance of land the jurisdiction depends on the fraud in procuration, but the court having taken cognizance of the case for one purpose will execute the decree by making the reconveyance, and will put the party in possession. Hence such suits are sometimes called equitable ejectment.[4]

The jurisdiction in divorce is the result of uniform practice from the earliest time since the spiritual courts yielded up their jurisdiction to the chancery.

Suits to Reform or Cancel Obligations.—As was pointed out in connection with the subject of contracts, one can only become bound by his real consent, and any apparent obligation procured by fraud or executed by mistake will not bind. To relieve against these by rescission, cancellation or reformation is the peculiar province of equity.[5] *A judgment* is an obliga-

deeds relating to the boundary of land in America.

[1] Lumley v. Wagner, 1 De G. & M. 604; Merwin, Eq., § 771. The chancellor said in De Rivafinoli v. Corsetti, 4 Paige Ch. 262, that it was well settled that a bird that could sing, but would not, should be made to sing. See note to this case, 3 Lawy. Ed., N. Y. Ch., p. 429. The restrictive covenants in deeds may be enforced by injunction.

[2] Massie v. Watts, 6 Cranch, 148.

[3] But the law courts do not generally rescind except where the fraud relates to the execution and renders the contract void. Windett v. Hurlbut, 115 Ill. 403; Todd v. Mitchell, 67 Ill. App. 84.

[4] Boone v. Chiles, 10 Pet. 177; Smith v. Brittenham, 109 Ill. 540.

[5] Hearne v. Marine Ins. Co., 20 Wall. 490. The nature of the document which stands in the way of a legal

tion of record, but is always procured by one party against the other. Consent judgments are in fact but contracts, because the court is not called on to exercise deliberation.[1] A judgment in a litigated case may be procured by fraud, or may be larger or smaller than is just by reason of mistake. A default decision or *pro confesso* decree may have been procured by the fraud of the plaintiff in misleading the defendant, or without giving him notice.[2]

The principles applicable to the one extend to the other; fraud and mistake are grounds for relieving against all these. It was at one time argued that chancery could not interfere with judgments of other courts, but that is answered by the rule that the order of the court of chancery operates against the person and not the judgment, compelling him to release or enjoining its collection.[3]

Bills of review differ from original bills to set aside judgments for fraud in this: that the former are in the nature of a petition for a new trial or rehearing for newly-discovered evidence, and the filing of such bills is permitted or disallowed in the sound discretion of the court, while the latter are original bills for relief, and may be filed as of right.[4] A bill may combine both grounds of suit.[5]

right is quite immaterial. Where a mortgage was canceled and a new one taken in its stead, in the mistaken belief that there was no other lien, when in fact there was an intervening mortgage of record, it will be reinstated, where such reinstatement will place all parties *in statu quo*, though the mistake could have been avoided by greater vigilance. McKenzie v. McKenzie, 52 Vt. 271; Bruse v. Nelson, 35 Iowa, 157; Association v. Thompson, 32 N. J. Eq. 133.

[1] Jenkins v. Robinson, 1 H. L. Cas. 117; Edgerton v. Muse, 2 Hill (S. C.), 51; Farwell v. Great W. Tel. Co., 161 Ill. at p. 600; Wadhams v. Gay, 73 Ill. 415.

[2] Any fact which shows it to be against conscience to execute a judgment is ground for relief. Marshall v. Holmes, 141 U. S. 589. A judgment may be opened because of perjury of the plaintiff, or perjury procured by him. Meyers v. Smith, 8 N. W. Rep. 273. And a decree in chancery procured on a perjured answer may be opened. Grover v. Faurot, 76 Fed. Rep. 257; Munro v. Callahan, 55 Neb. 75; Meyers v. Smith, 80 N. W. Rep. 273; Adamski v. Wieczorek, 170 Ill. 374.

[3] Id.; Wadhams v. Gay, 73 Ill. 415. The court is not acting as a court of review, and it follows that the proceeding may be in any court where jurisdiction of the parties may be obtained. Davenport v. Moore, 74 Fed. Rep. 945; Remer v. Mackay, 35 Fed. Rep. 86.

[4] Adamski v. Wieczorcek, 170 Ill. 373; Hancock v. Hutchinson, 76 Va.

[5] Manufacturing Co. v. Lindblom, 68 Ill. App. 539.

Suits to Provide Against Future Contingencies and to Protect Executory Interest.— This is one of the most interesting phases of equity jurisdiction.

Bills to remove clouds on the title of land, or bills to quiet title, are allowed where one is in possession of land and another has an apparent muniment of title to it, which casts a suspicion upon the title of the one in possession and threatens his quiet enjoyment of his property.[1] The only legal actions to try title afforded by the common law were as to suits brought by persons out of possession. Consequently, for one in possession, the only way to settle a title, and to clear it, was by a bill *quia timet*,[2] as it was called, to remove a cloud.

"The general principles of equity jurisprudence as administered both in this country and in England permit bills to quiet title to be filed only by a party in possession against a defendant who has been seeking to establish the legal title by repeated actions for ejectment, and, as a prerequisite to such bill, it was formerly necessary that the title of the plaintiff should have been established by at least one successful trial at law."[3]

"At common law a party might, by successive fictitious demises, bring as many actions of ejectment as he chose, and a bill to quiet title was only permitted for the purpose of preventing the party in possession being annoyed by repeated and vexatious actions. The jurisdiction was in fact only another exercise of the familiar power of a court of equity to prevent a multiplicity of suits by bills of peace."[4]

The bill states the title of the possessor, the pretended or fraudulent title of the defendant, and prays that it be removed.

Equity cannot affect legal titles is one of the maxims of the court[5] which is most apt to confuse one who sees, perhaps, a

609. To obtain new trial in equity on ground of newly-discovered evidence, complaint must show evidence was not discovered in time to have been used in legal action. Snider v. Rinehart, 20 Colo. 448.

[1] Wehrman v. Conklin, 155 U. S. 314; Hart v. Sansom, 110 U. S. 151; Bracken v. Preston, 1 Pin. (Wis.) 584; Johnson v. Gibson, 116 Ill. 301.

[2] 1 Story, Eq. Jur., sec. 701; Willard, Eq., p. 328.

[3] Pom. Eq. Jur., secs. 253, 1394, 1396. It lies by one having an equitable title. Tuffree v. Polhemus, 108 Cal. 670.

[4] Wehrman v. Conklin, 155 U. S. 314. "A statement of the underlying principles of such bills is found in the opinion of the court in Holland v. Challen, 110 U. S. 15, 19."

[5] Penn v. Ld. Baltimore, 1 Ves. 444; 2 Ld. Cas. Eq. Specific performance of agreement relating to bound-

warranty deed removed as a cloud; and how, then, can it be said equity does not deal with the title?[1]

Equity acts in personam is the great maxim or rule which not only designates the jurisdiction, but controls the remedy.

The jurisdiction of the person, then, is the all-essential thing; the locality of the land is immaterial.[2]

The decree compels the defendant to convey on penalty of contempt, or in modern times the court has made the remedy complete by making the conveyance in his name if he refuses.[3]

Equity will not directly decree the title from one to another by a direct decree.[4]

Interpleader, Bill of.— It frequently happens that one has in his possession, as debtor or custodian, money or property in which two or more have an apparent interest and which they claim, but where the situation is such that it is unsafe for the debtor or custodian to decide which is the proper party to have the money or property. In such cases equity will entertain a bill of interpleader to prevent either from suing him until the legal rights are adjudicated either in the law courts or in equity.[5]

In such a case the custodian should be indifferent in his interest or desire as to who should secure the fund.[6] He should collude with neither.[7] The matter must be one fairly open to dispute, but it is not necessary that he wait till he is sued.[8]

The peril of decision and the avoidance of vexation are the grounds of jurisdiction.[9]

ary of land in Pennsylvania. Pike v. Hoare, 2 Eden, 182. Bill to try validity of a will devising land in Pennsylvania. Massie v. Watts, 6 Cranch, 148; Gardner v. Ogden, 22 N. Y. 332; Wilhelm's Appeal, 79 Pa. St. 120.

[1] Davis v. Headley, 22 N. J. Eq. 115; Akin v. Lloyd, 100 Ill. 19; Cooley v. Scarlett, 38 Ill. 319; Remer v. Mackay, 35 Fed. Rep. 86.

[2] Binney's Case, 2 Bland Ch. 145; Enos v. Hunter, 4 Gilm. 215.

[3] White v. White, 7 Gill & J. 210.

[4] Cooley v. Scarlett, 38 Ill. 319; Hart v. Sansom, 110 U. S. 151.

[5] State of Georgia v. Brailsford, 2 Dall. 402; S. C., Id. 415; Richards v. Salter, 6 John. Ch. 445. The court may adjudicate the rights of the defendants. Id.; Story, Eq. Pl., § 291; McClintock v. Helberg, 168 Ill. 384. An essential ancillary process in the suit is injunction against other suits by the claimant.

[6] Haggart v. Cutts, 1 Cr. & Phil. 204; Cogswell v. Armstrong, 77 Ill. 139.

[7] Richards v. Salter, *supra.*

[8] Id.; Spring v. Insurance Co., 8 Wheat. 268.

[9] Id. The difference between a strict bill of interpleader and one in the nature of such a bill lies in the

Bills of peace proceed upon the idea of preventing a multiplicity of future suits where there are many parties who might have joined, but who were not obliged to and did not join in a suit which has already been heard. The bill in effect makes them parties and enjoins all further proceedings.[1]

Injunction against waste is by the owner of the remainder or reversion to prevent spoliation by the owner in possession.[2]

Bills to perpetuate testimony are very uncommon, but are not obsolete. The idea of such suits is to preserve evidence for a contingency which will in all probability arise, but concerning which no present suit can be brought. Thus, a remainderman may perceive the necessity of evidence which can only be used in the future.[3] Statutes regulating the preservation exist in some states, but in the absence of these equity will give relief.

Trusts.— It is uniformly held that pure trusts are not cognizable by the courts of law. They are, as we have seen, the creatures of the court of equity, and only these courts have the power to establish, control and direct same. The relation between the beneficiary and the trustee is an equitable relation, and for this reason courts of law have no jurisdiction.

The trusts here contemplated as within the peculiar jurisdiction of equity are the active continuing trusts,[4] and not the casual trusteeship which arises as to a particular matter or thing in the course of trade or commerce. The latter are cognizable in equity, but are not the direct object of the transaction out of which they arise.[5]

Tracing Trust Funds.— The rule of equity that a fund or property once impressed with the character of trust property

interest of the complainant. Newhall v. Kastens, 70 Ill. 156; 2 Story, Eq. Jur., § 824. And the only effect is on the costs, which in a strict bill should never be taxed against the complainant, but in the other case are within the discretion of the court. Groves v. Santell, 66 Fed. Rep. 179.

[1] Eldridge v. Hill, 2 John. 282; Alexander v. Pendleton, 8 Cranch, 468; Wehrman v. Conklin, 155 U. S. 314.

[2] See Real Property.

[3] Smith, Man. Eq. 486; 2 Story, Eq., §§ 1505–13.

[4] Sturt v. Mellish, 2 Atk. 610; Kane v. Bloodgood, 7 Johns. Ch. 97. A court of equity has jurisdiction of an action which, in addition to a recovery of money, seeks to establish a trust in favor of plaintiff and to obtain a sale of the property. Townsend v. Vanderwerker, 160 U. S. 171.

[5] A pure trust is created "where property is conferred upon and accepted by one person on terms of holding, using or disposing of it for the benefit of another. Per Owen, C. J., in Mannix v. Purcell, 46 Ohio St. 102; 15 Am. St. Rep. 562." Cannon v. White, 125 Ill. 412.

will be so regarded and followed through all its mutations,[1] extends its operation to every character of trust, and as between the parties occupying the relation is given the fullest operation. As between third persons purchasing the property, or creditors of an insolvent trustee, the identity of the property is important. It has generally been held that it is essential to establish the identity in order to save it to the owner; and that unless this can be done, he can only be allowed the rights of a creditor.[2]

Public charities, being in the nature of trusts requiring the continuing exercise of supervision, control and direction, is a matter entirely foreign to the common-law courts and has always been the peculiar subject of equity jurisdiction.

Wills — Construction and Contesting.— The probate of wills is not primarily the subject of equity jurisdiction, but is quite generally committed to a court of probate. It has been held quite uniformly that there was at common law no jurisdiction in equity to contest a will for fraud or undue influence.[3] These decisions declare that chancery had no jurisdiction, but the fact is to the contrary; equity did exercise such a jurisdiction on such ground,[4] directing the issue, whether there was a will (*devisavit vel non*), to be tried by a jury in a law court, and, unlike other cases, the verdict of a jury is not merely advisory,

[1] Ind., I. & I. Ry. Co. v. Swannell, 157 Ill. 616.

[2] Cook v. Tullis, 18 Wall. 332; Calvin v. Gleason, 105 N. Y. 256. The cases on this subject are numerous. A citation of the extreme ones will afford access to the whole line. Oil Co. v. Hawkins, 74 Fed. Rep. 395; 20 C. C. A. 368, criticised in Met. Bank v. Campbell Co., 77 Fed. Rep. 705; Bank v. Hammel, 14 Colo. 259; Van Allen v. American Nat. Bank, 52 N. Y. 1. The doctrine that the identical money or thing must be ascertained, even though the mass in the hands of the trustee is much larger, is under present conditions harsh, technical and inequitable, and the tendency is to give the *cestui que trust* a preference over general creditors. See note sub., State v. Foster, 5 Wyo. 199; 63 Am. St. Rep. 47; Springfield Int. v. Copeland, 160 Mass. 380; Myers v. Bond, 51 Kan. 87; 37 Am. St. Rep. 263. In the case of funds collected, the question is affected by the custom to mingle the fund, or by directions which, in effect, negative that right. See Morse on Banks, sec. 567; Wallace v. Stone (Mich., 1895), citation and dissent.

[3] The opinion is based on Kerrich v. Bransby, 3 Bro. P. C. 358 (1727); Gaines v. Fuentes, 92 U. S. 10; Broderick's Will, 21 Wall. 503; Spaulding v. White, 173 Ill. 127.

[4] Webb v. Claverdam, 2 Atk. 424; Powys v. Andrews, 2 Bro. P. C. 476; Boyse v. Rossburgh, 3 De G., M. & G. 817; Haynes' Outline Eq., p. 189; Colton v. Ross, 2 Paige, Ch. 396; Spence, Eq. Jur. treats it as the obsolete jurisdiction of chancery. Vol. 1, p. 701.

but final.[1] So it can hardly be said that modern statutes have given equity *power to try* the validity of a will or have changed the ancient law. Chancery will not take jurisdiction to construe a will for future guidance of parties, except in so far as trustees may require the oversight of chancery in the present execution of their trust.[2]

Suits relating to torts and crimes, as such, are not within the jurisdiction of equity to prevent or punish.[3] But this subject will illustrate the flexibility of the jurisdiction of this branch of remedial justice. Peculiar circumstances of such a nature as to overshadow the form which the impending injury is taking often impels the court to act.

Abatement of nuisances,[4] both at the suit of private persons and public officials, is a well recognized class of equitable suits. The remedy is by injunction and an order of removal.[5]

The remedy does not prevent a private action for damages or a criminal prosecution. The grounds of the jurisdiction are the inadequacy of any remedy by way of mere damages and the necessity for speedy reparation.[6]

Trespasses.— The court of equity will not ordinarily interfere to enjoin a trespass to property, but will leave the party to his action at law; but there may be circumstances when, although the act is a mere trespass pure and unqualified, the consequences of it are so serious and calculated to inflict such lasting and irreparable damages that the rules for assessing damages afford no adequate compensation.[7] Thus, where the trespass consists

[1] Moyer v. Swygart, 125 Ill. 262; Brown v. Judges, 75 Mich. 274. The proceeding in the probate court is *ex parte;* in chancery it is adversary. It has some features of appellate proceedings, but there are new parties. See McArthur v. Scott, 113 U. S. 340–386.

[2] Minot v. Taylor, 129 Mass. 160; Washbon v. Cole, 144 N. Y. 294.

[3] In re Sawyer, 124 U. S. 200.

[4] A nuisance is not easy to define, but the idea of a nuisance is the doing of that which, under some circumstances, would be innocent, at such a time and under such circumstances as to inflict unnecessary or improper injury to another or to the public. Cooley, El. Torts, 232; State v. Luse, 9 Houst. (Del.) 376.

[5] Taylor v. P. K. & Y. Ry. Co., 91 Me. 193; 64 Am. St. Rep. 216.

[6] Mugler v. Kansas, 123 U. S. 673.

[7] The power of a court of chancery to enjoin a trespass upon land and the boxing and scraping of trees to obtain turpentine is sustained in Wiggins v. Williams (Fla.) 30 L. R. A. 754, by virtue of a statute, notwithstanding the constitutional guaranty of a right to trial by jury; but the act is held inoperative in respect to an award of damages for a mere trespass cognizable at law. Where the

in the seizure of the whole of a stock of goods, the consequences involved are generally the loss of credit and destruction of business, and equity may properly enjoin the seizure or sale upon an attachment or execution.[1]

Libels were formerly regarded as crimes, and this was then considered sufficient to prevent jurisdiction.[2] When this reason was outgrown the doctrine of the liberty of the press and the danger of legal censorship were sufficient, and these still have weight, and, with the supposition that the remedy at law for damages is sufficient, has governed the majority of the courts to refuse relief in equity.[3]

Strikes and boycotts have recently become of such frequency and involve so many rights, and are so serious in apparent consequences, that courts have taken jurisdiction to prevent, *not the strikes*,[4] but torts and trespasses which experience shows usually accompany them.[5] The boycott proceeds on other grounds, being a conspiracy to injure one, which, if participated in by many, is not adequately handled in law courts. Equity seeks to protect and prevent irreparable injury which threatens.

Liens fall naturally under the cognizance of equity for the reason that they always involve an equitable relation between the principal parties and frequently involve numerous interests of third persons.[6]

trespasses are continuing, the jurisdiction may rest quite clearly on the idea of a bill of peace, and to prevent a multiplicity of suits. Bowline v. Crook, 104 Ala. 130.

[1] Watson v. Sutherland, 5 Wall. 74; Van Norden v. Morton, 99 U. S. 378.

[2] See observations, In re Debs, 158 U. S. at p. 593.

[3] Boston Diatite Co. v. Florence Mfg. Co., 114 Mass. 69; Whitehead v. Kitson, 119 Mass. 484; Brandeth v. Lance, 8 Paige, 23; Singer Sew. Mach. Co. v. Dom. Mach. Co., 49 Ga. 70. And in Kidd v. Hovey, 28 Fed. Rep. 773, the jurisdiction was denied. Emack v. Kane, 34 Fed. Rep. 46; Bell v. Singer Sewing Machine Co., 65 Ga. 452; Meyer v. Devries, 64 Md. 532; Chase v. Tuttle, 27 Fed. Rep. 110; Ass'n Co. v. Boogher, 3 Mo. App. 173, are decisions in favor of the jurisdiction.

[4] In re Debs, 158 U. S. at p. 598. This whole subject is very ably presented in 11 Harv. Law Rev. 488, where all the authorities are examined.

[5] Vegelohn v. Guntner, 167 Mass. 92. In this case there is vigorous dissent and able discussion. Oxley Stave Co. v. Coopers' Int. Union, 72 Fed. Rep. 695.

[6] *E. g.*, in mechanics' and contractors' liens the subject of the suit is almost uniformly cognizable at law, but the necessity or convenience of providing for the protection of

Administration of estates is never as such committed to equity, but is taken cognizance of to prevent fraud or to administer a trust, and once the jurisdiction attaches the court may administer the estate completely, though it is seldom done.[1]

Dissolution of partnership can only be decreed judicially by a court of equity because of the necessity for accounting,[2] as in general one partner cannot sue another.

The collection of taxes may be enjoined in equity, but only on grounds of want of power to levy, and fraud in the levy, or where the proceedings leading up to the judgment are void.[3]

Bills to protect personal rights have been spoken of; they are outside the ordinary heads and subjects of equity, and are so far defended on some analogy to a property right rather than the mere right of privy or personal comfort.[4]

The parens patriæ furnishes, as we have seen, a distinct class of cases.[5]

Partition of land is not necessarily an equitable action, and is regulated by statutes in most of the states allowing a proceeding in the common-law court; but the reason for equity jurisdiction is frequently found in a prayer for an account of rents and profits.[6]

Where title is denied, the federal courts will decline to take jurisdiction in equity, because of the right of trial by jury;[7] but in Illinois all matters of title and clouds on the same are settled in one suit on the equity side of the court.[8] Generally a trial by jury is not allowed on the equity side as to questions of title, and in some states the codes extend this to all civil actions.[9]

The practice is to decide the questions of title, and then ap-

various interests influences the legislators to give equity jurisdiction. Conklin v. Plant, 34 Ill. App. 264; Streety v. McCurdy, 104 Ala. 493; McGhee v. Alexander, id. 116.

[1] Dougherty v. Hughes, 165 Ill. 384; 2 Woerner on Adm. 500. Probate courts are frequently given large equity powers, which naturally takes away the necessity of a resort to an equity court. Lynn v. Lynn, 160 Ill. 307.

[2] See Partnership.

[3] Keigwin v. Comm., 115 Ill. 347; Arthur v. School Dist., 164 Pa. St. 410.

[4] *Ante*, p. 1066.

[5] See Index.

[6] Hunt v. Hunt, 109 Mich. 399.

[7] This was the common-law rule in equity. Am. Ass'n v. Eastern Ky. Land Co., 68 Fed. Rep. 721.

[8] Mott v. Danville Sem., 129 Ill. 403.

[9] McRoberts v. Lockwood, 49 Ohio St. 374. See Klever v. Seawall, 65 Fed. Rep. 393.

point commissioners to view the land and report the practicability of a partition, and designate a division, if practicable. If the court decides finally that division is not practicable, the land is sold and proceeds divided.

Bills of revivor are entertained when suits, which have progressed to some degree, are abated by the death of a party, and it would be inequitable to compel a new suit. The suit is revived against those who succeed to the rights of the deceased in the subject of litigation.[1]

Bills of Discovery.— All of the causes of action above mentioned have their appropriate bills which pray for the relief which is desired in reference to the cause of action. There is still another original bill which does not proceed upon the idea of administering any particular relief,[2] but is used as a mere instrument of the court of equity to provide means for the vindication of a right in some other tribunal, namely, the bill of discovery. Because of this distinction original bills are sometimes classed as bills of relief and bills of discovery,[3] although all bills in equity are in a measure bills of discovery, in that they pray for an answer.[4] Before the passage of the evidence acts, which removed the disabilities of parties and interested persons as witnesses, this bill was a very important instrument of justice. It was always a bill auxiliary to some proceeding in another court.[5]

The bill of discovery, properly so called, prays for no relief except that the defendant make full and complete answer to the questions propounded in the bill.[6] When the defendant has fully answered the case is at an end, for there is no decree in such a case;[7] the whole object of the proceeding being

[1] If personalty, the administrator; if realty, the heirs. Story, Eq. Pl., § 354; Merwin, Eq., § 933.

[2] Dixon v. Campbell, 3 Dana, 603; Little v. Cooper, 10 N. J. Eq. 273; McIntyre v. Union College, 6 Paige, 240. There is a tendency in modern times to disregard this rule and to act upon the other now controlling rule, that equity having taken jurisdiction for any purpose, even for mere discovery, will afford complete relief. Smith v. Smith, 92 Va. 696.

[3] Wigram on Discovery, p. 3 et seq.

[4] Any bill may join in it a bill of discovery, and is then called a bill for discovery and relief. Wick v. Dawson, 42 W. Va. 43.

[5] Story, Eq. Jur., § 1483; Cont. Ins. Co. v. Webb, 54 Ala. 688; Kerney v. Jeffries, 48 Miss. 357; Thompson v. Whitaker Iron Co., 41 W. Va. 574.

[6] Answer under oath cannot be waived. O'Hare Co. v. Daly, 161 Ill. 359.

[7] Dixon v. Campbell, 3 Dana, 603.

to obtain the information and then to use the answers as an admission in other proceedings. The effect of the statutes removing disabilities of witnesses has been to dispense almost entirely with the necessity for bills of discovery,[1] and pure bills of this kind are very rare.[2]

Another cause which has lessened the necessity for resorting to discovery is the power of law courts to allow an inspection of books and papers, which occasioned the prayer for oyer in common-law proceedings.[3]

The pleadings in chancery are materially affected by the disuse of bills of discovery; for it was only in these bills that there was any difference in the mode of allegations in law and equity. As to bills of relief, pure and simple, the mode of allegations of facts is substantially the same as that of averments of facts in actions at law; and these facts must, in both forms, be advanced in such a way that the defendant may put them in issue for trial.[4]

The Great Writs of Equity.— The original process in equity is, as we have seen, the subpœna commanding the defendant to appear and answer. Next in order are writs which may be issued *before hearing.*

The great writs or instruments of equity by which it arrests the acts of the defendant and preserves the property until the court can determine the cause of relief are:

First, the writ *ne exeat*,[5] in which the court directs the sheriff to arrest a defendant and to compel him to give bail not to go out of the jurisdiction of the court.

[1] The title of the first law in Illinois (1861) to remove the disabilities of parties and interested persons as witnesses was entitled *a law to dispense* with the bill of discovery. The procedure in equity and the very jurisdiction, or at least the grounds of the jurisdiction, have been greatly affected and somewhat changed by the recent acts doing away with the incompetency of witnesses on the grounds of interest or being parties; *e. g.*, when the defendant may be competent as a witness the reason for discovery is removed. See Wild v. Hobson, 2 Ves. & B. 108.

[2] See Glenney v. Stedwell, 64 N. Y. 120; Mulhern v. Kent Circuit Judge, 111 Mich. 528; Cont. Bank v. Heilman, 66 Fed. Rep. 184.

[3] Andrews' Steph. Pl. 159.

[4] Van Santvoord's Pl. & Pr. 65; Mechanics' Bank v. Levy, 3 Paige, Ch. 606; Hood v. Inman, 4 Johns. Ch. 467.

[5] See form of writ, Daniell's Chan. Prac. 2329. The old writ read, *ne exeat regno*, that he go not out of the realm.

Second, the preliminary injunction, which before hearing is called an interlocutory, preliminary or temporary injunction, and is always prohibitory and never mandatory. It is never a matter of real right, but rests in the sound discretion of the court.[1]

Third, the order for the appointment of a receiver. A receiver is a person appointed by the court to preserve property or to conduct a business during the litigation.[2] He need not be a disinterested person, but should be chosen with special reference to his fitness for the particular duties. He is from the time of appointment an officer of the court, and a representative of the person or of the corporation whose property he takes charge of. He takes on a new *status*. Ordinarily he cannot be sued in this capacity without leave of court.[3]

After hearing comes the decree, which is explained below. This may direct:

(1) *A final or perpetual injunction*, which may direct either that defendant forever refrain from acting in certain specified

[1] *Equity Practice—Preliminary Injunction.*—On application for preliminary injunction it is not proper to decide the merits of the controversy, especially where the case turns on grave questions of law. All that the judge should, as a general rule, require, is a case of probable right and probable danger to that right without the interposition of the court, and the judge's discretion should then be regulated by the balance of inconvenience or injury to the one party or the other. The judge should, in a case of probable right, grant the provisional injunction where the relief sought is essentially preventative, and a denial of the injunction might in effect amount to a denial of all relief. New Memphis Gas Light Co. v. Memphis, 72 Fed. Rep. 952.

[2] "The appointment of a receiver is not for the benefit of the plaintiff merely, but for all other persons who may establish rights in the cause. Moneys in the hands of the receiver are *in custodia legis* for whoever can make a title to it." Kerr on Receivers. "It is a discretionary power, exercised by a court of chancery only for a more speedy getting in of a party's estate, and securing it for the benefit of such persons as shall appear to be entitled, and does not at all affect the right." Skip v. Howard, 3 Atkins, 534. The appointment of a receiver "is often called an equitable execution." Story, Equity, § 829. The appointment of a receiver does not operate to derange the priority of legal or equitable liens. The money in his hands is in the custody of the law for whoever can make title to it, and when the party entitled to the estate is ascertained the receiver will *be his receiver*." 2 Redfield, Railways, 363.

[3] Central Trust Co. v. Railway Co., 59 Fed. Rep. 523, and discussion.

ways (a prohibitory injunction);[1] or that he do something (a mandatory injunction). The latter is often applied to the abatement of nuisances. It is used not only to protect private property rights, but to protect public political rights,[2] public rights in general[3] — in fact, it is the great writ to maintain the *status quo* of that over which the court assumes jurisdiction.

(2) *The Writ of Assistance or Restitution.*— Where the defendant has refused compliance with the decree of the court, the court will, after having inquired into the matter, issue a writ directing the sheriff to assist the complainant and to put him in possession. It is equitable replevin or ejectment which this writ accomplishes.[4]

(3) *The writ of execution* was not one of the ancient processes of the court, but made its appearance in cases of money decrees in analogy to the execution (or *elegit*) of the law courts.

Attachment for contempt is a process which for the purpose now under contemplation seeks to compel the actual performance of the decree by fine or imprisonment of the defendant.

Sec. 658. *Legal Actions* are of two great classes, differing from each other in the character of the parties and the nature of the subject-matter. They are usually classed as ordinary actions and extraordinary actions. The former are the private suits between persons of whatever rank, residence or capacity concerning private property or personal rights, and are the actions commonly treated in books on pleading and practice.[5]

[1] As in case of a continuing trespass. Wheelock v. Noonan, 108 N. Y. 179. An injunction may be used as a great prerogative writ to protect the people as to matters *publici juris* (of public right). State v. Cunningham, 81 Wis. 440. An injunction is not an appropriate remedy by the state to restrain corporations from abusing their franchises or exercising powers in excess of their charter, except where the matter involved is a duty owed to the state rather than to stockholders, or the acts amount to a public nuisance. Attorney-General v. Utica Ins. Co., 2 Johns. Ch. 370; People v. A. & V. Ry. Co., 24 N. Y. 261; Attorney-General v. Jamaica Pond Aqueduct, 133 Mass. 361. *Cf.* Attorney-General v. Railroad Co., 35 Wis. 425, criticised in High, Inj. (2d ed.), p. 19.

[2] State v. Cunningham, 81 Wis. 440.

[3] Craig v. People, 47 Ill. 487.

[4] Boone v. Chiles, 10 Pet. 189; Smith v. Brittenham, 109 Ill. 540.

[5] See Andrews' Steph. Pl., p. 60 et seq.

OUTLINE OF THE FORMS OF CIVIL ACTIONS.

PRIVATE ADVERSARY ACTIONS.†

- **Real and mixed.**
  - 1. Involving possession and damages.
    - Forcible entry and detainer.
    - Equitable ejectment in Pennsylvania.*
  - 2. Involving possession, title and damages.
    - (1) Waste.
    - (2) Writ of entry.
    - (3) Trespass to try title.
    - (4) Writ of dower.
    - (5) Ejectment.
- **Personal.‡**
  - 1. Actions *ex contractu.*
    - (1) Debt.
      - a. In the *debet.*
      - d. In the *detinet.*
    - (2) Covenant.
    - (3) Account.
    - (4) *Assumpsit.*
      - a. General.
      - b. Special.
  - 2. Actions *ex delicto.*
    - (1) Detinue.
    - (2) Trespass.
      - a. *Vi et armis.*
      - b. *De bonis asportatis.*
      - c. *Quare clausum fregit.*
    - (3) Trespass on the case.
      - a. Trover.
      - b. Libel.
      - c. Slander.
      - d. Malicious prosecution.

      All actions for the redress of a personal wrong occasioned by non-feasance or misfeasance where direct force is not the ground of the action. *Ante*, p. 1049.
    - (4) Replevin.
      - a. In *cepit.*
      - b. In *detinet.*

PUBLIC CIVIL ACTIONS.

- *Mandamus.*
- *Quo warranto.*
- *Scire facias.*
- *Prohibition.‡*
- *Certiorari.‡*
- *Habeas corpus.‡*

SPECIAL PROCEEDING.

- Partition, under statutes.
- Condemnation proceedings, under eminent domain.
- Special assessment proceedings for public improvements.
- Probate proceedings.
- Proceedings to protect persons *non compos mentis.*

MARITIME CAUSES.

- The jurisdiction in admiralty is exclusively in the federal courts, and is in form a proceeding against the vessel, but it is to all intents and purposes adversary and not *ex parte.*‖

* Gen. Am. T. & T. Co. v. Shallcross, 147 Pa. St. 485.

† This outline is taken from the author's edition of Stephen (Andrews' Steph. Pl., p. 60), and each action and the procedure and pleading therein are there fully explained, with reference to both code and common-law requirements.

‡ These each have a function as an appellate process as well as an original suit.

‖ Desty's Fed. Pro. (9th ed.), sec. 2, p. 27 et seq.

Public or extraordinary remedies, so called,[1] involve as the subjects of the suits matters public in their nature.[2] The subjects of these suits, though they may be owned and controlled by private persons, are of such public interest that the people have the right to demand the proper use and management of them;[3] and so such suits, although generally instigated and urged by private persons as relators, may proceed without a relator's complaint, simply on the motion of the people's law officer. In every case they proceed in the name of the people. In other words, they are civil suits by the people to protect matters of public interest.

There are five of these great writs: *Mandamus*, *prohibition*, *quo warranto*, *habeas corpus*, and *certiorari*. The beginner sees in these names a suggestion of their nature. A *mandamus* commands that something be done; a *prohibition* forbids some act; a *quo warranto* questions the right or authority of some act; a *habeas corpus* demands the body or person of some one imprisoned; a *certiorari*, the use of which is not so easily perceived, calls for the record of a lower court to make certain, by its examination, certain facts in regard to the suit.[4]

Mandamus was originally a great prerogative writ,[5] and was regarded as criminal in form. It is now a great public writ, civil in form, and governed by the rules of civil pleading, practice and evidence.[6] It lies to compel the performance of a ministerial duty by public officers,[7] or the performance of acts required *by public laws* in reference to a subject which, being

[1] They should not with us be designated or regarded as extraordinary remedies. It is regarded in the federal courts especially as an action rather than a prerogative writ. Kentucky v. Denison, 24 How. 66.

[2] The student should study State ex rel. v. Cunningham, 81 Wis. 440; Id., 83 Wis. 90.

[3] Bassett v. Atwater, 65 Conn. 355.

[4] These suits may be appellate in nature and form, or they may be original suits, that is, the first resort to the *judicial* branch of the government.

[5] See 3 Cooley's Blk. (4th ed.) 110, note; also, Bassett v. Atwater, 65 Conn. 355. But it does not now issue from or by any prerogative power. It is nothing more than the ordinary process of a court of justice, to which every one is entitled where it is the appropriate process for asserting the right he claims. Kentucky v. Denison, 24 How. 66.

[6] People v. Crabb, 156 Ill. 155.

[7] Marbury v. Madison, 1 Cranch, 152. It does not lie to direct how a matter, discretionary in its nature, shall be done, but only to do that which must be done. Hudson v. Parker, 156 U. S. 277; Laubach v. Omera, 107 Mich. 29.

exercised under a public franchise, is within the control of the public.[1] It is the only process to compel the payment of money by public corporations.[2]

Prohibition is a writ appropriate to the use of a superior judicial tribunal for the purpose of restraining an inferior judicial officer from proceeding without jurisdiction or in excess of it. It may be used in aid of appellate jurisdiction, or as an original process to prevent injury under a mistaken assumption of power.[3] It may lie against a legislative body which is about to invade the bounds of the judicial and thereby violate the obligation of a contract.[4]

Quo warranto is a proceeding to question the exercise of official power or authority, or of rights and privileges which can only be exercised by virtue of a public authorization, *i. e.*, a franchise.[5] It has been held by the same tribunal to be a civil suit,[6] and again held to be penal in nature.[7]

It is the great remedy by which corporations are kept from usurping power, and individuals restrained from assuming corporate or official powers.[8]

The case comes to the court by petition,[9] and the judgment, if against the usurpation, is a judgment of ouster.

Habeas corpus is the great writ which by Magna Carta, and the bill of rights in all our constitutions, must be issued by all

[1] *E. g.*, the officers of a private corporation pass by-laws by direction of law; they must be obeyed as a law, and *mandamus* lies to compel obedience. Bassett v. Atwater, 65 Conn. 355; Rosenfield v. Einstein, 17 Vroom, 481.

[2] Beach, Pub. Corp., § 1573 et seq.; People v. Boards, 139 N. Y. 524.

[3] In re Chetwood, 165 U. S. 461; Arnold v. Shields, 5 Dana, 28; People ex rel. v. Horton, 169 Ill. 201.

[4] State v. Young, 29 Minn. 523.

[5] 3 Cooley's Blk. (4th ed.) 263; Regents v. Williams, 9 Gill & J. 365; High, Ex. Rem., § 591 et seq.; Attorney-General v. Blossom, 1 Wis. 317.

[6] People v. Holtz, 92 Ill. 426. *Contra*, 68 Ill. 256; 3 Blk. Com. 262. See High, Ex. Rem., § 600.

[7] Diversey v. Smith, 103 Ill. 378.

[8] See Corporation; People v. P. P. C. Co., 175 Ill. 125. Where the corporation is a corporation *de jure*, it was formerly held that a usurpation of power was properly questioned by *quo warranto*, but that the forfeiture or validity of the charter was more properly questioned by *scire facias*. Regents v. Williams, 9 Gill & J. 367; 31 Am. Dec. 72.

[9] The court should examine the petition as to the relation of the relator to the subject, his motives and the consequences of granting the writ. State v. Tolan, 33 N. J. L. 198. Generally a private person cannot act as relator to question the existence of a corporation. People v. N. Chi. Ry. Co., 88 Ill. 544. See High, Ex. Rem., § 733.

courts having jurisdiction, at the petition of any person imprisoned,[1] to test the legality of the restraint.[2] Even if the proceedings under which the prisoner is held are void, he will not be discharged, but the court may remand for further trial.[3]

Certiorari is a well known common-law writ to test the validity of official action, judicial or *quisi*-judicial in its nature,[4] whether it be exercised by a court or by a special tribunal.[5] Whether the proceedings are appellate in form or not, the trial is by the record; and the only question is as to the sufficiency of the record[6] to uphold the judgment. It is therefore examined to see whether there was jurisdiction, and whether the proceedings were according to the forms of law.[7] The writ lay at common law to remove a pending suit;[8] but this is not now the general rule.

Sec. 659. *The Judicial Establishment of the United States.*— The lawyer, before he holds himself out as qualified to advise and protect the rights and interests of clients, ought to be familiar with the different judicial tribunals to which he may apply for relief and redress, and to have sufficient understanding of their jurisdiction that he may readily advise which one is the most advantageous tribunal in which to bring his action. Merely to understand the legal rights of the parties to a transaction is not enough. Circumstances often render it imperative that a jurisdiction which does not naturally suggest itself to the uninformed shall be chosen; and in many cases the party has his choice or election of forums, one of which is likely to be preferable to the other for his purposes.

[1] Ex parte Milligan, 4 Wall. 2. It is the great case on this subject.

[2] In extradition proceedings the question arises, Is the prisoner charged with a crime according to the laws of the country asking for him (People v. Brady, 56 N. Y. 184; Roberts v. Reilly, 116 U. S. 80), and is there *any evidence* tending to prove his guilt? Bryant v. United States, 167 U. S. 104.

[3] Ex parte Gibson, 31 Cal. 621. For power of federal courts, see In re Burris, 136 U. S. 586.

[4] State v. Dodge, 56 Wis. 79; Mayor v. Dean, 62 Ill. App. 41; Commissioners v. Griffin, 134 Ill. 330; Gilbert v. Board, 11 Utah, 378; Farmington Ry. Co. v. Commissioners, 112 Mass. 206.

[5] Miller v. Trustees of Schools, 88 Ill. 26. See People v. Cunningham, 81 Wis. 440; People v. Town Board, 90 Hun, 488; In re Fitch, 147 N. Y. 334.

[6] Blair v. Sennott, 134 Ill. 78.

[7] Blair v. Sennott, 134 Ill. 78. At common law it was not a proper remedy for mere errors on the trial. Forbes Co. v. Winters, 107 Mich. 116. It is used as a writ to supply record on appeal and writ of error. Strohm v. People, 160 Ill. 586.

[8] Lynd v. Noble, 20 John. 80.

NATIONAL JUDICIARY.

The Courts.
["The judicial power shall be vested in one supreme court, and such inferior courts as the congress may from time to time ordain and establish." Art. III, § 1, U. S. Const.]

1. Supreme court of the United States.
2. Circuit court of appeals.
3. Circuit courts.
4. District courts.
5. United States commissioners.
6. Territorial courts.
7. Courts of District of Columbia.
8. Court of claims.
9. Court of private claims.

*Orbit of Jurisdiction.**
["The judicial power shall extend to all cases in law and equity." Art. III § 2, U S. Const.]

1. *Depending on the nature of the cause of action.*
   Cases arising under this constitution, the laws of the United States, and treaties made or which shall be made under their authority.
   To all cases of admiralty and maritime jurisdiction.
   To all cases between citizens of the same state *claiming lands under grants of different states.*

2. *Depending on the character of the parties.*
   To all cases affecting ambassadors, other public ministers and consuls.
   To controversies to which the United States shall be a party.
   To controversies between two or more states.
   Between a state and a citizen of another state.
   Between citizens of different states.
   Between a state, or the citizens thereof, and foreign states, citizens or subjects.

*This classification is approved in California v. So. Pac. Ry. Co., 157 U. S. 229.

The national and the state courts are not distinct and foreign to each other, but are interdependent, co-operating systems, and together constitute one vast machine of justice, planned and operated that a remedy may be found for every wrong, and that protection is afforded the weakest against the most powerful, without regard to residence or nationality.[1]

With this interdependency of the two systems in view, a very brief outline of the different courts is presented.

The national constitution provides that the judicial power of the United States shall be vested in one supreme court and in such inferior courts as the congress may from time to time ordain and establish.[2]

The judicial power shall extend:

To all cases in law and equity arising under this constitu-

[1] Claflin v. Houseman, 93 U. S. 130. Cases do not arbitrarily and always go to a particular court. The character of the parties or the nature of the subject-matter may control, and there may be a choice of forums.

[2] Art. III. See California v. So. Pac. Ry. Co., 157 U. S. 252.

tion, the laws of the United States, and treaties made, or which shall be made, under their authority.[1]

To all cases affecting ambassadors, other public ministers and consuls.

To all cases of admiralty and maritime jurisdiction.[2]

To controversies to which the United States shall be a party.

To controversies between two or more states.

Between a state and a citizen of another state.[3]

Between citizens of different states.

Between citizens of the same state claiming lands under grants of different states, and between a state or the citizens thereof and foreign states, citizens or subjects.

Jurisdiction of Supreme Court.— In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction.[4]

In all the other cases before mentioned the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the congress shall make.[5]

Jury Trial.— The trial of all crimes, except in cases of impeachment, and all civil trials where the matter in controversy shall exceed in value $20, shall be by jury.[6]

[1] This is the broad grant of judicial power. It cannot be enlarged or diminished except by a constitutional enactment. The eleventh amendment is an example.

[2] This is a peculiar grant of jurisdiction, described by reference to a well-established source of jurisdiction. It differs in that particular from all the other grants. The admiralty and maritime jurisdiction was not a common-law jurisdiction, but one based on the law of nations as stated in the civil law; and so the maritime customs and usages, as recognized by the leading mercantile nations, become a standard of jurisdiction and a guide of procedure on the subject. Hence the appropriateness of conferring exclusive jurisdiction on the national court. See The Glide, 167 U. S. 606. Where a plank was negligently handled on a dock, injuring a man working in the hold of a ship, the jurisdiction was held to be in the admiralty court and not in the state court. Hermann v. Port B. M. Co., 69 Fed. Rep. 646.

[3] But a state cannot be sued except by its own consent. Amendment to Const., art. II. It was held otherwise before this amendment. Chisholm v. Georgia, 2 Dall. 419. See Hahn v. Louisiana, 134 U. S. 1.

[4] Art. III, § 2; Börs v. Preston, 111 U. S. 252. This section does not confer a right to sue a state, but merely gives jurisdiction where rights exist. California v. So. Pac. Ry. Co., 157 U. S. 229.

[5] Id.

[6] Amendment to Const., art. VIII.

Place of Trial.— Such trials shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed.

The outline shows the courts as they exist, all of which, except the supreme court, have been created by acts of congress.

The constitution does not even prescribe the number of judges, their term of service, or qualification. But the choice or selection is in the president, with the advice and consent of the senate.

The orbit of jurisdiction is, however, carefully marked out[1] by the constitution, and necessarily so, in order that congress could not encroach upon the jurisdiction of the states by conferring upon the federal courts jurisdiction which naturally belonged to the state courts.

Source of Jurisdiction.— Federal courts have no common-law jurisdiction, the common law having no force or vigor in reference to the national constitution and governmental establishments, excepting only its utility as a guide to procedure and criteria of construction,[2] and by express provisions of congress, that the procedure of the courts of equity shall be the same as the procedure of the high court of chancery of England, makes the English law in that respect a guide.[3]

Where the constitution confers original jurisdiction over a class of cases the court proceeds according to the course of the common law.[4]

The constitution does not confer jurisdiction on any court

[1] This is the orbit of the whole department, but not the parceling of jurisdiction between the courts, which are created by congress. This is left to congress, and the law is to be sought in the statutes and judicial construction of them. California v. So. Pac. Ry. Co., 157 U. S. 232.

[2] California v. So. Pac. Ry. Co., 157 U. S. 229.

[3] See In re Burris, 136 U. S. 586, and note in official report; United States v. Worrell, 2 Dall. 384; Tennessee v. Davis, 100 U. S. 280.

[4] Id. The equity jurisdiction of the courts of the United States is independent of the local law of any state, and is the same in nature and extent as the equity jurisdiction of England from which it is derived, and it is no objection to this jurisdiction that there is a remedy under the local law. Gorden v. Hobart, 2 Sumner C. C. 401; Dodge v. Woolsey, 18 How. 331, 347.

except the court created by it, viz., the supreme court. All other courts can act only by authorization of congress.[1]

It follows then that these courts are within the reason of the rule which applies to courts of special and limited jurisdiction, and the record must show jurisdiction or the judgment may be disregarded collaterally.[2]

Original jurisdiction, *i. e.*, the right to take first cognizance of a case, is conferred by the constitution on the supreme court as to several specific cases. This cannot be taken away nor enlarged by congress.[3] But congress may give original jurisdiction of the same cases to the courts created by it.[4]

By reference to the outline it will be seen that there are two classes of cases within the jurisdiction of the federal courts. As to the first class, the amount in controversy or the character of the parties does not affect the jurisdiction, because the subject-matter is such as to be peculiarly a national concern; that is, the cause of action arises under national laws, or (2) under admiralty, or (3) is based upon a national grant, and because of this such a suit is said to involve a federal question.[5]

As to the second class of cases, the character of the parties is an essential requirement, although congress has limited the jurisdiction of the courts in some, but not all, instances by the value of the matter in controversy; while as to others, particularly the United States, the value of the subject-matter is immaterial.[6]

A Federal Question.— This is one arising under the constitution, the treaties, or the grants of the United States, or a matter peculiarly within the cognizance of the nation, although until it acts the states may have a right to act in the same matter.[7]

Original Jurisdiction.— The fact that a federal question is involved — that is, that one party bases his right or the other his defense on some national law or authority — will not in all

[1] Turner v. Bank, 4 Dall. 8; In re Barry, 42 Fed. R. 113. See sub., In re Burris, 136 U. S. 597, n.; Sewing Machine Cases, 18 Wall. 577.

[2] Turner v. Bank, *supra;* Railway Co. v. Gray, 38 Mich. 468; Börs v. Preston, 111 U. S. 252.

[3] Marbury v. Madison, 1 Cranch, 137.

[4] Börs v. Preston, *supra.*

[5] Byers v. McAuley, 149 U. S. 608.

[6] United States v. Sayward, 160 U. S. 493; Shiras, Eq. Prac. 14, 15.

[7] *E. g.*, admiralty and patent matters, insolvency cases until a petition in bankruptcy is filed, etc.

cases give the federal courts *original* jurisdiction. In order to confer such jurisdiction the question must fall within some one or more of the provisions of the act of congress or the constitution.

Appellate jurisdiction, on the other hand, depends upon the presence of a federal question,[1] and the further fact that a decision has been made adverse to the party appealing,[2] and that the court making the decision is the highest court of the state having jurisdiction of the subject.[3]

The character of parties as affecting the jurisdiction has reference to the real parties interested.[4] And yet the federal courts have been quite liberal in construction. In order to afford a remedy to an injured party, they have allowed officers of the government, acting on behalf thereof, to be sued where the government could not have been subjected to a suit.[5] Diversity of citizenship is a ground of jurisdiction independently of the character of the parties or nature of the action. The diversity must be of such a character that all on one side are diverse in citizenship from all on the opposite side.[6]

Parties cannot waive the objection and by consent confer jurisdiction, nor can they by a colorable or fraudulent transfer accomplish the object.[7]

Sec. 660. *State Judicial Establishment.*— Each state has a court of ultimate appellate jurisdiction, termed the supreme court or court of appeals.

Most of the states have established an intermediate appellate tribunal, whose decisions are final only as to certain classes of cases, including cases involving amounts not large enough

[1] See Judiciary Act, U. S. Rev. Stat.

[2] Murdock v. Memphis, 20 Wall. 590.

[3] Curtis, Jurisd. of U. S. Cts. 27; Miller v. Joseph, 17 Wall. 655.

[4] The person holding the legal title is the real party, although another may be beneficially interested. Coal Co. v. Blatchford, 11 Wall. 172; Am. Bible Soc. v. Price, 110 U. S. 61.

[5] Infringement of patent by federal officers using the invention for the government. Belknap v. Schild, 161 U. S. 10.

[6] But in the case of a suit by a stockholder of a corporation in its behalf against its officers, where there are many stockholders, resort may be had to the federal court by a citizen of one state, even though the corporation could not have sued, and although there were many shareholders citizens of the same state with the officers. Dodge v. Woolsey, 18 How. 331; Muller v. Dows, 94 U. S. 444.

[7] Lehigh M. & M. Co. v. Kelley, 160 U. S. 327. The objection may be raised by plea in abatement. Id.

to require the action of the supreme tribunal. These courts are not given the authority to entertain jurisdiction over all classes of cases.[1]

In all cases the highest courts have original jurisdiction as to some matters specified in the constitution, and a jurisdiction which is to all appearances original, but which is in reality an appellate jurisdiction, under which they issue process of prohibition, *mandamus* or *certiorari* and *habeas corpus*,[2] and a direct appellate jurisdiction exercised by *certiorari*, appeal and writ of error.

Next to these appellate tribunals is a system of trial courts established in every county. This system constitutes the great common pleas court of the land. These courts are called the district or circuit courts, and have jurisdiction of all the ordinary forms of action *in personam* and *in rem* in law and equity. In counties which have a large volume of business, the courts often consist of many judges.

Terms of Court.— The courts, while always open for the commencement of law-suits and for the transaction of ministerial business, do not sit continuously, but at fixed and stated times called in our law "terms." It is important to understand the technical signification of a term of court and certain special rules which relate thereto.[3]

E. g., for many purposes all acts taken during the term date from the first day of the term, so that changes or even death may not affect an act actually transpiring later than the happening of the event.

Again, judges are authorized to transact certain business in vacation, and the existence of vacation depends upon the adjournment of the court.[4]

[1] In Illinois, appeals from the trial tribunals in revenue cases, and in cases involving a freehold or franchise, the validity of a statute, or construction of the constitution, go directly to the supreme court.

[2] As to supervising control of these courts, see State v. Johnson (Wis.), 79 N. W. Rep. 1081.

[3] Mulhern v. Kent Circuit Judge, 111 Mich. 528.

[4] The distinction must be made between the powers of the court and the powers of its judge. There can be no court except during term time. The judge may by the customs of the common law or by statute exercise certain powers, *e. g.*, grant and dissolve injunctions. U. S. Life Ins. Co. v. Shattuck, 159 Ill. 610; Hobart v. Hobart, 45 Iowa, 501; Dunn v. State, 2 Ark. 229. The clerk may take confession of judgment in vacation. The masters in chancery may recommend an injunction in vacation.

County Courts.— Besides these tribunals it has been found necessary to create a court with a jurisdiction which relates to the fiscal affairs of the community and to the collection of the revenue, and in which it is usual to institute proceedings for the condemnation of property, the imposition of special assessments, and matters of like municipal concern. Insolvency matters are quite generally taken in this court, but there is no implied limitation on the power of the legislature as to what jurisdiction shall be delegated to any particular court.[1]

These are generally termed county courts, and it is not unusual to invest them with concurrent jurisdiction in civil and *quasi*-criminal suits and penal actions as to matters limited in amount, or less important than are committed to the court of common pleas.

Probate or Surrogate Courts.[2] — A large part of the judicial business of the country consists in the administration of estates, testate and intestate. Indeed, it has been said that the title to all real property will be found to trace through the probate court on an average once in thirty years. These courts are variously termed probate, surrogate or orphans' courts.

It will be seen that in most of our states the lines which separate the courts of exchequer, the courts of common pleas and the courts of king's bench are recognized, not because of any obligation so to do, but because of the natural way in which the subject-matter within the jurisdiction of the courts divides itself; and because the further jurisdiction, anciently committed to the spiritual courts, which has reference to the personal property of an intestate, coalesces with the jurisdiction over all the intestate's interest in land, and because the idea that the per-

[1] Sayler v. Simpson, 45 Ohio St. 141.

[2] There is no principle or provision which requires that each of these jurisdictions should be lodged in different tribunals, and they are often united as in Illinois. The county court in many counties unites the jurisdiction over fiscal matters, etc., with the probate jurisdiction and jurisdiction over conservation of lunatics, guardianship of infants, etc.; while in large counties there are separate probate and county courts.

The equitable jurisdiction of the probate courts is generally quite extensive, not as an original source of jurisdiction, but as a means of more effectually exercising the proper jurisdiction of the court and doing complete justice in a single proceeding. Sayler v. Simpson, 45 Ohio St. 141. Clouds may be removed in order to facilitate the sale of land. Newell v. Montgomery, 129 Ill. 58. For other examples, see Willard's Appeal, 65 Pa. St. 265; Carter's Appeal, 59 Conn. 587.

sonal goods of the testate should go to the benefit of his soul has no place in our modern law.

Justice Courts.— Besides these courts of greater dignity there are established in every township one or more petty or magistrate courts, usually called justice courts, uniting in one magistrate the functions of a court proper, and of an officer for the preservation of the public peace. In these courts small offenders are apprehended and punished, and graver offenses are examined into, and those accused apprehended and committed for the action of the grand jury or the higher tribunal having jurisdiction to hear, award judgments and punish the offender.

Municipal Courts.— In ancient times a jurisdiction was given to the lord of the manor to hold a manorial court; so also a special jurisdiction was given to the counties palatine and certain of the larger cities.

In the larger cities municipal courts are frequently erected having civil and *quasi*-criminal jurisdiction, limited in amount and as to subjects, and also a special jurisdiction over offenses connected with the municipality. They are created to relieve the congestion of business which might otherwise prove an inconvenience to the general administration of justice, and are variously designated as the mayor's or recorder's court, or court of the city, etc.

Source of Jurisdiction.— Inasmuch as all of these state courts exist by virtue of the sanctioning power of the people, it is obvious that their jurisdiction must depend upon the constitution and statutory provisions. But inasmuch as most of the states derive a large part of their law and procedure from England, it is the general rule to provide for a jurisdiction similar to that of the courts of the common law; and a constitutional provision, adopting the common law as it stood at some designated time, has the effect of recognizing the ancient causes of action, forms of action and provisions in reference to due process of law and personal liberty. Thus is preserved a general jurisdiction and procedure according to the course of the common law, excepting as modified by statutes and rules of court provided under the inherent power of the courts to regulate their practice.

Sec. 661. *Parties to Suits and Actions.*— The universal rule in all courts is that the real party in interest, if not under disability,[1] shall bring the suit;[2] that is, the person whose legal right is infringed, injured, or who owns the cause of action, or, as it might be put, in whom vests the right of action.[3]

A cause of action is either a chose in action or a mere personal tort; in either case such a cause of action was not, by the common law, assignable, except in the case of the special classes of contracts called negotiable.[4]

Privies may sue and be sued though they were not known to have been such and did not know of their rights.[5]

Joining of Parties.— It frequently happens that more than one person has a right or interest in the matter in which the injury is sustained. This interest may be strictly a joint interest, or it may be a common interest, not technically a joint one, the latter denoting the idea of joint ownership in the subject injured.[6]

[1] These sue in name of guardian, conservator or next friend. Andrews' Steph. Pl. 34. At common law a married woman could not sue in a law court, and in equity only by a next friend. Jordan v. Gray, 19 Ala. 618; Garlick v. Strong, 3 Paige Ch. 440. The married woman acts remove this disability. Richmond Ry. Co. v. Bowles, 92 Va. 738.

[2] Where a contract is made by an agent without disclosing his principal, the principal may sue on it. McConnell v. East Pt. L. Co., 100 Ga. 129; Tutt v. Brown, 5 Litt. 1; 15 Am. Dec. 33. In such cases the opposite party may elect to sue either, but cannot sue both. *Ante*, pp. 814–15.

[3] Andrews' Steph. Pl. 30 et seq.; Pomeroy, Code Rem. 168; Hendrick v. Lindley, 93 U. S. 143.

Exception.— An agent may be sued where the principal is beyond the jurisdiction. Osborn v. Bank, 9 Wheat. 739; McArthur v. Scott, 113 U. S. 540. On insurance policies the beneficiary generally should sue. Mut. Ins. Co. v. Stibbe, 46 Md. 302; Mass. M. L. Co. v. Kellogg, 82 Ill. 614. The trustee in an active trust is the real party in interest. Shipp v. Williams, 62 Fed. Rep. 4; Platt v. Iron Ex. Bank, 83 Wis. 359. So an assignee. Harris v. Cornell, 80 Ill. 55.

[4] The right to recover for a mere personal tort is not assignable. Ackley v. N. C. C. Ry. Co., 171 Ill. 100; Linton v. Hurley, 104 Mass. 355; Noonan v. Orton, 34 Wis. 259; 17 L. R. A. 441. But a claim connected with an injury to property or a breach of contract may be assigned in such a way as to allow a suit by the assignee. *Ante*, § 613; Cincinnati v. Hofer, 49 Ohio St. 60; McKee v. Judd, 2 Kern. 622; Bushnell v. Kennedy, 9 Wall. 387; Sloan v. Williams, 138 Ill. 46.

[5] *Ante*, § 612. Where one purchases property of another and expressly or impliedly agrees to answer for the obligations of the prior owner in reference to it, there is sufficient privity to sustain a suit. Atl. Nat. Bank v. Harris, 118 Mass. 147.

[6] See Andrews' Steph. Pl., p. 36 et seq.; and case of Hannay v. Smurthwait, 69 L. T. Rep. 677, set out fully in Andrews' Steph. Pl., Appendix, p. 445.

All parties jointly interested in the subject-matter *must* be joined as plaintiffs.[1]

All persons having a common interest in the subject-matter and the relief *may* join, but need not all be joined.[2]

In legal actions a necessary plaintiff may be joined without his consent and against his protest.[3]

In equitable actions a non-consenting necessary party may be made a defendant.[4]

The substantive law determines what are joint rights or joint obligations, and what are several, and when they are joint and several.

In cases of ownership and contractual relation, the nature of the estate, interest or the provisions of the contract control.

In cases *ex delicto* (torts) the rules are more simple. All persons having a joint interest may join and may be required to join, but non-joinder can be required only by plea in abatement. Persons having separate interests and separate damage cannot join, though injured by the same act. Persons having separate interests but a common damage have the election to join or not.[5]

A misjoinder is the uniting in one suit of persons not entitled to sue, or the uniting as defendants persons not jointly liable.

We have seen that joint rights or obligations arising *ex contractu* or from ownership are entire things, and are not severable at the pleasure of any one, so that the rule of joinder is but the result of the nature of the right and obligation and not a matter of form.

[1] Andrews' Steph. Pl., § 14. In case of voluntary societies the strict rule would require all to join, but a practice is sanctioned of allowing a committee to sue on behalf of all. Fitzpatrick v. Rutten, 160 Ill. 282. See *ante*, § 472.

[2] Id.

[3] Andrews' Steph. Pl. § 19. This is the general rule. Fain v. Gathright, 5 Ga. 7; Sumner v. Sleeth, 87 Ill. 500.

[4] The codes in some states provide that one not consenting *may* be made a defendant. This is on the theory that, the form of procedure being equitable, it is not material on which side one appears; but in truth the new permission does not abrogate the old right, and in many cases the practice would work an absurdity. In Hargrave v. Lewis, 6 Ga. 207, it is said that "it is a legal absurdity for a man to be a defendant in a case seeking a decree in his favor." The codes are just uncertain enough to allow the courts to be guided by the good sense of the ancient rules. See remarks of Com stock, J., in N. Y. & N. H. Ry. Co. v. Schuyler, 17 N. Y. 592; Andrews' Steph. Pl. 40.

[5] Andrews' Steph. Pl., p. 49 et seq. and p. 445; Hannay v. Smurthwait, 69 L. T. Rep. 677.

A non-joinder is the omission of a necessary party.

A violation of these rules as to joinder may be fatal to the cause at any stage.

Parties in Equity.— The courts of equity proceed upon a policy not applicable to a suit at law, in this: that, taking jurisdiction, the court, having regard for the public as well as the parties, insists that the whole controversy shall be settled in one suit. But a joint action cannot be maintained upon several distinct matters, even though they arise out of the same transaction, unless the complainants have at least a common interest.[1]

The first rule, then, is that all persons interested in the subject-matter in such a way that the decree will affect their interest *must* be made parties to the bill.[2]

In the application of this policy and this rule, parties are regarded in the light of their substantial interest as, 1st, merely formal parties; 2d, parties interested in the subject, but not necessarily interested in the controversy or relief prayed; and 3d, persons whose rights are necessarily affected by the decree, or who bear such a relation to some party that it would be inequitable to proceed without him.[3]

Exception.— Where the parties on one side are very numerous, or beyond the jurisdiction of the court, they need not be joined.[4]

The rule only applies to those interested in the subject of the suit; that is, those interested in the cause of action.[5] It is not

[1] Maxwell, Code Pl. 30.

[2] All persons materially interested are necessary parties to a bill in chancery. Want of proper parties is good cause of demurrer, or may be assigned for error upon appeal. Johnson v. Rankin, 2 Bibb, 184; Parberry's Heirs v. Goram, 3 Bibb, 107. Unborn persons who may have executory interests in remainder or reversion, etc., may be affected by a decree and may be proper parties. Loring v. Hildreth, 170 Mass. 328.

[3] California v. Southern Pacific Ry. Co., 157 U. S. 229.

[4] Davis v. Peabody, 170 Mass. 397; Land Co. v. Peck, 112 Ill. 408. The shareholders and members of a corporation have a right to bring suits on behalf of others similarly situated. This does not embrace those who have no community of interest with the plaintiff, or who by contract or circumstances occupy different positions from the plaintiff. Such joinder must be by those who occupy the same position as the plaintiff, and should be limited to those alone. Luling v. Atlantic Mut. Ins. Co., 45 Barb. 510; Robinson v. Smith, 3 Paige, 222; Walker v. Devereaux, 4 Paige, 256; Hawes v. Oakland, 104 U. S. 450.

[5] Todd v. Mizner, 4 J. J. Marsh. 447.

only not necessary, but improper, to bring in parties not interested in the cause, simply because they are interested in the property in some collateral way.[1]

Multifariousness is the term used in equity to denote the joining of too many parties or subjects in one bill. The principle governing the joinder of parties is the same in both forums; that is, there must be a common or joint interest of all parties in the subject of the suit and the relief or judgment.[2]

Sec. 662. *Joinder of Causes* is not allowed in equity to the extent of bringing in distinct causes. In legal actions several distinct causes may be joined in one action, provided they are of classes to be joined, using separate counts for each cause.[3] But in equity two entirely independent matters cannot be litigated in a single suit.[4] But the whole of what is a single transaction must be litigated. A case cannot be split up and tried in piecemeal.[5]

Multifariousness should be objected to by demurrer, but may be raised by answer, and must be raised by one or the other of these modes, unless the court, of its own motion, declines to proceed.[6]

Sec. 663. *Pleading* is the legal designation of the mode or modes of statement by which the facts of a case, controversy or proceeding are exhibited to a judicial tribunal for hearing and decision; or, in other words, pleading relates to the mode of alleging the facts of a case.[7]

Our law literature abounds in treatises on common-law pleading, code pleading and equity pleading, and the natural inquiry is, Is there a distinct system of pleading for each of these?

The purpose of the following remarks is to show that while the law and equity courts each originally developed its own sys-

[1] Ch. T. Soc. v. Gage, 109 Ill. 175; Jones on Mort., § 1440.

[2] Luling v. Atl. Mut. Ins. Co., 45 Barb. 516; Boyd v. Hoyt, 5 Paige Ch. 65; 3 Lawy. Ed. 629, note; Whitney v. Fairlands, 54 Fed. Rep. 985.

[3] Andrews' Steph. Pl. 310; Craft Ref. Co. v. Quinnipiac Brewing Co. (Conn.), 25 L. R. A. 856. Numerous specific deals involved in one continuous transaction may be decided. Kilbourn v. Sunderland, 130 U. S. 505.

[4] Id.; Story's Eq. Pl., § 271; Walker v. Powers, 104 U. S. 245; Merwin's Eq., § 923; Winslow v. Jenness, 64 Mich. 84; Whiteside Co. v. Burchell, 31 Ill. 68.

[5] Beloit v. Morgan, 7 Wall. 617; Litch v. Clinch, 136 Ill. 410.

[6] Gilmore v. Sapp, 100 Ill. 302.

[7] 3 Cooley's Blk. (4th ed.) 293.

tem of practice and form of statement, and each still preserves some distinctive rules or incidents peculiar to the nature of the subject and mode of trial, so far as the main body of rules and the governing principles *of pleading* are concerned, the system of rules of pleading developed in common-law cases in England governs and guides them all. That is, the so-called common-law rules constitute the main body of every system of pleading, each system having some peculiar rules.[1] And since the idea of marking the points of impact or contest in cases by raising issues of law and issues of fact has developed, and the almost total disuse of discovery in bills, the reasons for the chief differences have disappeared; and although the form of statement in an equitable suit and the instruments of pleading, *i. e.*, bill, answer, pleas, supplemental bill, etc., differ, these do not affect the principles and rules which guide in the statement of the facts and denials made use of in these various documents. Again, when the suit is contested by plea, the old idea of chancery pleading as to that part of the case disappears entirely.[2]

The Objects of Pleading.— The primary object of all written pleadings is to ascertain the subject-matter of the suit, *i. e.*, the cause of action, and to limit the matters of law and fact which are in dispute between the parties.

The first branch determines the jurisdiction of the court over the subject-matter.[3] The second limits the exercise of jurisdic-

[1] It may be doubted if there ever was a system of pleading in equity made up of rules of allegation different from the common-law rules. Prof. Haynes, in a course of lectures before the English Incorporated Law Society in 1838, contrasting law and equity procedure, states that the absence of any specific rules or system is one of the advantages of chancery procedure. Haynes, Outlines Eq., pp. 66, 67, Appendix, *291, Law Lib., vol. 98. And it is remarkable that in most of the text-books entitled Equity Pleading, no rules of pleading are given differing from the rule already established by the law courts. Names are changed, such as denial for traverse, multifariousness for duplicity, impertinence for surplusage and redundancy or the pleading of evidence, but there are no distinctive rules, properly so called. One of the chief aims of Lubé, in his treatise on Equity Pleading, was to show that the basic principles of pleading were the same in both jurisdictions. Lubé, Eq. Pl., Preface.

[2] The student should here be told that it is allowable to answer a part of a bill and plead to another part.

[3] Lubé, Eq. Pl., §§ 182, 183, 205; Kerfoot v. People, 51 Ill. App. 409, citing Dickey v. Reed, 78 Ill. 261; Windsor v. McVeigh, 93 U. S. 274; United States v. Arredondo, 6 Pet. 691; Munday v. Vail, 34 N. J L. 418; People v. Liscomb, 60 N. Y. 559; Pomeroy, Eq. Jur., § 129.

tion, because the court has no authority, in any form of action, to decide without allegation,[1] *and governs the relevancy of evidence.*[2]

Framing of Issues.— What questions are contested is ascertained by the framing of issues of law or fact, showing the precise points the parties intend to litigate and the facts they intend to admit.[3]

Res Adjudicata Determined by the Issue.— Another object of written pleading is to furnish a record which shall show what has been litigated, in order that the parties shall not be twice vexed for the same cause, and the court called upon to try a case more than once.[4]

The Common-law System of Pleading Peculiar.— It has heretofore been remarked that trial by jury was peculiar to the British constitution.[5]

The fundamental rules *of procedure* in reference to trial under this system was that it was the province of the jury to

[1] Id.; Angelo v. Angelo, 146 Ill. 629; Pom. Code Rem., § 554.

[2] Andrews' Steph. Pl. 1.

[3] The framing of issues to guide the court and the parties is now required in chancery cases, having been introduced in analogy to the common-law practice. Keener v. Finger, 70 N. C. 48; Lubé, Eq., § 211. The theory *and issue* govern to the same extent in both jurisdictions. Reed v. Jourdan, 109 Mich. 128; Angelo v. Angelo, 146 Ill. 629; Andrews' Steph. Pl. 1.

[4] *Res Adjudicata.*— It is a rule that a cause of action once finally decided shall not be tried again. Another rule is that a fact once litigated shall not again be litigated between the same parties or privies. The first relates to a cause of action, the second to some fact which, although perhaps not the cause of action in either the action pending or the suit wherein the judgment or decree relied upon was given, was actually litigated in the former suit. In the first situation the pleadings are the only evidence of the cause of action. In the second situation (*i. e.*, where the causes are not claimed to be the same), resort is had first to the issues joined. If these are vague, indefinite or general, evidence may be taken as to what was actually disputed and actually decided. In the first case supposed the adjudication extends to every fact which might have been litigated under the issue. In the second, only the fact actually decided. Cromwell v. County of Sac, 94 U. S. 351; Outram v. Morewood, 3 East, 346; Duchess of Kingston's Case, 2 Sm. Ld. Cas. 734, notes; Riverside Co. v. Townshend, 120 Ill. 9. The distinction between using the former suit as a bar to a second suit for the same cause of action and using a former adjudication of *a fact* as an estoppel to litigating it in a second suit must be kept clearly in mind. See Lewis' Appeal, 67 Pa. St. 164; Moulton v. Libbey, 15 N. H. 480.

[5] 3 Cooley's Blk. (4th ed.) 379, note.

decide questions of fact; of the judge to decide questions of law.[1]

This required a system of allegation (pleading) which would separate the questions of fact from the questions of law, in order that the respective province of the judge and jury might be the more readily and intelligibly exercised.[2]

This is the occasion evolving issues.[3]

The utility of thus separating the law from the fact in all cases, irrespective of whether these were to be tried by a jury or a judge, and especially for the purposes of *appellate* procedure, finally caused the introduction of the issue in every form of proceeding, and has reduced the points of divergence between law and equity pleading to a few subordinate rules, which can hardly be called rules of pleading, but are rather rules of practice based on the policy of the law in reference to the subject of the suit.[4]

The introduction of the issue in chancery pleading came about as follows: In ancient times the rules of pleading in common-law actions were not applied. The complainant stated the facts of his case at large, and the defendant did likewise.[5] From these loose recitals and statements the chancellor selected from the mass the material matters,[6] and these were termed by

[1] Andrews' Steph. Pl. 102–148.

[2] "It is hardly too much to say that the common-law system of pleading, if not historically a consequence of the severance of the functions of the judge from those of the jury, is almost a necessary condition to the working of any judicial system in which such severance exists." [1858.] Prof. Haynes' Outlines of Equity, p. 65. This book is volume 98 of "Law Library."

[3] Andrews' Steph. Pl. 210–214.

[4] *E. g.:* The policy of equity is to require an answer, and formerly defaults were unknown as a form of admission; and now the rule is that matter alleged in the bill and not admitted by the answer must be proved by the complainant. In law a default was taken as a confession, and judgment followed. So, logically, the rule in law cases was that every fact not traversed was confessed. But this rule is applied in equity cases only for the reason stated. If, instead of answering, the defendant elects to plead some one fact as a defense, he impliedly admits the part of the bill pleaded to, precisely as at law. Detroit, L. & N. Ry. Co. v. McCammon, 108 Mich. 368.

[5] Of course there were then no skilled pleaders, and no definite theory was required. The chancellor then performed the work the pleaders must now perform.

[6] This informal narrative was formerly supposed to be a great advantage, but in time gave way to the idea that a distinct theory must be advanced, and *the party* must indicate not only his evidence by way of recital, but the *legal facts* he claims to result from them; and this is now the universal rule. *Ante*, p. 1060.

the clerical practitioners, who depended on the civil law for their guide, the *litis contestatio*. The common lawyers anciently called the ultimate points for decision the *exitus — issue*, or end of the pleading. Two systems so divergent existing side by side could not preserve their integrity, and when the law pleaders began to practice in the chancery court the courts began to influence each other; the chancellor began to send questions which he framed out of the mass of statements to the law courts for trial by a jury. In this manner the issue was introduced from the common-law courts, and in time supplanted the "*litis contestationes*."[1] The issue never, however, so long as the mingled form of bill for relief and discovery survived, became so clearly marked in chancery as at law, and every bill formerly mingled these objects; but since the recent evidence acts, the positive allegation in the bill of facts is required, and a direct denial or admission in the answer without evasion or argument, and the result is a traverse of material facts or controlling question of law, which results in *an issue of law or of fact made out of the pleadings*.[2]

The Codes do Not Abolish the Substantial Rules of Pleading. Mr. Justice Rodman, in the case just cited, states the object and effect of the code on the system of pleading: "This code of New York (which in this respect has been almost literally copied in our own [North Carolina]) enacts rules of *pleading* which *essentially*, and in all respects in which the common-law system is distinguished from the chancery system of ascertaining the issue, are those of the common law. This may be seen by comparing the rules of the code with those given by Stephen.[3] *By these the parties are or may be compelled to come to one or*

[1] See opinion of Rodman, J., in Keener v. Finger, 70 N. C. 35. The learned judge gave an account of the introduction of the practice of framing issues in chancery; citing Stephen's Pl., pp. 24, 54, 124 and 444; Andrews' Ed. 102, 148, 210, 432.

[2] An issue of fact is brought about by a *traverse*, or denial of a fact alleged by the opposite party. Such a traverse always tenders an issue, and at law or in chancery, if the fact alleged in dispute is material, it must be either traversed or admitted. If admitted as a fact, the legal effect may be questioned by raising an issue of law by demurrer, or any other mode of questioning the sufficiency of a pleading.

[3] It should be emphasized that Stephen in reality codified the law of pleading. His *method* is precisely that followed by the New York Code Commission. His *materials* are the then existing rules, which until his time had never been arranged as a system *without regard to forms of action*. Fitz James Stephen's Evi-

more issues decisive of the case; and although in practice it often happens that the desirable result is not attained, it is from negligence in the pleaders and indulgence in the courts, and not from anything in the rules designed to produce such an abortive result."[1]

The Relation of Code, Common-law and Equity Pleading.— Whatever technical differences formerly existed between the object of pleading at law and in chancery in reference to the elucidation of issues and the form of allegation, which in law was direct and confined to the ultimate facts, while in chancery the circumstances were stated more at large, had largely been greatly modified before the code was adopted in New York.[2] The influence of the codes is to abolish all technical and formal differences, and to reduce the substantial ones to the minimum; and such is the tendency in all jurisdictions.

The main object of a bill in chancery was formerly to compel the defendant to make full, complete and direct answer. Anciently there was no default in chancery, and no relief could be had until answer was made, and then relief was on the answer. Such a proceeding required that the bill should recite at some length the incidental or evidentiary facts, and ask the defendant to make specific answer to these. The framing of a specific issue was, in such cases, of no importance under the ancient practice.[3]

In modern times, however, much less importance is attached to the defendant's answer, *unless he is called upon to answer under oath*, and the modes of allegation have become gradually assimilated. The complainant affirms and the defendant denies, and thus issues have been introduced into chancery. Formerly no particular theory was required and no specific relief prayed, it being left to the chancellor[4] to disentangle the narrative and give such relief as the case required.[5]

Now these matters are changed. The issue is introduced in

dence Acts and Chalmers' Digest of the Law of Bills and Notes are constructed on the same model. Stephen gives only thirty-eight principal rules; all the rest are subordinate to these. See Table of Contents of any edition.

[1] Keener v. Finger, *supra.*

[2] Hood v. Inman, 4 John. Ch. 437.

[3] Lubé, Eq. Pl., § 204; Hawley v. Wolverton, 5 Paige, Ch. 522; Van Santvoord's Pl., 62.

[4] Adam, Eq., 307.

[5] Keener v. Finger, 70 N. C. 35.

analogy to the common law. The oath may be waived, the defendant defaulted, and the issue tried by calling witnesses.[1]

It was formerly the rule in all pure bills for relief, and as to that part of of the bill not aiming at discovery, that the same mode of allegation of fact should be adopted in chancery as at law.[2]

Van Santvoord, in his treatise on Pleading under the New York Code, states the old law quite clearly:

"*Under the old practice in chancery a bill of complaint might have a twofold object — discovery and relief.* A bill for discovery and relief, in addition to the grounds for relief, might state matters of evidence which were material in establishing the main charge or in determining the nature and extent of the relief;[3] but

"*A bill merely for relief should contain allegations of fact entitling the party to it substantially in the same form as averments in an action at law.*[4] This was the old rule of equity pleadings.

"*The pleadings should consist of allegations of facts, stated with as much brevity and precision as possible, not of inference or argument.*[5] In *Mechanics' Bank v. Levy*, above cited, the chancellor says: 'The allegations in the bill, so far as the question of the complainant's right to the relief is concerned, are substantially in the same form as the averments in a declaration at law, and the pleader must state his client's cause of action in such a manner that the main facts upon which his right to relief depends *may be put in issue and tried.*' So much in respect to the question of *relief;* but the complainant was also entitled to a *discovery*, and accordingly, under the old equity system, he might, to quote from the same opinion, 'state any matters of evidence in his bill which may be material in establishing the main charge, or in ascertaining the nature or kind of relief proper to be administered, and may interrogate the defendant as to these matters.'

"*The discovery is now abolished by the code.* The pleading can no longer be used as a method of examination or to obtain evi-

[1] Lubé, Eq. Pl., § 211.

[2] Hood v. Inman, 4 John. Ch. 437; Chambers v. Chalmers, 4 Gill & J. 441; 23 Am. Dec. 591.

[3] Mechanics' Bank v. Levy, 3 Paige, 606.

[4] Id.

[5] Hood v. Inman, 4 Johns. Ch. 437.

dence in the aid of the relief sought. Nothing is left of the old equity mode of pleadings but the simple allegations of facts material to the relief sought, and which go to establish the plaintiff's case; and whether these facts were one or more, they were required, as we have seen, even under the old equity system, to be set forth substantially the same as averments at law, and were required to be such as might be *put in issue and tried.*'"[1]

The same result is indirectly accomplished by the practical abolition in all states of the bill of discovery, and the discovery part of bills of relief and discovery, brought about by the modern evidence acts.[2]

The constitutional requirement that the right to a jury trial in common-law cases must be protected, and that a jury trial is not a requisite in equity cases, accounts for all the difference in form which remains between chancery and common-law pleading. The first New York code necessarily provided for this in a manner to preserve all of the ancient differences, but did not increase them, and this model has controlled elsewhere.[3] The codes expressly contemplate the framing of issues.

The dependence of code pleading upon the principles of the common-law system is no longer a disputed or debatable point in American jurisprudence. Bliss in his treatise on Code Pleading says: "It is assumed that the student of the code is fa-

[1] Van Santvoord's Pl., 65, 66.

[2] *Ante*, pp. 1088, 1089.

[3] Mason, J., in Hill v. McCarthy, 3 N. Y. Code Rep. 49, says: "While, however, the present code of procedure has abolished all distinction between law and equity, so far as the form of the action and the jurisdiction of this court is concerned, and so far as the mode of commencing suits and the forms of pleadings, etc., are concerned, still there is recognized, so far as the forum before which the trial shall be had, to a certain extent, a distinction still. The two hundred and fifty-third section of the code provides that whenever *an issue of fact* shall be joined in an action for the recovery of money only, or of specified personal or real property, it must be tried by a jury, unless a jury trial be waived as provided in section 266, or a reference be ordered as provided in sections 270, 271; and the two hundred and fifty-fourth section provides that *every other issue of facts* shall be tried by the court, unless the court shall order the whole or some specified question of fact therein to be tried by a jury, or shall refer it as provided by sections 270, 271. It will readily be perceived upon a moment's reflection that the effect of sections 253 and 254 is to throw the trial of all questions of fact in the old common-law actions upon the court and jury; and at the same time to throw the trial of the whole class of equity suits upon the court without a jury, unless for some special reason the court shall order such issue to be tried by a jury."

miliar with the common-law and equity systems of pleading. If not, he is groping in the dark, and much which is offered (in his book) will escape his apprehension. *This knowledge is deemed essential . . . because the foundation idea of pleading is not changed.*"[1]

The relation between law and equity pleading is not so well understood. Lawyers and text-writers do not sufficiently distinguish between the forms of procedure and the rules and principles of pleadings, properly so regarded, and so the idea has obtained that the principles and rules of pleading are as divergent as the practice and formal instruments in which these pleadings are set forth. Such, it is apprehended, is not the case.

Long after Stephen had formulated the fundamental rules of pleading classed with reference to their objects *without regard to the form of action*, Lord Cottenham said: "The whole *machinery* of pleading in equity is somewhat cumbrous and not quite well reduced to principle."[2]

"At an early stage in the development of the equity jurisdiction of the court of chancery in England, the pleadings in equity conform very nearly to those at the common law,"[3] and notwithstanding the difference in the *machinery* of equity, and the discovery branch of all chancery suits, the true principles of pleading, so far as any were established and stated, were the same as those used in the law courts. Tyler says: "The bill must state the case in direct and positive terms and with reasonable certainty. Allegations must be positive and not by way of recital, and must be of facts only. . . . The well-established principles of equity pleading require nothing more than a simple statement of the plaintiff's case with a prayer for relief and process. . . . The defendant must answer . . . positively and directly and not by way of argument."[4] Now these are the principles which govern the pleading in legal actions.

[1] Bliss, Code Pl., § 141. Prof. Bryant and Judge Phillips introduce their treatises with a short review of the common-law system, the former using the rules formulated by Stephen. The late Judge Cooley says: "Let the common-law rules be mastered and the work under the code will prove easy and simple. Int. to Cooley's Blk. (4th ed.), xxvii.

[2] Foley v. Hill, 3 Mg. & Cr. 482 [1838]; Tyler's Mitford, Eq. Pl. 84.

[3] Mitford, Eq. Pl. (Tyler's ed.), Introduction, p. 83.

[4] Id., pp. 65, 66, 67.

Sec. 664. *Structure of a Declaration or Complaint and of a Bill in Equity.*— Before explaining the distinguishing features between pleading in law and equity cases, the structure of the complaining parties' pleading may be profitably examined.

A declaration or count[1] in a legal action contains either eight or nine parts, according to the nature of the suit.[2]

The caption, designating the court.[3]

The title of the case, stating who is suing and who is sued, and the nature of the suit, which was formerly the result of the original writ.[4]

The Inducement.— A recital showing the relation between the parties on which the duty violated is claimed to rest. It may be a contract, or in negligence cases the relative situations, and an allegation of such duty as a legal fact.[5]

The charge, which may be a breach of contract, covenant, etc., or negligence, malice, or the like, or a forcible trespass to person or property.[6]

The injury and ad damnum clause are alleged after the allegation of the charge, breach of contractual obligation, trespass, negligence or malicious injuries, by alleging "whereby the plaintiff is injured, and has sustained damages in the sum of," etc. If there are special damages, *e. g.*, expenses incurred, loss of profits, special consequences of a libel, loss of employment, etc., they must be alleged.[7]

[1] A declaration may have several counts. Each count must state a complete cause of action. The description here is of a single count. Many may be joined in one declaration. Andrews' Steph. Pl., 310, note.

[2] See Supervisors v. Decker, 30 Wis. 624; T., W. & W. Ry. Co. v. McLaughlin, 63 Ill. 389.

[3] Id.

[4] See theory, Andrews' Steph. Pl., § 218.

[5] In direct forcible injuries, where the acts charged in the charging clause are *prima facie* unlawful, no inducement is required. The inducement serves to show why the acts are an injury to the plaintiff. See People v. Ryder, 12 N. Y. 433.

[6] In some cases special damages will support an action which otherwise would not lie; *e. g.*, slander, where the words are not actionable *per se*, and case, for a nuisance public in its nature, where a private party can sue only because of a special injury.

[7] *Declarations in libel and slander* present an anomaly in pleading in the use of a phrase in the inducement called a colloquium, and in the charge of an explanatory phrase called the innuendo. The former consists in alleging that the malicious discourse (speech) or publication (writing) was of and concerning the plaintiff. The latter is occasioned by the rule requiring the words to be

Signature of declaration by counsel, or by the party (*pro se*) if he has no counsel, is required.

A Bill in Equity — Ancient Forms Becoming Obsolete.— A bill in equity formerly had a double object: the statement of the cause of action by means of the stating and charging parts, and the examination of the defendant as to the facts and circumstances involved. Inasmuch as this examination under oath was the only way of getting the defendant's testimony,[1] it was until the recent evidence acts a very important branch of a bill in equity. Since these acts, bills of discovery are very infrequent. The weight given to an answer under oath, which is the only way the defendant can be required to answer specifically, and the right to call him as a witness, has rendered such specific questioning unnecessary. These two reasons have materially changed the structure of bills in equity.

The Parts of a Complaint in Equity.— The address formerly took the shape of a petition to the chancellor, later to the "honorable judges" of the court, designating it, with no caption.[2]

The stating part indicated who sued, and, after naming each of the complainants, as your orators, J. Doe, etc., proceeded to state and show to the court the nature of the relation between all persons connected with the transaction or interested in the subject-matter, and the circumstances showing the relative rights, obligations and duties of the particular persons to be subsequently named as defendants. *This corresponds exactly with the inducement in the declaration.*[3]

The charging part alleges the facts, conduct and acts which are the grounds of suit,—accident, mistake, fraud, fiduciary relationship, threatened injury, etc., suitable to any of the several forms of equitable suits.[4] These facts must be alleged with the same directness, conclusiveness and certainty as is required in allegations of fact in a law case.[5]

substantially repeated in the declaration, and these being often ambiguous, the plaintiff is allowed after each word to throw in his construction of the meaning intended by the defendant. Andrews' Steph. Pl. 124; Lewis v. Chapman, 16 N. Y. 371.

[1] Under the old chancery practice an order could be obtained by the complainant to examine the defendant under oath. 1 Greenl. Ev., § 361; Bragg v. Geddes, 93 Ill. 39.

[2] No title to the cause; *e. g.*, J. Doe v. R. Roe, is inserted.

[3] Lubé, Eq. Pl., § 217.

[4] *Ante*, p. 1072.

[5] "The code has by no means dispensed with that certainty and regu-

The interrogating part (now obsolete) consisted in questions put to the defendant as to the evidentiary facts and circumstances, precisely as a witness is questioned in a modern deposition.

Prayer for Relief.— This part of the bill generally begins with the unnecessary recital that there is no adequate remedy at law, followed by a petition for the specific relief against each and all the persons, naming them (with their residence), who are made defendants, followed by a general prayer that the complainant shall have such other and further relief as equity requires and the court deems most proper.[1]

The prayer for process prays the court to issue the writ of subpœna in chancery, summoning the defendant to appear at the next term of the court and then and there answer the bill.

Prayer for special processes of preliminary or temporary injunction, *ne exeat*, etc., may be added.

Signature and oath of party are generally required.

Signature of counsel or solicitor is required.

Impertinence in equity pleading consists in introducing unnecessary, redundant and immaterial recitals in the stating or charging part of a bill. It corresponds to redundancy and surplusage in common-law pleading.[2]

From this explanation of the structural parts of the complainant's instrument of complaint, it is plain that in general the rules for alleging or stating facts in all forms of action will naturally be the same, and that only in special particulars do they differ.

larity in pleading which is essential to every system adopted for the administration of justice (Rowland v. Windley, 82 N. C. 131); and that now, as in the old equity practice, 'there should be such certainty in the averment of title upon which the bill is found that the defendant may be distinctly informed of the nature of the case he is called upon to meet.'" Story, Eq. Pl., § 241; Dunn v. Johnson, 115 N. C. 249.

Pleading — Theory.—See Variance and Amendments.

A plaintiff should not be allowed to frame his complaint in ambiguous language and then complain that he has been held to one of two possible constructions. The complaint in this case contained one hundred and fifty-eight pages, besides a copy of the judgment roll. Alexander v. Donahoe, 143 N. Y. 203.

[1] Prayers may be framed in the alternative. Hardin v. Boyd, 113 U. S. 756. The general prayer will support a decree for any relief consistent with the theory of the bill. Beebe v. Bank, 1 John. 547.

[2] Hood v. Inman, 4 Johns. Ch. 437.

Sec. 665. *Instruments of Chancery Pleading.*[1]—The bill sets forth the complainant's cause and grounds of action.

There is no repugnancy in different allegations in the same bill or answer by reason of the pleading taking different grounds.

It is allowable to state two distinct and independent grounds on which relief or defense is based, and if either is sufficient it is not impaired by the fact that it is joined cumulatively with another allegation, which, of itself, will not maintain the equity of the bill.[2]

An Information.—Where the public brings a suit in chancery in reference to some subject-matter other than what would be a mere private transaction but for the parties, the suit is brought by an information instead of a bill, in the name of the state or the attorney-general on the relation of some private person, or, if there is no relator, without this element.[3]

Amendments to the bill are corrections of the statements of the case and the addition of material facts which existed at the time of the filing of the bill, or the addition of new parties to the case.[4]

An amended bill is used where the amendments are so considerable as to amount to a restatement of the case. It may change the theory of the complainant.[5]

A supplemental bill proceeds upon a theory different from

[1] The reforms in procedure have made great changes in the names and modes of questioning the sufficiency of the documents, but there has been little or no change in the underlying principle.

[2] Bennett v. Vade, 2 Atk. 324; Shipman v. Furnace, 69 Ala. 555.

[3] Such are the great injunction, *quo warranto* and *mandamus* cases we have noticed.

[4] *Ante*, p. 1061; Story, Eq. Pl., § 332; Stafford v. Howel, 1 Paige, 200. However defective a bill may be, even though it is lacking in jurisdictional allegations, it may be made good *ab initio* by amendments. Grimes v. Grimes, 143 Ill. 556. It is not unusual for the appellate tribunal to direct amendments to be made. Nichols v. Drew, 94 N. Y. 22; Dobson v. Racey, 3 Sandf. Ch. 60. After a cause has been heard, and a case for relief established which differs from the case disclosed by the bill, but does not change the subject-matter, an amendment which states the real case will be allowed. Story, Eq. Pl., § 893; Arnett v. Welch, 46 N. J. Eq. 543; Neale v. Neales, 9 Wall. 1; N. Ry. & C. Co. v. Long Dock Co., 41 N. J. Eq. 407; The Tremolo Patent, 23 Wall. 518; Sawyer v. Campbell, 130 Ill. 186.

[5] Story, Eq. Pl., § 333.

mere amendments, and because a court of chancery undertakes to adjust all equities between the parties up to the time of the making of the final decree.[1] A supplemental bill is necessary to introduce into the case *facts happening since the filing of the bill*[2] and introducing new parties who have become interested since that time.[3] It may very materially change the structure and theory of the original case,[4] but cannot introduce a new cause not existing when the bill was filed.[5]

The replication is the reply of the complainant to the defendant's answer or to the plea, wherever it is intended to traverse the matters alleged in the answer or plea.[6]

Demurrer to bill or cross-bill is the only demurrer that a complainant in chancery can file, it not being allowable in chancery to demur to anything excepting a bill.[7]

Cross-bill to a Cross-bill.— It is allowable in some instances for a complainant to file a cross-bill to a cross-bill filed by the defendant.

Defendant's Pleadings.— Ordinarily the great instrument of defense used by the defendant is the answer. It has two principal objects.[8] First, is to make direct and complete answers to the statements and charges of the bill of complaint.[9] Second, to bring forward the affirmative defenses, *i. e.*, to allege affirmative facts not alluded to in complainant's bill of complaint, but which are relied upon by the defendant to defeat the effect of the facts alleged by the complainant.[10]

An answer, then, consists of admitting those facts which are true, and denying or traversing those which are claimed to

[1] Loaby v. Redmond, *ante*, p. 1070, note 4.

[2] If facts existing when the bill is filed must be mingled with those happening since, the proper instrument is a supplemental bill. Story, Eq. Pl., § 332; Walker v. Gilbert, 7 S. & M. 456. They are not a new proceeding. Rigney v. Rigney, 127 N. Y. 408; Id., 160 U. S. 531.

[3] Wilson v. Wilson, 93 Va. 546.

[4] Story, Eq. Pl., § 333.

[5] Ledwith v. Jacksonville, 32 Fla. 1; Neubert v. Mastman, 37 Fla. 91.

[6] Formerly special replications were allowed traversing specific points, but now pleadings in equity stop with a general replication denying the truth and sufficiency of the answer, and asserting the truth and sufficiency of the bill.

[7] Story, Eq. Pl., § 456.

[8] Stone v. Moore, 26 Ill. 172.

[9] It must admit or deny the charges in a bill, not evasively but directly. Puterbaugh, Ch. Pl. 167; Bauerle v. Long, 165 Ill. 345. It must apprise the complainant of the theory of defense. *Ante*, p. 1060.

[10] Id.

be untrue,[1] and alleging additional new matter by way of defense.[2]

A plea is a special answer to a bill or some part thereof, showing and relying upon one or more additional facts as a reason why the suit should be abated, or suspended, or completely barred.[3]

Demurrer is a pleading by the defendant questioning the legal sufficiency of the bill, and contains no allegation of new matter, but tenders only an issue of law. It is consequently an admission of the bill.[4]

A cross-bill is used by the defendant when he seeks affirmative relief against the complainant, in which case he states the cause of action which he claims he is entitled to, and the relief which should be given him as against the complainant

[1] *Admission in Chancery Pleading.* The facts alleged in the bill bind the complainant. Bebee v. Bank, 1 John. 546. A fact alleged by the defendant in his answer may aid the plaintiff without amendment. Bang v. Phelps, 96 Tenn. 351.

Implied admissions are the direct opposite of those in law. In equity, matters neither denied nor admitted by the opposing pleading must be proved by the party affirming them. Litch v. Clinch, 136 Ill. 410. But if the answer in pleading mentions the allegation in dispute and answers it evasively, the fact is admitted. McVey v. McQuality, 97 Ill. 93; Corbin v. Com., 2 Met. (Ky.) 280.

An answer responsive to the bill operates as evidence for the defendant. Coldiron Co. v. Ashville Co., 93 Va. 364. But even a sworn answer is not final and conclusive. Edwards v. Rodgers, 41 Ill. App. 405. Such an answer can only be overcome by evidence outweighing that of a single witness. Godden v. Kimmell, 99 U. S. 206; Bragg v. Geddes, 93 Ill. 39. The special traverse is appropriate in equity pleading. Lubé, Eq. Pl., § 343; Litch v. Clinch, 136 Ill. 410.

[2] The matters of fact made use of in this part of an answer may also be used in a plea. Stone v. Moore, 26 Ill. 172.

[3] Lubé, Eq. Pl., § 214, citing Mitford's Pl. 178. These pleas may be classified the same as pleas in legal actions into pleas in abatement, in suspension to the jurisdiction of the court, and in bar of the suit.

[4] A demurrer in equity, as at law, admits only facts well pleaded and not all general allegations. United States v. Des Moines, 142 U. S. 510; Miller v. Davidson, 3 Gilm. 518; *ante*, p. 1070. If the facts fully appear in bill a demurrer may raise the question of limitation or laches. Answering over after a demurrer to the bill waives the demurrer. Bauerle v. Long, 165 Ill. 340. In some jurisdictions the specific grounds of demurrer must be set forth, and each ground is regarded as a special demurrer. S. & N. A. Ry. Co. v. H. A. & B. Ry. Co., 104 Ala. 233. Where such is the rule, a general demurrer that there is no equity in the bill is not sufficient. Pate v. Hinson, 104 Ala. 559. But in most states a general demurrer is allowed. Cochran v. Adams, 50 Mich. 16.

party.[1] It is a defense which necessarily he must use in connection with and only after he has answered the bill of complaint.[2]

The defendant's replication is made necessary by the pleadings, following the cross-bill in precisely the same manner as a replication is used by the complaining party on the original bill.

A disclaimer is a defendant's statement that he claims no rights or interest in the subject-matter of the suit.[3]

The Forms and Use of Defensive Pleadings.— It is allowable to plead to one part of the bill, demur to another part, and answer the balance of the bill, combining the three modes, so that the whole bill is met by some form of defense.[4]

One cannot answer and demur to the same matter. An amendment to a bill, however trivial and unimportant, authorizes a defendant, though not required to answer, to put in an answer making a new defense and contradicting his former answer.

An amendment to a bill does not, however, enable a defendant who has answered the original bill to demur to an amended bill upon any cause of demurrer to which original bill was open, unless the nature of the case made by the bill has been changed by the amendment.[5]

A defendant cannot, after he has answered an original bill, put in a general demurrer to the bill as amended, because the answer to the original bill will overrule the demurrer. A de-

[1] Equities may be adjusted between defendants without any cross-bill. Elliott v. Pell, 1 Paige, Ch. 268; Yates v. Stuart's Adm'r, 39 W. Va. 423. But one defendant who desires affirmative relief against the complainant or a defendant must file a cross-bill. Id.; Story, Eq. Pl. 392; Jewett v. Iowa Land Co., 64 Minn. 531.

[2] A cross-bill must be confined to matters which are involved in the original bill, and is filed to enable the defendant to fully avail himself of some defense by making his redress complete through the granting of affirmative relief, which could not be done under the original bill and the answer. Andrews v. Kibbie, 12 Mich. 94; Griffin v. Griffin, 112 Mich. 87. This is an important case, making parties and bringing in new parties by the cross-bill.

[3] Lubé, Eq. Pl., § 22.

[4] Lubé, Eq. Pl., § 23. But this rule must be qualified in its application to demurring to one part and pleading or answering to another part, by observing that a demurrer can lie only to an integral part, as either the discovery or the relief prayed. See Story, Eq. Pl., § 441.

[5] 1 Dan. Ch. Pr. (15th ed.), p. 409.

fendant must in such case confine a demurrer to matter introduced by the amendment.[1]

The defendant cannot urge, as a ground for demurrer to the entire bill as amended, that the complainant has an adequate remedy at law if he has made no such defense to the original bill.[2]

Attacking the Answer.— The sufficiency of an answer in chancery is to be tested by the peculiar modes provided by the court of chancery for that purpose. A demurrer to an answer is unknown in the equity practice of the federal courts, as it was unknown to the practice of the high court of chancery in England.[3]

The only way by which the sufficiency of an answer to the bill in equity can be tested is by setting the case down for hearing upon bill and answer, the effect of which is an admission by the complainant of all the averments of fact properly pleaded in the answer and a waiver of any right to contest them by replication and proof.[4]

In order to properly understand the mode of attacking an answer, the twofold office of the answer should be borne in mind. The first is to admit or deny each and every one of the material facts set up in the complainant's bill; and second, to bring forward and state to the court the nature of such affirmative defenses as the defendant conceives that he may have. It takes the place of the plea in the common-law practice, and either confesses or denies the facts upon which the complainant's equity depends, or confesses and avoids them by the introduction of new matter, from which an opposite conclusion follows.[5]

If the complainant considers that the defendant's answer does not fully answer what it professes to answer, or evasively denies that which it mentions by way of denial, or that it contains impertinent matter, or scandalous matter not pertinent to the charge, or is in other like respects defective, he may file

[1] 1 Dan. Ch. Pr. 583.

[2] Bond v. Pennsylvania Co., 69 Ill. App. 507.

[3] Crouch v. Kerr, 38 Fed. Rep. 5, 49; Banks v. Manchester, 128 U. S. 244, 9 Sup. Ct. 36; Travers v. Ross, 14 N. J. Eq. 254, 258; Winter v. Claitor, 54 Miss. 341; Edwards v. Drake, 15 Fla. 666; 1 Dan. Ch. Pr. 542.

[4] Barry v. Abbott, 100 Mass. 396; Brown v. Mortgage Co., 110 Ill. 235; Stone v. Moore, 26 Ill. 165.

[5] Stone v. Moore, 26 Ill. 165; 2 Dan. Ch. Pr. 814.

exceptions to it in which he states particularly what his objections are.

If there is nothing objectionable to the matter or the manner in which it is stated, but it appears to the complainant that the same presents no sufficient answer to the bill, he should set the case down for a hearing, and in that manner test the sufficiency of the facts alleged as a defense. This is the chancery equivalent for the common-law demurrer. If the matter which is set up seems to be irrelevant entirely, that may be excepted to.[1]

Where, however, a demurrer is in fact filed to an answer, and no objection is made thereto, the court may treat the demurrer as an application to set the cause down for a hearing as upon exceptions on a hearing.[2]

Under the English chancery practice exceptions would not lie to an answer not under oath; but in Illinois, under the peculiar statute of that state, a bill in chancery not under oath may be excepted to.[3]

SEC. 666. *Practice.*— The general subject of procedure is usually divided into the law of pleading, practice and evidence.

Practice embraces that body of rules which regulates the time and manner of taking the various steps in a law-suit.

It must not be expected, however, that the subjects of pleading, practice and evidence are independent, separate from each other. They are in their actual administration intimately associated one with the other. One cannot construct a treatise upon the subject of evidence or pleading without embracing within it much of the subject of practice. The subjects constantly interlace.

It will be readily understood that the subject of practice can only be understood in connection with some particular code or body of law, as the practice in New York or in Illinois, or common-law practice or equity practice.

Again, it is very difficult in many instances to point out and distinguish with nicety whether a given subject most properly belongs to the law of evidence or pleading or practice. *E. g.*, do the rules regulating what is called the burden of proof fall most appropriately under the rules of pleading or evidence?

[1] Stone v. Moore, 26 Ill. 165.
[2] Barry v. Abbott, 100 Mass. 396.
[3] Hair Co. v. Daley, 161 Ill. 379.

Are those rules which regulate the mode of producing evidence rules of evidence or rules of practice? These suggestions show how necessary it is to treat and study the subject of practice with reference to some particular system, and in association with the rules of pleading and evidence.

The details of practice at law and in equity, even in those states where the old common-law procedure prevails in a modified form, differ materially in each state. In most of the states of the Union the adoption of the reform procedure has made essential changes from the ancient procedure. Again, the practice is not uniform even among the code states. For these reasons, as well as those stated at the beginning of the chapter and in the preface, no attempt will be made to treat in detail the subject of practice.

Steps in Actions at Law.— The student will find an outline and explanation of the proceedings in actions at law in chapter 1 of the earlier editions of Stephen's Pleadings. In chapter 3 of the edition prepared by the author (Andrews' Stephen's Pleading), beginning at page 60, and on this page is a synoptical outline of the proceedings in an action at law from beginning to termination.[1]

Inasmuch as it is beyond the plan of the present volume to enter upon a treatment of the details of procedure or practice, and because, further, as has been heretofore pointed out, the system of common-law pleading and procedure forms the foundation of all other systems of practice, or point of departure from which they diverge (in detail rather than in principle), the author believes that it is indispensable as an introduction to the study of procedure in American law that the substance of what is contained in the one hundred and fifty pages making up chapter 3 of the book referred to,[2] shall be acquired by the student.[3]

[1] This outline is in no other edition.

[2] Andrews' Steph. Pl., ch. 3. In no other treatise accessible to American students is there such a succinct, orderly presentation of these proceedings. Other authors of books on pleading assume in the reader a knowledge of procedure, and confine themselves more particularly to rules of pleading, or mingle in a treatise called a work on pleading the subjects of pleading and practice. Stephen's plan was to outline the proceedings for the purpose of applying the rules which he treated in the subsequent chapters of the book.

[3] In the author's edition above referred to great pains was taken to show the relation of code and common law in these matters, with copious citation of decisions from code and common-law states.

The steps in a chancery suit adapt themselves to the most convenient dispatch of the business of that court, which formerly proceeded more deliberately than the law courts.

Speeding the Cause or Dismissing the Bill.— After an equity case is begun, it may be the desire of the defendant to have the bill dismissed.[1]

It is not always a matter of course that the bill can be dismissed even by the plaintiff, although ordinarily this is his privilege at any time before a cross-bill is filed.[2]

Order of Proceeding — When and by Whom Taken.— Under the earlier practice in chancery, if the plaintiff did not proceed with the steps necessary on his part to bring the cause to a hearing, the defendant's only remedy was by motion to dismiss the bill for want of prosecution. It was the plaintiff's duty, after demurrer or plea, to set the cause down for argument or take issue on the plea; after answer to the bill and interrogatories, and the same held sufficient, to set the cause down for hearing on bill and answer, to reply, or to amend should the answers make amendment necessary; after replication, to serve a subpœna to rejoin, to obtain, when necessary, a commission to examine witnesses, have it executed and returned, to have rules to produce witnesses, to pass publication, to set down the cause for hearing, and serve a subpœna to hear judgment. The several periods limited for the performance of these duties were fixed by general orders, and on default by the plaintiff the defendant might move to dismiss the bill for want of prosecution. If, however, after notice of this motion, the plaintiff made good the default or undertook to speed the cause by taking the next step required, or if upon hearing he satisfied the court that he had used due diligence and was reasonably entitled to further time, the motion was dismissed.

With the abolition of most of this cumbrous machinery, and the adoption of rules simplifying the practice, the reason for the motion to dismiss for want of prosecution has largely if not wholly disappeared. The defendant is no longer obliged to wait the plaintiff's motion at any stage of the proceedings,

[1] A motion to dismiss is never a proper mode of testing the sufficiency of a bill. It is a proper mode of questioning the complainant's right to file a bill of the nature of the bill in question. Grimes v. Grimes, 143 Ill. 550.

[2] When it is not allowed. Stokes v. Little, 65 Ill. App. 259; Bates v. Skidmore, 170 Ill. 233; Kempton v. Burgess, 136 Mass. 192.

but may either take or require the plaintiff to take any step necessary to expedite the cause. The motion to dismiss for want of prosecution, having been superseded by more effective remedies, has practically become obsolete. By the English practice, the motion to dismiss was merely for the purpose of expediting the proceedings of the complainant; and there is no ground for such an application on the part of the defendant where either party is at liberty to proceed in the cause.[1]

Pleas — Several Kinds.— Pleas in equity like those at law are either *dilatory* in their character or they are pleas *in bar;* that is, the former show matter in abatement or suspension of the action or question the jurisdiction of the court, while the latter interpose some new fact not mentioned in the bill as a reason for defeating the plaintiff's cause on the merits.[2]

Questioning the Sufficiency of Pleas.— Under the strict chancery practice a demurrer is proper only to a bill; and while it would seem that a demurrer ought to be allowed to dilatory pleas, the practice has been not to allow a demurrer, but to require that the plea be set down for argument, and the same practice applies to a plea in bar.[3]

The strictness of the ancient practice, however, is greatly relaxed in all the jurisdictions except the federal courts, and in the code states entirely changed.[4]

Motions in Chancery.— A chancery case is speeded on its course by means of motions and rules.

A motion in chancery is a written request in the form of a motion to the court that the opposite party be required to do this or that, or that something be done in the case.

A motion amounts to nothing unless called up and presented in open court; the mere filing of a document which might, if presented in open court, constitute a good motion, is a nullity.[5]

Rules nisi are frequently granted during the pendency of a case that a party do this or that *or show cause* why, and these are then called rules *nisi.* Everything done in a case is done on the order of the court after rule entered. The practice in chancery is adapted to the taking of such steps pending the

[1] Whitney v. Mayor, 1 Paige, 548.

[2] Lubé's Eq. Pl. 187 et seq.; Story's Eq. Pl., § 705 et seq.; Andrews' Steph. Pl., p. 136.

[3] Lester v. Stevens, 29 Ill. 155.

[4] Id.; *ante*, p. 1124.

[5] McCormick v. Flaherty, 123 Ill. 525; Thompson v. Wooster, 114 U. S. 111.

suit as will preserve the interests of the parties and keep alive all rights until the final hearing and decree.

Defaults.— In law cases, when a defendant ignored the process to appear, he was said to be in default, and a judgment was taken against him; but decrees without appearance and answer were originally unknown in chancery, it being the theory in that forum to act only on hearing, and to compel appearance and answer.[1]

Defaults were introduced into the chancery courts in analogy to the practice at law,[2] and a decree *pro confesso* is now entered where the defendant fails to appear and plead, his *entire failure* to answer being treated as a confession of the bill.[3]

Hearing the Case.— After settling the issues the case stands for hearing. It might be on an issue taken on a plea, or the case may be set down on the bill and answer without evidence.

Jury Trial.— Where the case is regularly at issue on bill, answer and replication, an issue may be framed to be tried by a jury.[4]

The verdict of a jury in all cases, excepting the issue *devisavit vel non*, that is, in contests over the validity of a will, whether the instrument was a will or not a will,[5] was merely advisory and was not binding or conclusive on the court.[6]

Reference to Master.— In most cases where there is a hearing on evidence the case is referred to a master in chancery or referee to take and report the proofs.

He may be required to report with his findings of fact his

[1] Craig v. McKinney, 72 Ill. 314; King v. Bryant, 3 My. & Cr. 191.

[2] They were introduced by Stat. Wm. IV., ch. 36. 1 Spence, Eq. Jur. 375; Thompson v. Wooster, *supra*. And American courts followed the practice. Cairns v. Fisher, 1 Johns. Ch. 8.

[3] The default only admits the facts, not that they constitute a good cause of action. Board v. Smith, 95 Ill. 328. Nor do they admit the damages. See C. & St. L. Ry. Co. v. Holbrook, 72 Ill. 419. A defaulted defendant, unless he has appeared, is not entitled to notice of further steps, but he may appear and introduce evidence as to the damages. C. & R. I. R. R. Co. v. Ward, 16 Ill. 522; Craig v. McKinney, 72 Ill. 314; 2 Dan. Ch. Pl. & Pr. (3d ed.), p. 1115.

[4] Lubé's Eq. Pl., § 132. These are called "feigned issues" because they are not the real and binding mode of trial, but are a means taken to satisfy the conscience of the chancellor where he is doubtful whether his judgment is correct in a matter of fact. The defeated party may move for a new trial, and the chancellor may grant it or he may order as many as he sees fit. Stacé v. Mabbot, 2 Ves. 552; Johnson v. Harmon, 94 U. S. 371; Fanning v. Russell, 94 Ill. 386.

[5] *Ante*, p. 1085, note 1.

[6] Id.

conclusions on the law and recommend a decree, or simply to report the evidence back to the court without finding the issues of fact; in that case his function is little more than that of a commissioner to take evidence.[1]

The finding of a master in chancery who had heard and seen the witnesses is likewise merely advisory, although appellate tribunals, in cases where the credibility of witnesses is important, indulge a presumption in favor of the findings of facts of the master over the weight of the finding of the judge who had not this advantage.[2]

Master's Report.— After the master hears the evidence, if he is to report his findings as to the law or facts or both, the parties are given an opportunity by the solicitors to argue these questions, and after argument the master reports.

Objections to the report, questioning the correctness of his findings of fact or law or both, are then allowed, and these may be re-argued.[3]

Exceptions to the Report.— After the re-argument of the objections and the master's findings thereon, either or both parties who feel themselves aggrieved by the master's findings may except to his rulings on the objections, and then the case is ready for hearing before the court.[4]

Hearing Before the Chancellor.[5]— The final hearing is before the judge sitting as a chancellor, and if the evidence has been taken in open court the whole case is heard, argued, and by the court decided.

If the evidence has been taken by the master the case is heard on the exceptions to the master's report, and the argument is confined to the points which have been eliminated by the previous hearings.

Decretal Orders.— During the progress of a chancery suit the orders that are made are all in the nature of decrees, but those matters which are merely incidental and do not adjudicate any particular right in regard to the merits of the cause are usually

[1] Kimberly v. Arms, 129 U. S. 512.

[2] Howard v. Scott, 50 Vt. 48; Whitcomb v. Duall, 54 Ill. App. 650.

[3] 2 Dan. Ch. Pr. (4th ed.), p. 1316, note 4.

[4] Some controversy as to the correct practice in such cases arose in the Illinois courts, and this occasioned a thorough examination and settlement of the practice in McMannon v. C., D. & V. Ry. Co., 167 Ill. 394, where the ancient authorities are reviewed and the practice explained.

[5] The hearing on demurrer is a trial. Hobart v. Illinois Cent. R. Co., 81 Fed. Rep. 5.

called orders, whereas if a right is determined finally the order which is written up is more formal and is called a decree.[1]

Decrees.— These decrees are either interlocutory decrees or final decrees; *e. g.*, in an action of accounting the case is heard on its merits on the question as to whether there is a liability to account, and proceeds to a decree that the parties do account; and in this interlocutory decree it is directed that the case be referred to a master to take and state an accounting,[2] and on the coming in of this report and argument a final decree disposing of the whole case is entered; but in most cases there is but one decree, namely, the final decree adjusting the equities between all the parties, ordering what each is to do and what each is to receive.[3]

These decrees operate *in personam* (against the person), although, as we have seen in some instances, they direct that in default of the defendant personally performing the decree of the court, some officer of the court perform it in his name and stead.

Sec. 667. *Evidence.*— A rational system of evidence is an essential factor in any judicial system.[4] It is a *desideratum* in any judicial establishment which requires due process of law.[5]

The object of evidence in civil causes is to produce belief. The subject-matter upon which evidence will be admitted, or about

[1] But some collateral orders may be final and appealable; *e. g.*, orders to produce books, to pay alimony, submit to examination, etc. Lester v. Berkowitz, 125 Ill. 327.

[2] Such decrees are not final and are not appealable. Forbes v. Tuckman, 115 Mass. 120; Allison v. Drake, 145 Ill. 500.

[3] There may be several decrees final in the sense that they may all be appealable at different times. Elyton Land Co., Ex parte, 104 Ala. 88; Hunt v. Hunt, 109 Mich. 399.

[4] The necessity for an elementary exposition of the principles and rules of evidence is almost entirely dispensed with by the very concise treatise "The Theory of Evidence," by Wm. Reynolds, of the Baltimore bar. The book is professedly based upon the code of evidence prepared by James Fitz-James Stephen, and which constitute the Indian Evidence Acts, and which is known in America as Stephen's Digest of the Law of Evidence. Mr. Reynolds, who is also the editor of Stephen's Digest of Evidence, has presented the principles and rules of evidence in the more readable style of a text-book, adding elementary features by stating the reasons upon which they are based. The most scientific and scholarly treatise is doubtless the more elaborate one by Professor J. Bradley Thayer, of the Harvard faculty.

[5] The importance of an orderly and settled procedure providing fixed rules governing the admissibility of evidence was never made more apparent than in the Dreyfus case, tried with the French system (lack of system). The trial of Aaron Burr for treason, in the federal circuit court, shows the contrast between the British and American systems and that of the French republic.

which belief is material, is determined beforehand by the rules of pleading. The intimate relation between the subject of pleading and that of evidence is shown by the following three rules:

What is admitted by the pleadings cannot be the subject of dispute between the parties on trial.

Proof[1] will not be allowed of facts not in issue.[2]

The material facts must be proved as alleged.[3]

Evidence, regarded from the standpoint of the materials or instruments of proof, may be said to be that which makes evident, *i. e.*, anything which tends to convince the mind of the existence or non-existence of some particular thing.

Evidence, or the law of evidence, as descriptive of a subject-matter, in legal nomenclature is much wider and includes the methods of handling evidence by the tribunal — indeed, every means which may be resorted to in order to arrive at belief.[4] Juries are frequently instructed that they may test the weight and value of the testimony by their own knowledge and experience in affairs of life.[5]

The law of evidence is sometimes said to be a part of the law of procedure, but from a broader standpoint much of the law of evidence is substantive law.[6]

The development of the present system of evidence coincides very nearly with the development of the system of pleading which lies at the basis of our various systems, and which resulted in the establishment of the modern system of trials of specific issues. The fact that the hearing is before a single

[1] Evidence may be heard of any relevant fact.

[2] *Allegata et probata* (the evidence must correspond to the allegations, and refer to the point in issue) is a rule of evidence as well as of pleading.

[3] Id.

[4] 1 Wilson's Works, 480.

[5] Oil Co. v. Van Etten, 107 U. S. 334.

[6] *E. g.:* It is a rule of constitutional law that no *ex post facto* law shall be passed. A law which changes the law of evidence may fall within this inhibition. Kring v. Missouri, 107 U. S. 221. "Under the thirty-fourth section of the Judiciary Act of September 24, 1789 (1 U. S. Stat. at Large, 92), which provides that 'the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply,' the law of a state allowing a party to a suit to be examined as a witness on his own behalf is a rule of decision to guide the judgment, and not a rule of practice, and must be adopted as a rule in this court." Dibblee v. Furniss, 4 Blatchf. 262.

judge, or a number of triors, called jurors, is not the keynote to the system.

The ancient jury trial had little connection with the modern system of *trial by evidence*, and bears no resemblance to the modern jury trial.

The fundamental principle of modern trial evidence is the regard that is paid to the logical relation of cause and effect between different facts, and a regard for a wise public policy and general convenience, which experience has shown must set limits to the extent of the inquiry and the means of prosecuting it.[1]

It neither requires nor permits any mere physical, arbitrary tests.

The number of the triors, the unanimity of verdict, is insignificant compared with the all-important requisite of a modern investigation of questions of fact.

The present mode of inquisition, however and wherever conducted, is essentially *a trial by evidence.*

The basis of the system, then, is a rational theory adopted to accomplish the end sought, namely, belief as to issues joined between the parties.

Classification of Rules.— It must not, however, be understood that all of the rules of evidence are mere logical deductions. The rules of evidence may be classified as of two sorts:

First. The logical rules, and these are nothing more than the result of processes which would naturally suggest themselves to any reasoning person, irrespective of whether the inquiry was in a judicial tribunal or otherwise.

Second. Such rules as are said to be based on public policy. They are arbitrary rules supposed to be conducive to the safety of the public and security of individuals. An example of the latter is the exclusion of parties to law-suits, which was formerly the rule; so, also, the rule in some jurisdictions[2] that a party to negotiable paper, who has given it currency by his

[1] Upon this latter foundation rest all the constitutional safeguards; *e. g.*, against unreasonable seizures and searches (Counselman v. Hitchcock, 142 U. S. 547; People v. Forbes, 38 N. E. Rep. 303), no one shall be compelled to criminate himself, etc.

[2] The very fact that many states will not allow the rule shows that the policy is arbitrary, and this illustrates the truth that many of the rules are also arbitrary; that is, one set of men would reject what another adopts.

signature, cannot be heard to testify to anything which would impair its validity in the hands of an alleged innocent purchaser.[1]

Legislative Control Over Rules of Evidence.— The power of the legislature to change many if not most of the rules of evidence is everywhere admitted.[2] So the grounds of admissibility and competency are constantly changing, and it is not uncommon for the legislature to say what shall be conclusive and what *prima facie* evidence of a given fact.[3]

Universality of General Rules of Evidence.— So far as the rules of evidence depend upon reason and logic, they will naturally be very nearly uniform throughout those communities regarding the same fundamental principles of law, and having similar systems of administering justice.[4]

"However widely may differ different codes in matters of arbitrary, positive institutions, the general modes of investigating the truth of contested facts must be common to all, and, generally speaking, the principles of the law of evidence are of universal application, alike to law and equity, to civil and criminal procedure."[5]

Branches of Subject — Relevancy and Proof.— Slight reflection upon the *modus operandi* of hearing and determining questions suggests that aside from the *ultimate facts in issue* many other collateral facts rendering the existence of these controlling, material facts probable or improbable must be inquired into. In fact in many if not most cases there will be no witness or direct evidence to the main fact in controversy, and these collateral facts, called collateral circumstances, are the only matters which can be brought forward.

By what means the facts which may be heard shall be com-

[1] One can see, in this latter case, that the witness excluded may be entirely unimpeachable, and his testimony in that view of the matter may be conclusive; but on the ground of public policy, in order to protect negotiable paper, the arbitrary rule of exclusion prevents hearing what would give a satisfactory solution of the question in issue by a witness who, in the nature of things, is fully cognizant of the facts. See Sweeny v. Easter, 1 Wall. 173; Dewey v. Warriner, 71 Ill. 198; 12 Am. Rep. 93, note. See also remarks in Reynolds' Steph. Dig. Ev. (3d ed.), art. 110*a*, and note, p. 256*b*.

[2] Howard v. Moot, 64 N. Y. 262.

[3] Penn. Ry. Co. v. McCann, 54 Ohio St. 129.

[4] The proof of cases is governed by the law of the place of trial, and not by the law of the place where the cause of action accrued. Richmond & D. Ry. Co. v. Mitchell, 92 Ga. 77.

[5] Warren's Blackstone (2d ed.), 563.

municated or made known to the triors is a matter distinct from what may or must be shown.

The rules which regulate the manner of obtaining and introducing the testimony and proof constitute the practice in reference to the evidence, and at this point the rules of practice and evidence coincide.

The rules which determine these matters constitute the branches into which the subject of evidence may be divided. That is, the subject of evidence may be divided into the Rules of Relevancy, the Rules Regulating the Instruments of Proof, and the Practice as to the Evidence.[1]

Relevancy is the connection which a fact offered to be proved[2] bears to the fact *in issue*,[3] or any other material and relevant fact, as constituting a cause or effect of either the fact in issue or some other relevant fact whereby the existence or non-existence of the fact in issue or other material fact is rendered certain or uncertain, probable or improbable.[4]

It is quite plain that any fact which relates to the disputed fact is in a broad logical sense relevant, that is, it relates to it; and if that were all there was to the question, one would simply inquire whether the fact offered to be proved related to the fact in issue, and logically or reasonably affected its existence or non-existence.

"*A transaction* is a group of facts so connected as to be referred to by a single legal name, as a crime, a contract, a wrong, or any other subject of inquiry which may be in issue.[5]

[1] See Reynolds' Theory of Evidence, p. 4.

[2] Relevancy is always discussed as to a fact offered to be proved.

[3] *Fact in issue* means all facts which by the form of pleading in any action are affirmed on one side and denied on the other. Stephen's Dig. Ev., art. 1.

[4] "The word relevant' means that any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present or future existence or non-existence of the other." Reynolds' Steph. Ev. 5. The necessary connection need not be, as an element in the transaction in question, the *res gestæ;* but if a disconnected fact throws light on the motive or preparation for, or the intent with which an act is done, it is legally relevant, and if of sufficient force may be material. Reynolds' Steph. Dig. Ev., art. 7; Peabody v. Dewey, 153 Ill. 657; Thompson v. Bowie, 4 Wall. 463. If linked together in some way they may be legally relevant. Reynolds' Steph. Dig. Ev. (3d ed.), p. 203.

[5] Story & Isham Co. v. Story, 100 Cal. 30; Craft Ref. Co. v. Quinnipiac Co., 63 Conn. 551. See *post*, p. 1153.

"Every fact which is a part of the same transaction as the facts in issue is deemed to be relevant to the facts in issue, although it may not be actually in issue, and although if it were not part of the same transaction it might be excluded as hearsay."[1]

Logical and Legal Relevancy Differ.— The law does not extend the range of investigation to so wide a scope, and it is this limit of admissibility, or, in other words, the rules of exclusion, which make up the first branch of the law of evidence, namely, relevancy. It has been well said "*that what is logically relevant is legally so, unless excluded by some principle or some arbitrary rule.*"[2]

The subject of relevancy is made up chiefly of the rules of exclusion. The law of relevancy does in some instances work by way of inclusion, and brings unconnected facts within the range of legal relevancy.[3]

Materiality.— By immateriality is meant a fact which, although it may be relevant, is nevertheless so distantly connected with the fact in issue, or some relevant material fact, that it cannot reasonably be said to have any perceptible or material effect upon such facts as a cause or effect; that is to say, it is too remote.[4]

Competency relates to the adaptability of an instrument of proof, generally or at the particular stage in the proceeding when the question arises, whether it consist of oral evidence, documentary proof or a witness.

The practical utility of observing the distinctions between competency, materiality and relevancy consists in this: that on the trial the party offering the proof, when it is objected to on the ground of irrelevancy and immateriality, has the burden of showing its relevancy and materiality, and consequently opens and closes the discussion if any is required on the point; whereas in the case of incompetency of witnesses at least, and

[1] Reynolds' Steph. Ev., 7.

[2] Thayer's Cas. on Evidence, Introduction, p. 2. Prof. Thayer very properly adds that the law of evidence is the creature of experience rather than logic. Id.

[3] Reynolds' Steph. Dig., art. 10; Peabody v. Dewey, 153 Ill. 657.

[4] The judge may exclude evidence of facts which, though relevant or deemed to be relevant to the issue, appear to him *too remote* to be material under all the circumstances of the case. Lucas v. Brooks, 18 Wall. 436; Reynolds' Steph. Dig., art. 2.

generally speaking of all instruments of proof, the party objecting has the burden of showing why he considers the particular instrument or witness incompetent, and he opens and closes the discussion.[1]

Objections should be specific wherever the objection is such that if insisted upon it could have been obviated had it been pointed out.[2]

The Res Gestæ.— In the law of evidence *the transaction*[3] out of which grows the dispute or cause of action is called the *res gestæ* (thing in development), and naturally all such facts as form one connected transaction or event must have a continuity and connection as of cause and effect, and must be relevant.[4]

A transaction, whether it consists of a devolution of title or an extended course of dealing, embracing perhaps years of time and many acts and words, or consists of a mere casualty, occupying a very brief space, the *res gestæ* is completed, and whatever is said by those concerned in the transaction or casualty is mere hearsay, or an admission, depending upon whether the person speaking is one of the principal and a party, or participated in the transaction or accident as an agent.[5]

It follows that any act or declaration which falls within the description *res gestæ*, that is a part of the development of the facts constituting the cause of action, is admissible, although they may be mere hearsay; but unless a fact is a part of the *res gestæ* it cannot be admissible in evidence unless it is relevant in the sense above intimated, or is an admission.

[1] Best's Right to Begin, p. 37, note.

[2] If these distinctions between relevancy, materiality and competency are borne in mind, the practitioner would be able to state and argue his objections more intelligibly. It is very common to object to what is offered because of irrelevancy, immateriality and incompetency, without discriminating which of the three is really the correct ground of objection. If the evidence is relevant, but too remote, it should be objected to on the ground of *immateriality;* if it is irrelevant it should not be objected to because of incompetency; and incompetency should only be used as a ground of objection where, however relevant a fact offered to be proved may be, the instrument of proof is not at the time of the offer a proper one. So where a variance could be easily obviated, the objection should be placed on the ground of variance. People v. Brandreth, 36 N. Y. 191; Hartford Fire Ins. Co. v. Olcott, 97 Ill. 477.

[3] Robinson v. James, 29 W. Va. 224.

[4] Reynolds' Theory of Ev. 8; Montgomery v. Brush, 121 Ill. 523.

[5] Starkie on Ev.*86–89, note; Springfield Ry. Co. v. Welsch, 155 Ill. 51; Tolbert v. Burke, 89 Mich. 132.

Hearsay evidence, by which is meant the testimony by a person testifying of what another person not testifying said, is never admissible, except that the expression of the third person is a part of the *res gestæ*.

The general logical principle of exclusion is based upon an ancient maxim, which, however venerable it may be, and just though it is, must not in all cases be literally applied: "*Res inter alios acta alteri nocere non debet*"— a transaction between two parties ought not to operate to the disadvantage of a third — one person ought not to be affected by an act to which he is not a party.

The maxim is just, and an accurate guide if the idea that all of the incidents of the *res gestæ* must be taken to affect every person who connects himself with the transaction or title, irrespective of the time when his privity or connection arises.[1]

Legal relevancy, which, as before indicated, is but another name for a limitation or an extension of the admissibility by reason of its being logically relevant, excludes from consideration in a given case all such matters of fact which, though they may relate to the fact in question, are so remotely and slightly connected therewith as not to constitute a *probable* cause for the fact or act in question, in which case they are said to be immaterial.[2]

Whether a given fact is sufficiently near, or too remote to be practically considered as a cause and effect, is a question for the judge, and therefore calls into exercise the personal discretion of the judicial officer, and this element precludes any exact arbitrary rule. What one man may consider too remote, another may consider sufficiently near.[3]

[1] The criticisms of this maxim by Stephen (Reynolds' Steph. Dig., note vi to art. 10) are based upon a rather narrow view of the word *transaction*, and "to which he is not a party." When one links himself with a transaction, he takes it as it is, and all acts by whomsoever performed affect him; *he is not any longer a third party*. When he takes a title to land or goods, he becomes privy to all former mutations through which it has passed. This is the reason why declarations of parties in possession explanatory of the character of the possession are admissible, irrespective of when they are made. 1 Greenl. Ev., § 109 et seq.

[2] Reynolds' Steph. Dig. Ev., art. 10.

[3] Reynolds' Steph. Dig. Ev., art. 3. See Butler v. Manhattan Ry. Co., 143 N. Y. 417; 42 Am. St. Rep. 738; Thompson v. Bowie, 4 Wall. 463.

The question also arises where similar but unconnected facts have taken place, and it is desired to show the one which has happened in order to render it probable that the other did happen or may have happened.[1]

Proof.— The other branch of the law which determines the instruments or *media* of communicating the facts to the trial tribunal is called proof, and includes the rules of competency and incompetency of witnesses, documents and oral testimony, and the grades of evidence.[2]

In regulating the means or instruments by which proof shall be made, it is first provided that no proof need be offered of certain facts generally well known to exist, or of such a nature that the tribunal must know of their existence.

In other words, there are certain facts of which the court will take judicial notice, and these need not be otherwise proven.

In the practical application of this rule some facts need not be even mentioned in order that they shall be observed by the court; as, the laws of the state or the constitution of the United States.

Other facts, though of a nature which the court will notice judicially, must be called to the attention of the court.[3]

Grades of Proof.— The first rule as to the quality of evidence which shall be produced is that *the best evidence of the fact in question must be produced.*[4]

If the fact is one evidenced by a public record, it cannot be proven in the first instance between the parties to it by a mere written document, or by the testimony of one of the parties.[5]

A contract which is in writing cannot, as between the parties to it, be proved by oral testimony, unless it is shown that the written evidence of it is not accessible.[6]

Primary and Secondary Evidence.— In such cases the written document is termed primary evidence, and the oral account of it would be secondary evidence. This rule, however, only applies between parties to the transaction;[7] and where such a fact

[1] Id.; Peabody v. Dewey, 153 Ill. 657.

[2] See *post*, "Primary and Secondary Evidence," p. 1138.

[3] In re Duncan, 139 U. S. 449.

[4] Reynolds' Steph. Dig. Ev., art. 90.

[5] Carbine v. Morris, 92 Ill. 555; McIntyre v. People, 103 Ill. 148.

[6] Coonrod v. Madden, 126 Ind. 197.

[7] Julliard v. Chaffee, 92 N. Y. 534; Needles v. Hanifan, 11 Ill. App. 303.

arises between third persons, one desiring to prove the fact is not obliged to produce the original or account for its disposition, but may prove the desired fact in any proper manner, being obliged, however, to use the best evidence which is within his control. Nor does it apply to documents not in issue, but collateral thereto.[1] What is primary and secondary evidence can only be stated with relation to specific subjects or instruments of proof. A written document is not always better than oral proof.[2] Nor are all kinds of writings within the rule, *e. g.*, memoranda of sale, receipts, etc.;[3] but the document must be of a dispositive character, or be a contract.[4]

Competency of Witnesses.— Among the logical rules governing the competency of witnesses is that the witness offered shall be of such mental capacity as to be entitled to credence; that is to say, if from extreme youthfulness, or from any mental disturbance, it is plain that the witness cannot testify understandingly, his testimony will not be received.

Here again the discretion of the court is called into play, and there is no arbitrary rule which can be applied from the mere logic of the situation. It is competent for the legislature to fix the age of capacity, and the general usages of the common law have to a certain extent regulated this subject.

Aside from the question of mental capacity, the rules of exclusion are arbitrary, although they may be supposed to be based on a sound public policy and supported by good reason.

Public policy in such cases, as in all others, is a relative, inexact standard, depending upon the views which may be entertained at a given time.

Parties and those Interested.— Until a comparatively recent time parties to the record and interested parties were excluded

[1] 1 Whart. Ev., §§ 76, 78; Hewett v. State, 121 Ind. 245; Coonrod v. Madden, 126 Ind. 197.

[2] W. U. Tel. Co. v. Cline, 8 Ind. App. 364.

[3] The reason is clear enough once it is appreciated. If the giving of a receipt was the fact in question, the receipt would be the best evidence, *i. e.*, primary; but if the payment or delivery is the fact, then the writing is only a recital; but in case of contracts the document is, in the absence of fraud, regarded as the act or fact in issue. Stackpole v. Arnold, 11 Mass. 27; Hunt v. Adams, 7 Mass. 518; Keith v. Mafit, 38 Ill. 305. *Cf.* Baum v. Parkhurst, 26 Ill. App. 128, and Murray v. W. W. Kimball Co., 10 Ind. App. 184, with Ware v. Allen, 128 U. S. 590; Mr. Reynolds' note to Reynolds' Steph. Dig. Ev. (3d ed.), 256.

[4] Id.; McCrea v. Purmont, 16 Wend. 460.

on the ground of public policy;[1] but at the present time it is regarded as better policy to allow even interested witnesses to testify, submitting to the jury the effect their interest may have upon their credibility.[2]

So, likewise, it is still considered impolitic to allow husband and wife to testify for and against each other, except in a few special cases, and formerly parties could not testify.[3]

The modern rules are in all these instances regulated by statutes, and these must be looked to in each state for the specific rule governing the special instance.

Construction of these Statutes.— In construing these statutes it is important to observe the grounds on which they have removed the disabilities, in order to determine whether all have been removed.[4]

A statute removing a disqualification, which was based upon the fact of the witness being a party to the record, would not affect his disability based on his interest, and the removal of disqualification on the latter ground would not extend to a disqualification which was formerly based upon public policy.[5]

Privileged Communications.— British jurisprudence was always tender of the ties of honor and kinship, and sought to avoid compelling one to violate them. These principles were carried so far that it became a constitutional provision that no one should be compelled to give evidence against himself in a criminal case. The same principle dictates the rule against unreasonable seizures and searches, by which one cannot be compelled to allow others to inquire into his private affairs.[6]

Practice in the Production of Evidence.— Witnesses whose attendance is desired are compelled to attend the court by pro-

[1] See peculiar exception in equity cases. Peirce v. Burroughs, 59 N. H. 512.

[2] See the various statutes removing disabilities.

[3] 1 Greenl. Ev., § 334.

[4] A very instructive case is Clements v. Marston, 52 N. H. 31.

[5] Id.; Dewey v. Warriner, 71 Ill. 198.

[6] Counselman v. Hitchcock, 142 U. S. 547; Newberry v. Carpenter, 107 Mich. 567. Compelling a person to disclose his possession of any property in his hands belonging to a decedent's estate, or his knowledge of any such property, on penalty of imprisonment for refusal, is held, in Levy v. Superior Court of San Francisco, 105 Cal. 600, to be lawful in a remedial, as distinguished from a penal proceeding; and this is held not to infringe the constitutional protection against unreasonable searches and seizures, or making one a witness against himself.

cess called subpœna, which is a paper attested by the court, commanding the witness to appear.

This is a direct command from the court to the witness, and may be communicated to the witness in any manner, and need not be served upon him by an officer or a party.

A subpœna *duces tecum* is a subpœna commanding the witness to appear and have with him in court some document, book or paper containing documentary proof.

The power of the court to compel the production and inspection of documents, books or papers is limited by the rules of public policy, some of which have become constitutional safeguards.

Swearing witnesses is done in two ways: on the *voir dire*, to answer questions touching their competency as witnesses, and this is a question which addresses itself to the court.

When the witness is found to be competent he is sworn or affirmed to testify in the case.

Direct Examination.— The party producing the witness examines him first, and this is called the examination in chief. Leading questions should not be put on the examination in chief, except for the purpose of directing the attention of the witness to a general subject.

A leading question is one which in any manner suggests to the witness the answer which the questioner desires.[1]

The cross-examination is an interrogation of the witness by the opposing party, who is allowed great latitude both as to the mode and scope of the inquiry, though in general the scope must be confined to the subjects brought out on the direct examination.

Leading questions may be asked and every means resorted to to test the credibility of the witness.

The cross-examiner should himself be cautious in extending the scope of his inquiry beyond the subjects brought out in the direct examination, because a party is concluded by the answers of a witness put to him on a cross-examination extended *beyond the scope of legitimate cross-examination and collateral to the issue.*[2]

[1] 1 Greenl., § 434. Simply because it may be answered by "yes" or "no" is not a test. Id.

[2] In order to conclude, both these elements must be present. Hebbard v. Haughian, 70 N. Y. 61; C., R. I. &

Objections to the competency of witnesses or instruments of proof should be taken at the time the offer to prove is made, and if the objecting party desires to perfect the record for use in the appellate tribunals, adverse rulings should be excepted to.[1]

Specific objections communicating the precise ground of objection should be taken in all cases where a specific objection would enable the opposite party to make his proof by resorting to other competent evidence, and in such cases general objections will not avail on a motion for a new trial, or in the appellate tribunals.[2]

Privilege of Witnesses.— Witnesses are protected against criminating themselves, and therefore the witness is not obliged to indirectly do what he cannot be directly compelled to do; and if a witness testifies that he fears if he should answer the question it will tend to incriminate him, he will not be compelled to answer.

Redirect examination is permitted by the party offering the witness for the purpose of allowing the witness to explain what he may have said on the cross-examination, and the court has a wide discretion in allowing further examination where counsel has overlooked a fact which he desired to bring out.

The burden of proof, or onus probandi, is the obligation of proof which rests upon a party who asks the court or jury to decide an issue of fact in his favor.

The *onus probandi* is determined in the first instance by the state of the pleading, and rests upon the person who has the *substantial* affirmative of the issue,[3] and is only satisfied by the production of such evidence and such a quantity of it as makes out a *prima facie* case; *i. e.*, evidence tending to prove all the material facts, and of such a weight as would warrant a verdict in his favor if nothing further was heard.[4]

Shifting of the Burden of Proof.— It is sometimes said by theorists that the burden of proof never shifts, while others assert the contrary; but, as in many logical disputes, the practical point is lost sight of, which in such cases is not so much

P. R. Co. v. Bell, 70 Ill. 102; 1 Whart. Ev., §§ 551–55; 1 Greenl. Ev., § 448; Com. v. Farrar, 10 Gray, 6; Hollenback v. Todd, 119 Ill. 543.

[1] Hollinsworth v. Koon, 117 Ill. 511.

[2] Libby, McN. Co. v. Scherman, 146 Ill. 542.

[3] Best's Right to Begin and Reply, p. 14.

[4] Farmers' L. & T. Co. v. Seifke, 144 N. Y. 354.

the theory as the practical situation confronting the parties and how to meet it.

By shifting of the burden of proof is meant that at a certain stage in the proceedings, when one contending party has offered sufficient proof that the trial judge would submit the evidence to a jury as sufficient to warrant a verdict, or will himself weigh it for that purpose, it behooves the other party to bring in proof to repel the inference which may be drawn from the evidence already in, and in this practical sense the burden of proof shifts whenever the equilibrium is so disturbed that nothing is left between a conclusion which might be drawn from the evidence already heard and the ultimate fact in issue.[1]

The quantity of proof depends upon the character of the case and the character of the issue.

In criminal cases the ultimate fact of guilt must be shown beyond a reasonable doubt; that is to say, so clearly that a reasonable man would not hesitate to act in the most serious affairs of life.[2]

To constitute proof beyond a reasonable doubt it is not necessary that the proof amount to a mathematical or moral certainty, or exclude all possible hypotheses, but it must exclude all reasonable ones.[3]

In civil cases a preponderance of the evidence is sufficient,[4] excepting, however, that in some jurisdictions, where a criminal charge is directly alleged and denied in the pleadings, it is required that such an issue shall be established beyond a reasonable doubt;[5] although in most jurisdictions, where the question arises incidentally and collaterally because of the relevancy of the fact in question, a preponderance is all that is required.[6]

Balancing probabilities, then, is in most cases the extent of certainty which can be attained or is required in civil cases,

[1] Nickerson v. Ruger, 76 N. Y. 280; Starr v. Peck, 1 Hill (N. Y.), 270; Best's Right to Begin, p. 14; Farmers' L. & T. Co. v. Seifke, 144 N. Y. 354.

[2] 1 Greenl. Ev., § 13*a*, note.

[3] Id.

[4] Herrick v. Gary, 83 Ill. 86. The jury should not be required to be satisfied (Graves v. Colwell, 90 Ill. 612) or to have a clear conviction. Hoener v. Koch, 84 Ill. 408.

[5] There is conflict in the rule as to the subject. See Reynolds' Steph. Dig. Ev., art. 94, notes; Germania Ins. Co. v. Klewer, 129 Ill. 599; Jones v. Greaves, 26 Ohio St. 2.

[6] Id.

and the issue must be decided in favor of the one whose contention under all the evidence shows the greater degree of probability; and a learned author on circumstantial evidence has not hesitated to decide that civil transactions of men must generally be determined on probabilities.[1]

Presumptions.— The experience of men in the ordinary affairs of life indicates that most persons will act similarly under similar circumstances. This has given rise to the idea that it is natural for a man to do thus and so, and the natural effect or consequences which attend a known fact are in the modern system of evidence allowed as a means of raising an inference as to the probable existence of a fact not known which is in issue, or material to the fact in issue.[2]

The doctrine of presumption is universal in all courts, and is one which is as obligatory upon the court as is the duty to consider evidence not merely presumptive in its character. A court has no right to ignore the presumptions in a given case which work for or against the parties.[3]

The Presumptions Operate as a Part of the Proof.— Presumptions, however, are generally indulged only in the absence of proof, for there is no occasion for indulging presumptions as to matters which there is a better means of proving;[4] but where the inference is as to innocence and rectitude, it acts with the other evidence.

Circumstantial Evidence.— The rules or doctrines of presumptive evidence are very closely associated with what is called circumstantial evidence, because circumstantial evidence depends for its operation and effect upon an inference from a known fact as to the existence of an unknown one.

Classes of Presumptions.— The proof of some facts requires the finding of some other fact as a legal conclusion from the fact proven. This is what is meant by legal presumption.[5]

A presumption of fact is one which leaves the inference uncertain and discretionary with the trial tribunal.

[1] Burrill's Pre. Ev., pp. 23 and 81; Rex v. Burdett, 4 B. & A. 95.

[2] Jackson v. Warford, 7 Wend. 62; Kirby v. Tallmadge, 160 U. S. 379.

[3] New Orleans v. United States, 10 Pet. 721.

[4] Gannon v. Ruffin, 151 Mass. 204; Russell v. Baptist Union, 73 Ill. 337. In this case an independent fact was presumed, viz., authority to sign a name rather than allow an inference of forgery. Case v. Case, 17 Cal. 598; Brandish v. Bliss, 55 Vt. 326.

[5] Reynolds' Theory Ev. (3d ed.), 82.

Arbitrary presumptions are such as from motives of policy have been established by the courts or sanctioned by the legislature.[1]

Such is the presumption of death upon long continued absence. It has been found necessary to the settling of titles, the administration of property which is abandoned by the true owner, or to define the rights of persons related to one who has disappeared or absented himself, that some period be fixed when he may be accounted as though he were dead; and although it is not uncommon for people to disappear and live many years beyond the term of seven years, it is quite generally presumed that one who has disappeared and not been heard from for the period of seven years is dead.

Evidence should be weighed by the jury in connection with these presumptions, and all such presumptions as are arbitrary should be indicated to them through the medium of the instructions.

Presumptions are indulged from the fact of the spoliation of evidence, or the non-production of evidence which is clearly within the power of one or the other of the parties to produce.

Presumptions are indulged in favor of the innocence and rectitude of parties rather than their culpability. In short, the doctrine of presumptive evidence rests upon the reasonableness and naturalness of things, excepting in so far as there are arbitrary rules established excluding these natural presumptions.

[1] The *principles* upon which the *doctrine* of presumptive evidence is based rest in good sense, logic and utility, but inasmuch as the conception of things changes, the rules of presumption are always subject to change. See Wharton on Ev., § 1234; Reynolds' Theory Ev. (3d ed.) 82; 3 Cooley's Blk. (4th ed.) 371.

PART IV.

THE LAW OF CRIMES.

CHAPTER XXXII.

CRIMES AND CRIMINAL PROCEDURE.

Sec. 668. *The Law of Crimes and Criminal Procedure* has no close relation, logically speaking, to the other branches of law.[1] It is a distinct part of the *corpus juris.*

Much of that body of rules called constitutional law relates to crimes, classification of crimes, and individuals charged with crimes. The crimes themselves may be classified as those relating to offenses against individuals, offenses against private property, offenses against public security, offenses against religion, etc., thus showing that all the departments of the law, however dissimilar they may be, are yet but parts of one great system.

One cannot understand the nature of crimes without understanding the law of property, or contractual relations, for instance, that which is technically termed master and servant. Thus, the law of embezzlement, as distinguished from larceny at common law, depends upon the nice shades of distinction in the manner that the person appropriating another's property becomes possessed of the same.

The jurisprudence of the United States shows its excellence, and the effect of a rational civilization, in no part more than in the laws for the prevention and punishment of crime.

The fundamental principle derived from the British constitution is to regulate the degrees of crime with reference to the atrocity of the act and the effect upon the public, and inflicting punishment commensurate with the crime.[2]

Protection to Accused.— The ancillary principle to effectuate this rule is to establish fixed laws defining crimes, and affixing

[1] The desirability of confining this treatise to a single volume outweighs the necessity for an elementary exposition of the subject, in view of the several monographs accessible. Washburn's Outlines of Criminal Law, edited by Marshall D. Ewell. The fundamental principles of our criminal law have never been better stated than in the lectures of Mr. Justice Wilson. 2 Wilson's Works, Part II, p. 337.

[2] 3 Cooley's Blk. (4th ed.) 41; 2 Wilson's Works, 342.

punishments, and providing a settled mode of procedure, in order to extend the protection of due process of law to persons accused of crime. The constitutional safeguards protect the accused from *ex post facto* laws,[1] thus securing him a trial according to the course of the ordinary law common to all.[2]

The convicted criminal is still within the pale of the law and the protection of the constitution, which secures him against any cruel or unusual punishment.[3]

The subject of criminal law is generally classified in such a manner as to designate and enumerate the crimes by name and the elements of the offenses.

Criminal pleadings, that is, the manner of alleging and charging offenses, *i. e.*, the elements of criminal indictments, informations and complaints.

Criminal evidence, that is, the special, peculiar rules which regulate the proof of the guilt or innocence of the accused.

The Practice in Criminal Cases.— In most states there is a criminal code which enumerates the offenses which most commonly occur, and these statutes very materially change and modify the known common-law offenses; so criminal pleading has been much simplified by statutory enactments, the principal one being, in substance, that an indictment describing the offense in the language of the statute creating it,[4] or in plain and simple language and in such a manner as to be easily understood by the jury, will constitute a good indictment; but this statute is not intended to dispense with the requirement of certainty in criminal proceedings.

[1] Kring v. Missouri, 107 U. S. 221.

[2] Ex parte Milligan, 4 Wall. 2.

[3] In re Kemmler, 136 U. S. 436.

[4] Though it is often sufficient to follow the words of the statute, it is not so when the statute does not contain words sufficient to describe the offense. Herrington v. State, 54 Miss. 490; Jesse v. State, 28 Miss. 100; Sarah v. State, 28 Miss. 267; State v. Graves, 34 N. H. 514.

An act which was an offense at common law and is simply named in the statute must be charged in the indictment as at common law. State v. Beasley, 18 Ala. 535; People v. Enoch, 13 Wend. 159. In such cases it is not sufficient merely to charge the offense in the language of the statute. State v. Campbell, 29 Tex. 44; Com. v. Dean, 110 Mass. 65; State v. Absence, 4 Porter (Ala.), 401; Anthony v. State, 29 Ala. 27; Jackson v. People, 113 Ill. 99.

It is a general rule that indictments upon statutes must state all the material facts which constitute the elements of the offense named in the act, so as to bring it precisely within it. Com. v. Hampton, 3 Gratt. 531; 1 Bishop, Crim. Pro. (2d ed.), sec. 612; State v. McKenzie, 42 Me. 392.

Criminal pleadings are intended to be very simple and concise, and so much regard is had for the security of the defendant in criminal cases that he is allowed to repel the charge under the general plea that he is not guilty.

The Plea of Guilty.— If, on the other hand, he desires to admit his guilt, he is arraigned in open court, admonished by the court of the consequences of his admission, and is then permitted, but never urged or compelled, to enter a plea of guilty.

The plea of *nolle contendere* is likewise permitted in a defendant who, seeing that he is so entangled that it will be unavailing for him to struggle against certain conviction, but not wishing to admit his guilt in such a manner that his admission may be used in another case, is allowed to plead that he will not contend against conviction.

The consequences of this plea do not differ from that of guilty in the suit at bar, but operate in collateral matters much as an admission under a protestation in a civil suit, to prevent any inference against him in another case.

APPENDIX.

THE WINCHESTER REPEATING ARMS COMPANY vs. THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

Superior Court, New Haven County, the 9th day of February, 1898.

[Reported in Yale Law Journal, Vol. 7 — March, 1898, p. 245.]

STATEMENT OF THE CASE BY THE EDITOR OF THE YALE LAW JOURNAL.

What causes of action may be joined in one count under the Connecticut practice act.— The following memorandum of decision was rendered by Hon. Samuel O. Prentice, judge of the superior court, in February, 1898, and is now on file in the office of the clerk at New Haven.

The action which is now pending in that court is for the loss of goods shipped by the plaintiff over defendant's railroad. The plaintiff stated in one count that the goods were delivered to the defendant *as a common carrier at common law;* that at the time of the delivery of the goods certain bills of lading were also delivered to and accepted by the defendant, but that there was no consideration for the bills of lading, that they were unreasonable and unjust in their terms, and that therefore they were not binding contracts, and that the defendant had no right to the limitation of liability expressed therein. Under these circumstances, the plaintiff claimed that, in spite of the bills of lading, the defendant was liable as a common carrier at common law, and alleged the failure of the defendant to carry and deliver the goods. The plaintiff went on to say that if the bills of lading were valid, then the defendant was liable because the goods were lost through its negligence.

Defendant moved to correct the complaint by requiring the plaintiff to state upon which cause of action it relied, or to separate the causes of action. The case was argued at length, plaintiff relying principally upon the decision of the supreme court of Connecticut in the case of Craft Refrigerating Co. v. Quinnipiac Brewing Co.

OPINION.

This complaint in one count contains statements of divers facts, some pertinent to a right of recovery upon one ground, and some upon another. The plaintiff justifies this combination of allegations in one count upon the authority of The Craft Refrigerating Co. v. The Quinnipiac Brewing Co., 63 Conn. 551.

The question is thus raised as to the scope and effect of this oft-cited case. By the profession generally it has apparently been received as it has by counsel for the plaintiff as sanctioning as proper pleading the filing in court as a complaint of any leaf of history between persons which may be said

to relate to any single transaction, using that term in its most comprehensive sense, however varied and many-sided that transaction may be. As necessary sequels to this manner of pleading it is conceived that the plaintiff may shift his position as often as he is pleased or forced to do so, as the case progresses, as long as he keeps under the cover of any of the averments of his complaint; that the opposite party and the court are put to the hazard of searching out at their peril for defense, trial, ruling and decision, the many causes or rights of action which may be concealed within its multitudinous allegations, and that the plaintiff has under it a *carte blanche* to recover for any cause of action which his opponent shall fail to discover or successfully defend.

Against such doctrine I must protest as being subversive of the very purpose of pleading and paving the way for all manner of uncertainty, confusion, pleading entanglement and even ultimate injustice. If we have come to the point where such pleading is permissible we have indeed taken a long step backward towards that primitive time when parties appeared in person before the magistrate and told their story in open court, and the magistrate adjudged as upon the whole seemed to him just and right. Modern conditions, I fancy, do not admit of such methods.

Phillips, in commenting upon the requirement of the codes for separate statement of causes of action, makes the following pertinent remarks:

"Such statement of causes is clearly indispensable to an orderly system of pleading. In no other way can the legal sufficiency of any one cause be tested by demurrer; in no other way can different defenses be made to the different causes; in no other way can separate and distinct issues be made and tried; in no other way can the introduction of evidence be intelligently conducted; and in no other way can the record be made clearly to show what matters have been adjudicated and how decided. The provision for the joinder of distinct demands in one action is for the convenience and economy of litigants, and its object may be promoted by liberality in its application, but the requirement that causes of action when joined shall be separately stated is to enhance the certainty, the precision and the safety of procedure, and its object can be promoted only by enforcing it with reasonable strictness." (Phillips on Code Pleading, sec. 202.)

Such doctrine, however, as that to which I have referred as having been drawn from the Craft case, I am confident is not supported by that case. It is doctrine which I believe to be plainly repugnant to the express provisions of our practice act and of all known codes, and I fail to discover what there is in the opinion in the Craft case, when properly interpreted, which warrants the conclusions which have been drawn from it.

The doctrine of that case, as I understand it, is simply and only this: that where a single inseparable state of facts gives rise to two or more rights of action, or where the plaintiff upon such statement of facts may upon differing constructions thereof be entitled to differing relief, the complaint in a single count setting up these facts may, in the first case, entitle him to demand and have any of the several kinds of relief which the facts in any aspect of them support, or in the second case to demand alternative relief appropriate to the different constructions which the law may place upon the facts, and have such relief as the true construction warrants.

There are many states of fact which give rise to more than one right of action, as, for instance, one in contract, and another in tort. A complaint setting up such states of fact may contain matter pertinent to each right of action, and no matter not pertinent to both. The Craft Refrigerating Company case very properly holds, as I shall have occasion to further notice later, that such a complaint in one count is good, that the plaintiff may go to trial thereon without electing which right of action he will pursue, and that he may thereunder be given such relief as the facts may warrant.

There, however, may be other conditions, to wit:

1. A count may contain allegations, all of which are appropriate to one right of action, while at the same time a portion of them are also appropriate to and sufficiently support another right of action, the remainder being altogether inappropriate to such second right of action.

2. A count may contain allegations, a part of which are pertinent and appropriate, and a part impertinent and inappropriate to each of two or more rights of actions.

With respect to such counts the principle of the Craft case does not apply. To so hold would be to violate the clear and express provisions of the practice act. Section 878 of the General Statutes provides what may be joined in a complaint, and how such joinder may be made. The pertinent requirements are (1) that several causes of action may, under certain conditions, be joined in one complaint, and (2) that such causes of action so joined must be separately stated.

Another pertinent provision is that which permits the joinder in one complaint of causes of action "arising out of the same transaction, or transactions connected with the same subject of action."

In order to arrive at a correct understanding of what the effect of this section of the statutes is, it is necessary to have a clear conception of the meaning of the terms which it employs, to wit, "*right of action*," "*cause of action*," and "*transaction*."

A "right of action" is the secondary right to relief which springs from the invasion of some primary right. It is the right to relief appropriate to the facts from which the right of action springs.

A "cause of action," on the other hand, to quote the language of Pomeroy, is the situation or state of facts from which a "right of action" springs, The facts from which a remedial right — that is, a right to relief — arises constitutes the "cause of action."

Phillips, in commenting upon this distinction between a "right of action" and a "cause of action," uses this language: "From the foregoing definitions of 'right of action' and 'cause of action,' it will be seen that the former is a remedial right falling to some person, and that the latter is a formal statement of the operative facts that give rise to such remedial fact." (Phillips on Code Pleading, sec. 31.)

A "transaction" is something quite apart from a "right of action," and something more comprehensive than a "cause of action." The term is one which has been seldom defined and to which it is hard to give a definition helpful in practical applications and suited to all circumstances. Our supreme court in the Craft case, however, has said that a transaction "con-

sists of an act or agreement, or several acts or agreements, having some connection with each other, in which more than one person is concerned, and by which the legal relations of such persons between themselves are altered."

A definition in different language, but to the same general effect, might be made upon the basis of Pomeroy's analysis somewhat as follows: "A single continuous connected proceeding, negotiation, or conduct of business between parties, characterized by a unity of action and circumstance, and forming one affair."

Definitions aside, however, it is certain that from a single "transaction" several "causes of action" may arise, each giving to the injured party one or more "rights of action."

In this connection it ought to be observed that a "right of action" is to be distinguished from the object of the action. The object of the action is the relief which is sought. The "right of action" is the right to that relief which arises from the facts which constitute the "cause of action." In actions at law the object, whatever the "right of action" may be, is generally damages.

A "right of action" at law always arises from the existence of a right and the invasion of it by some wrong on the part of another. The "cause of action" is the facts which establish the right and the wrong. Its statement is therefore only a statement of these facts. Such statement is single if it sets up only one right invaded by one wrong. It is double if it sets up either two rights invaded by one wrong or one right invaded by two wrongs.

If now we examine section 878 with these distinctions and principles in mind, its interpretation becomes clear and its operation simple. Where there is a single state of facts from which a right to relief arises, there is but one "cause of action." A count, therefore, which sets up such a state of facts, and that only, states but one "cause of action" in the sense in which that phrase is used respecting the joinder of actions, no matter how many rights of action may spring from these facts. Of course, causes of action might be differentiated, not only with respect to the facts averred, but also with respect to the nature of the relief sought upon the facts. This narrow distinction, however, is not the logical one, since the prayer for relief is no part of a count and no part of the cause of action. Neither is it the distinction contemplated by the practice act. The separation of causes of action is not to be determined by the relief demanded, but by the actionable facts alleged, from which the right to redress is claimed to flow. Upon this construction there can therefore be no joinder of causes of action in a count which sets up a single set of facts, all pertinent to whatever relief may be demanded upon those facts. Such a count of necessity alleges but one right and one invading wrong. Such in the opinion of the court was the single-count complaint in the Craft case.

If now we turn to counts of the second variety heretofore specified, to wit, those containing allegations all of which are appropriate to one "right of action," while a portion of them are also appropriate to and sufficient to support another "right of action," the remainder being altogether inappropriate to such second "right of action," the situation becomes at once and radically changed, if the plaintiff is permitted to treat such counts as good

ones for rights of action to which all their allegations are not appropriate. In such cases there is plainly a joinder of causes of action. The instant that there is combined in one count facts appropriate to one cause of action and facts inappropriate to it, but appropriate to another cause of action, there arises a joinder of causes of action. This is necessarily so since, as we have seen, causes of action are only the facts from which rights of action spring. A statement of a cause of action being only a recital of facts — a recital of the facts from which the right of action arises — the consequence is inevitable that wherever there is contained in a count material allegations inappropriate to a statement of a cause of action therein, but pertinent and appropriate to another cause of action, there is a joinder of causes of action, since there is a joinder of facts issuing independently in different rights of action.

The practical result in such a case should be that the count should be regarded as one for the right or rights of action to which all its material allegations are appropriate, and not one upon which the plaintiff might recover for a right of action to which only a part of its material allegations are appropriate. Having himself inserted the additional allegations which give character to the count as one for those rights of action which all its recitals support, he should be held to have chosen his ground as he has stated it, and not permitted to change it by treating his own material averments as surplusage. Such a count, under such an interpretation, would not contain a joinder. It would be simply a count for a single cause of action, to wit, that cause of action which all its material averments together support.

Counts of the remaining class, to wit, those containing allegations a part of which are appropriate and a part inappropriate to each of two or more rights of action, would, for reasons already discussed and which need not be repeated, contain a joinder.

If I am correct in this interpretation of section 878 its provisions become easily intelligible, and their application simple and satisfactory. There is no longer any mystery as to what a count may properly embrace, nor mystery as to what rights of action a count may support. A single count may contain the statement of a single cause of action, and that only. It is such a count, if all its material averments are pertinent and appropriate to the statement of any one cause of action. If its allegations are in part appropriate and in part inappropriate to each of two or more causes of action, there is a joinder of causes of action. Where there is a statement of a single cause of action, the plaintiff may have relief for any right of action to which it entitles him. He can have no relief for rights of action to which all the material allegations are not pertinent and appropriate.

The principles which I have thus laid down are general ones. In their application to actual conditions, however, they are not without natural and necessary limitations. Circumstances will sometimes arise under which, from necessity, or convenience amounting to a practical necessity, their strict enforcement will not be required. These circumstances will especially arise where equitable relief is sought, either as preliminary to or in connection with legal relief, or alone, where different forms of equitable relief are demanded. Equitable causes of action are frequently not sus-

ceptible of that clear and distinct separation from each other and from the circumstances of the transaction out of which they arise that legal causes of action are. Legal rights of action are generally clearly differentiated from each other, and the facts which issue in them are generally easily separable in statement from other connected facts. Equitable rights to relief oftentimes run more closely into each other, and the facts which issue in them are frequently not conveniently susceptible of an independent and unassociated statement. The practice act lays down no hard and fast rules which neither yield to necessity nor recognize that pleading is but a means to an end — the end that issues may be framed and relief demanded and given in a way most conducive to the convenient, orderly and proper administration of justice and equity.

The Craft case calls attention to one of these limiting principles, where it says that "separate and distinct causes of action within the meaning of the rule are those which are separable from each other, and *separable by some distinct line of demarkation.*" The opinion observes that in one sense every cause of action must be separate and distinct from any other, while in another sense causes of action might differ from each other only in that distinct and separate claims for relief issue from the same state of facts.

The practice act seeks to require nothing impossible, nothing superfluous, nothing which occasions inconvenience without a corresponding return. It therefore does not demand separation of causes of action where the only distinction between them can be that which arises from the distinct kinds of relief which may be demanded from a given state of facts; or where a separation by some distinct line of demarkation is impossible; or where the ends of good pleading are better and more simply reached by a departure from strict requirements. The principles which I have laid down are therefore simply general ones which are to govern the pleader, unless there is some sufficient controlling reason for action otherwise. They are not to be applied in any technical spirit or with microscopic exactness, but to the end that, upon the one hand, the many and grave evils of double pleading may be avoided, and, upon the other, that parties may arrive at issue as simply, directly and distinctly as they reasonably and properly may.

Having thus discussed principles without much reference to Connecticut authority, let me now inquire if there is such authority for contrary views, I submit that there is none. The Craft case is the only one which has discussed this general question to any extent. If it be carefully studied, I believe that in its doctrines there will be found nothing subversive of the positions I have here taken. The court in that case clearly regarded the complaint as one setting up only a single inseparable state of facts from which two rights of action sprang — a single cause of action in the broad and true sense of that term — or at least two causes of action incapable of separation by any true line of demarkation.

Much of the difficulty, I fancy, which has arisen in the interpretation of section 878, and of the Craft case, has come from a failure to distinguish a cause of action from a transaction. These terms have been used so loosely and interchangeably that the distinction between them which the codes and our practice act emphasizes is too often lost sight of.

The prevalent notion that all that one now needs to do is to tell his story, whatever that story may be, and leave to the opposite party and the court the duty of guessing out what his cause of action is, has, I must believe, its origin in this misunderstanding and the consequent misconception of what the practice act requires to be stated. The *cause of action*—that is, the facts from which the plaintiff's right or rights of action spring—is required to be set out. No semblance of authority is given for setting out a *transaction*, unless indeed the transaction in its entirety constitutes a cause of action. The plaintiff is compelled to discover from the acts and occurrences of the transaction his cause or causes of action, and set them out separately. He is not required, as the Craft case says, to construe his right under a cause of action and give it a label, as he was obliged to do in common-law pleadings; but he is obliged to select his cause of action, and make known his claimed actionable facts which constitute it. The story which the Craft case says he is permitted to tell as plainly and concisely as may be is the story which makes up the cause of action, and not any longer or more comprehensive story—not the story of a transaction. The practice act is careful to make this distinction between a transaction and a cause of action, and to impose the duty of separate allegation. It contains express recognition of "several causes of action arising from the same transaction, or transactions connected with the same subject of action."

Having thus laid down the rules by which counts are to be tested respecting joinder of causes of action therein, it remains to apply them to the complaint under review. It was apparently, and I believe I may fairly say confessedly, framed to enable the plaintiff to recover thereunder upon any cause of action it might ultimately appear that it had growing out of the matters covered by its allegations. If not precisely hydra-headed, it certainly looks in at least six different directions. Within it are matters which might be held to justify a recovery under any one of the following conditions:

1. A recovery for the breach of the common-law duty of a common carrier where no express agreement of carriage was made.

2. A recovery for the breach of the common-law duty of such carrier receiving goods for transportation without an express agreement for carriage, which breach of duty consisted in its active negligence.

3. A recovery for the breach by such carrier of an express contract of carriage.

4. A recovery for the destruction of property delivered to such carrier under an express contract, which being unreasonable and unjust in its terms, and improperly exacted from the shipper, may not protect it from responsibility for the destruction of the goods.

5. A recovery for the breach of duty of such carrier by reason of its own negligence, notwithstanding an express contract of carriage was made.

6. A recovery for negligence pure and simple.

The plaintiff disclaims any thought of preparing the way for recovery upon the latter ground, but expresses its desire to have the count so phrased that it would support a recovery if the evidence should disclose the existence of either of the other conditions.

I need not say that in my opinion a count of this kind is improper.

The fundamental fault in the complaint is that it sets out the whole transaction. The plaintiff has not sought to gather from its incidents its cause of action and set that up, or its causes of action and set them up separately.

It is clear that under the principles I have laid down the count is not a good one for either the first, second, third, fourth or sixth causes of action enumerated. The presence therein of material averments inappropriate to either one of these causes of action, but pertinent to other causes of action, leads to this result. If the count can upon its most liberal construction be justified as an attempt running through all its allegations to set up one cause of action, it must be one for the destruction, through the negligence of the defendant carrier, of goods delivered to it for transportation for hire under a special contract, which, being unreasonable and improperly exacted, could not exempt it from responsibility for such negligent destruction.

Even in this aspect of the count it is not free from faults. If it is sought to allege the existence of a special contract of carriage, the averments are neither appropriate nor sufficiently clear. Certain evidential facts are recited, but it is nowhere apparent much less distinctly alleged, whether it is claimed that a contract existed or not. It is impossible to gather from the averments what the claimed state of facts, and therefore what the cause of action, is. It is not possible to discover what right of the plaintiff it claims to have been invaded, or by what precise wrong it has been invaded.

Section 880 provides that all pleadings shall contain a plain and concise statement of the material facts upon which the pleader relies, but not of the evidence by which they are to be proved. Another requirement of code pleading is that all allegations shall be direct and certain. Clearly these requirements are not met in the present complaint.

The defendant's motion is granted to the extent that the plaintiff is ordered:

1. To separate into distinct counts its several causes of action, if it desires to rely upon more than one.

2. To state such cause or causes of action in distinct and certain averments, which shall avoid recitals of evidential matter, allegations of facts which are not ultimate and operative facts, and averments of facts which are not material to the cause of action being stated.

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